

Author: S Maass

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S Maass*

1 Introduction

Three recent Supreme Court of Appeal decisions, namely *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*,¹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39² and *Maphango v Aengus Lifestyle Properties*³ concerned constitutional disputes between private landlords and low-income tenants.⁴ In each case, the tenants' constitutional right of access to adequate housing⁵ was raised as a defence against the private landowner's claim for eviction on termination of the lease, because the effect of the eviction order would in each case have been to render the unlawful tenant homeless since there was no

* Sue-Mari Maass. BComm (Law) LLB LLD (US). Senior lecturer, Department of Public, Constitutional and International Law, UNISA (maasss@unisa.ac.za). Thanks to Professor AJ van der Walt and Dr M Du Bois for reading and commenting on this piece. Their help is always greatly appreciated.

1 *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA).

2 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2011 4 SA 337 (SCA). The essence of the decision was confirmed by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) para 104.

3 *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA).

4 To succeed with their application for rescission, the appellants in *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA) had to show that they had a *bona fide* defence against the plaintiff's eviction claim. The appellants contended that the eviction order would render them homeless and in terms of ss 4(6) and 4(7) of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (PIE) the court may grant an eviction order only if it would be just and equitable to do so. They alleged that they were entitled to protection in terms of ss 26(1) and 26(3) of the *Constitution of the Republic of South Africa*, 1996. S 26(1) guarantees the right to have access to adequate housing, while s 26(3) ensures at least due process in eviction proceedings, as the court must consider all relevant circumstances before granting an eviction order: para 9. In the court *a quo* (*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2011 5 SA 19 (SCA)), the occupiers contended that the effect of the eviction order would be to render them homeless and argued that the City must provide them with alternative accommodation. They relied on their constitutional right of access to adequate housing and the state's duty to give effect to this right: *Blue Moonlight Properties* 39 v *Occupiers of Saratoga Avenue* 2010 JOL 25031 (GSJ) paras 22-24. The Supreme Court of Appeal and Constitutional Court confirmed the point of departure that the landowner was entitled to an eviction order, because he complied with PIE. The remaining question was the time of eviction since the state first had to provide alternative accommodation. The question of whether or not the state has a responsibility to provide alternative accommodation to vulnerable evictees was the core issue in the Supreme Court of Appeal and Constitutional Court: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2011 5 SA 19 (SCA) para 74; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) paras 30, 74, 75, 96. In *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA), the unlawful tenants argued that termination of their periodic leases was contrary to public policy, because it infringed their s 26 right: para 26.

5 Section 26(1) *Constitution of the Republic of South Africa*, 1996 (henceforth the *Constitution*).

affordable alternative accommodation available, including in the private rental market.⁶ The cases highlight an underlying tension between the common law right of landowners to evict tenants on termination of their leases and the tenants' constitutional housing rights, namely the right of access to adequate housing and the right not to be arbitrarily evicted.⁷ In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39*⁸ and *Maphango v Aengus Lifestyle Properties*,⁹ the Court confirmed the common law principle that a private property owner is entitled to an eviction order once the lease has been terminated.¹⁰ For the eviction order to be just and equitable and therefore in line with section 26(3) of the *Constitution* and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998*

6 *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) para 2; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2011 5 SA 19 (SCA) para 17; *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA) para 9. For this reason the state was joined in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2011 5 SA 19 (SCA) and forced to accommodate the evictees: para 53. In the Constitutional Court, Van der Westhuizen J held that the City should make accommodation available 14 days before the date of eviction: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) paras 99-100.

7 Sections 26(1) and 26(3) *Constitution*, 1996 respectively. This tension was explicitly mentioned in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) para 35, although Van der Westhuizen J referred to the required balance between landowners' right not to be arbitrarily deprived of property (s 25 *Constitution*) and households' right of access to adequate housing and right not to be arbitrarily evicted. The common law right of landowners to evict tenants on termination of their leases is a constitutional property right and it can be restricted, provided that the restriction should not be arbitrary. The constitutional property right referred to by Van der Westhuizen J is therefore the common law right of the landowner to evict a tenant once the lease has expired. Van der Westhuizen J briefly referred to the social and historical importance of property (paras 34-37), but it is not clear how or when landowners' common law right to evict unlawful tenants should be restricted to give effect to the occupiers' s 26 rights. The Court merely mentioned that unlawful occupation will result in a deprivation that could either be arbitrary or not. The Court confirmed the point of departure that a private landowner is entitled to an eviction order if the tenant's occupation is unlawful (para 96) and that Blue Moonlight Properties should not be burdened with the duty to provide free accommodation indefinitely (para 100). The Court decided that a suspended eviction order would be just and equitable for both parties, because the City should be granted enough time to comply with the order.

8 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2011 5 SA 19 (SCA).

9 *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA).

10 This principle was confirmed in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2011 5 SA 19 (SCA) and *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA). The court *a quo* in *Blue Moonlight Properties 39 v Occupiers of Saratoga Avenue* 2010 JOL 25031 (GSJ) emphasised that private landowners should not be burdened with the duty to provide accommodation to vulnerable households and that this is a state duty: paras 93, 96. The Supreme Court of Appeal found that the landowner was entitled to an eviction order, because he complied with the provisions in PIE: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2011 5 SA 19 (SCA) para 74. This was confirmed by the Constitutional Court: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) para 96. In *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) the Court found that tenants do not have security of tenure in their residential property beyond the boundaries of the agreed lease: paras 27-29.

(PIE),¹¹ the Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39*¹² suspended the eviction order to allow some time for the City to arrange accommodation for the evictees.¹³

In terms of the common law, a fixed-term tenancy terminates on expiration of the agreed period, while either the landlord or the tenant can end a periodic tenancy by serving a notice of termination on the other party.¹⁴ In both cases the legally recognised right of the tenant would automatically end and the status of the tenant's occupation would become unlawful.¹⁵ In *Maphango v Aengus Lifestyle Properties*¹⁶ Brand J stated that "a tenant of property has no security of tenure in perpetuity. The duration of the tenant's tenure is governed by the terms of the lease One thing a lease cannot be is 'for ever'." However, the Constitutional Court¹⁷ decided that a tenant can fight termination of the lease on the basis that the landlord's ground or reason for termination of the lease constitutes an unfair practice since it prejudices the tenant's rights or interests.¹⁸ It is noteworthy that the Court emphasised the broad spectrum of rights and interests of both parties, which the Tribunals should take into consideration in deciding if the ground for termination amounted to an unfair practice.¹⁹ Cameron J held that the Rental Housing Tribunals should decide all unfair

11 In *Ndlovu v Ngcobo / Bekker v Jika* 2003 1 SA 113 (SCA) the Supreme Court of Appeal decided that tenants holding over should be protected under PIE.

12 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC)

13 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2011 5 SA 19 (SCA) para 74. Two months was found to be sufficient time. The Constitutional Court confirmed the Supreme Court of Appeal decision, but four and a half months was deemed enough time for the City to make available alternative temporary accommodation: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) para 104.

14 *Cooper Landlord and Tenant* 61-65.

15 Kerr *Law of Sale and Lease* 435. Kerr refers to *Tiopaizi v Bulawayo Municipality* 1923 AD 317 325, where the Court confirmed that the lease expired through effluxion of time. See also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) paras 7 & 10.

16 *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) para 28. This statement was indirectly confirmed in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) para 40. The difference is of course that a tenant, including a statutory tenant (this type of tenancy is discussed in s 3 of this article), must pay rent and abide by the terms and conditions of the lease. It is noteworthy that the tenants in both *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) paras 7, 8 & 10 and *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) para 7 tried to make their rental payments and the landowners did not claim eviction on the basis of breach of contract. They ended the periodic tenancies by serving a notice to that effect.

17 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

18 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 paras 47, 50 & 52.

19 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 para 52.

practice disputes; determine whether termination of the lease should be invalidated or not; and set aside termination of the lease if it finds in favour of the tenant.²⁰ The implication is that the Tribunals are empowered to nullify contractually agreed termination clauses, overturn the termination of leases, and reinstate tenants as lawful occupiers. The majority judgment's interpretation of the *Rental Housing Act* 50 of 1999 (*Rental Housing Act*) therefore highlights a substantial departure from landlords' common law right to unilaterally terminate leases, because the Tribunals are now empowered to scrutinise landlords' reasons for the termination of leases and in effect provide substantive tenure protection for tenants. The Court considered the extensive tenure security measures during the pre-1994 rent control regime and interpreted the *Rental Housing Act* to construe better security of tenure for tenants in the constitutional dispensation.²¹ Interestingly, the effect of the Court's interpretation of the Act in relation to strengthened tenure rights for tenants is similar to one of the general aims of rent control, which is to enable tenants to continue occupying the leased premises beyond the expiration of the agreed lease.

The purpose of this article is to critically show how the legal construction of rent control/regulation,²² as both a security of tenure and a rent restriction measure, has intervened in private landlord-tenant relationships in a number of jurisdictions, namely pre-1994 South Africa, England and New York City. In all of these jurisdictions the policy-makers and legislatures decided to regulate the private landlord-tenant relationship and provide substantive tenure protection for tenants.²³ The phrase "security of tenure" in the landlord-tenant framework is defined as a form of protection against eviction, but in effect it is aimed at suspending (or preventing) the termination of the tenant's legal right to occupy the premises. Substantive tenure

20 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 para 68.

21 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 paras 29-31.

22 The terms "rent control" and "rent regulation" will be used interchangeably throughout this article; both terms refer to a similar type of legislative intervention, namely where the state regulates the private rental market in order to restrict rent increases and provide security of tenure. The reason for the interchangeable use is that the different laws and literature do not necessarily make the distinction between "rent control" and "rent regulation" in the traditional sense, as noted by Miron 1990 *Urban Studies* 168. Miron argues that some modern forms of rent control are referred to as rent regulation, which refers to schemes that screen rent increases with a view to preventing unjustified rent increases, while traditional rent control froze or fixed rents.

23 See Maass and Van der Walt 2011 *SALJ* 436-451 for the difference between substantive and procedural protection.

protection (or security of tenure) is therefore a legislative mechanism that ensures lawful occupation for continuous periods, or in the words of Brand J, "in perpetuity".²⁴ Modern rent controls are generally aimed at placing restrictions on rent increases²⁵ and providing security of tenure for tenants through anti-eviction measures.²⁶ Rent control has been defined as a drastic form of statutory intervention aimed at providing tenants with continued occupation rights on termination of their leases.²⁷ Undoubtedly, the main objective and benefit of rent regulation/control is to ensure that the landlord cannot evict the tenant by simply increasing the rent disproportionately.²⁸ It is noteworthy that the aim and effect of the Constitutional Court judgment in *Maphango v Aengus Lifestyle Properties*²⁹ was to ensure that the landlord cannot simply terminate the lease in order to circumvent rent restrictions as negotiated in the lease.³⁰

The article considers the nature of rent control as a regulatory law that should ideally accord with the relevant socio-economic circumstances, while it also functions as a mechanism that aims to balance the unequal bargaining power of landowners and tenants. The justification for rent control is a recurring theme throughout the article. The required supply of decent affordable rental housing in the private sector usually indicates whether or not this type of intervention is necessary to accommodate tenants in general. However, rent regulation is also justified if only some tenants are experiencing a housing shortage.

The development of rent control in South Africa is discussed with English and New York City rent control laws as comparative sources. This comparison highlights the complexity of rent regulation laws and concludes with a reflection on the deregulation of the South African private rental market. The rationalisation for the continued imposition of rent control in New York City is highlighted in comparison with the conceivability of deregulation in the English rental market. The necessity of a social

24 *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) para 28.

25 Most rent control laws allow annual rent increases: Hill *Landlord and Tenant* 299-300.

26 Hill *Landlord and Tenant* 303 argues that security of tenure is at the core of all rent control laws.

27 Rosenow and Diemont *Rents Act* 61.

28 Miron 1990 *Urban Studies* 168.

29 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

30 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 para 25.

rental sector that serves as a "safety net"³¹ for low-income tenants is discussed, to explain the possibility of deregulation in the English private market. Finally, German landlord-tenant law illustrates a different approach to the provision of substantive tenure protection for tenants in general.

Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele,³² *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39³³ and *Maphango v Aengus Lifestyle Properties*³⁴ illustrate the fact that low-income³⁵ private-sector tenants are experiencing a housing shortage in South Africa because they are unable to access affordable alternative private rental housing once their leases terminate.³⁶ Ideally, the state should be involved in the provision of housing for these households, either directly as the public landlord³⁷ or indirectly through the mechanism of social housing,³⁸ because the evictees are able to pay rent.³⁹ With reference to the English landlord-tenant system, it is apparent that the social sector should accommodate lower income households and, if that is the case, the private rental market should be able to uphold deregulation. However, the social sector must

31 Bright *Landlord and Tenant* 157.

32 *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA).

33 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2011 4 SA 337 (SCA).

34 *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA).

35 For the purposes of this article, "low-income" tenants are analogous to "poor" tenants. The Constitutional Court refers to a household with an income of R940 per month as a poor household: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) paras 1 and 6. The tenants' income in *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA) was probably higher as they could afford R1239 rent per flat: para 2.

36 Approximately 423 249 households in Johannesburg are without adequate housing. Nearly 2 million households were living in informal settlements in 2001: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) para 2.

37 The Community Residential Units (CRU) Programme aims to provide public rental housing to very low income households who currently access informal rental housing opportunities: RSA, Department of Human Settlements *National Housing Code* 11. The purpose of this programme is to make available existing residential units that are owned by local government, to provide inexpensive rental housing to the very poor: 12.

38 The aim of the *Social Housing Act* 16 of 2008 is to introduce a social housing sector that can provide affordable rental housing through the creation of social housing institutions (social landlords). The social housing model is suitable for persons earning more than R2500 per month: Development Action Group 2010 www.dag.org.za. A number of social housing projects have been approved by the government, but social housing is generally perceived as private and not a public housing initiative: Tissington 2011 www.escri-net.org 102.

39 The duty to accommodate low-income households remains a state duty. See in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34 per Yacoob J; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 224 per Ngcobo J; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) para 97.

function efficiently and it is doubtful that this is the case in South Africa, because evictees are struggling to find alternative housing. In due course the South African social rental sector might develop as a "safety net" for low-income tenants, but the question in the interim is if landlord-tenant law, as applied in the private sector, is in the process of being transformed in line with sections 26(1), 26(3) and 25(6)⁴⁰ of the *Constitution* to provide substantive tenure security for tenants. If so, is this transformation taking place in general or only in certain circumstances to provide strengthened tenure protection for a certain category of tenants – for instance previously disadvantaged occupiers who are socio-economically vulnerable?

In the light of *Maphango v Aengus Lifestyle Properties*,⁴¹ the Rental Housing Tribunals can provide substantive tenure protection for tenants on a case by case basis if they find that the landlord's ground for termination constitutes an unfair practice. At this stage it is unclear whether or not this development in terms of which the Tribunals should adjudicate unfair practice disputes is sufficient to meet the basic housing needs of struggling tenants. It is also unclear whether the Tribunals would be able to adequately weigh the interests of both parties. The question therefore remains if tenants' sections 26 and 25(6) rights would be met if Tribunals were left to adjudicate unfair practice disputes on a case by case basis without any real statutory guidance regarding the landlord's legitimate grounds for termination and consequential eviction. In the interim this judicial development is a welcome innovation but it remains unclear whether or not the legislature should not intervene and provide thorough guidance for the Tribunals (and courts) to adjudicate landlord-tenant disputes.

40 Section 25(6) *Constitution* states that any person whose tenure is legally insecure as a result of past racially discriminatory laws is entitled to tenure which is legally secure. S 25(9) states that parliament must enact legislation in order to give effect to the constitutional commitment in s 25(6).

41 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

2 The nature and justification of rent control

2.1 Introduction

Arguably, state interference usually takes place when it becomes apparent that the public interest demands intervention in the process of supply and demand. Excess demand for rental housing in relation to insufficient supply will result in an increase in rent. By means of legislation, the state can intervene in the market and place restrictions on rent increases and the right of landlords to evict tenants on the termination of their leases, generally referred to as rent control. Rent control "usually originates when war or emergency conditions suspend the normal operation of market forces."⁴² Regardless of the domination of ownership over other interests in land and its resistance against statutory intervention, "governments routinely use (and have always used) legislation to amend or regulate the hierarchical domination of property ownership in response to social, economic and political circumstances and requirements. One significant example of such intervention is the embodiment of anti-eviction policies in legislation".⁴³ In the landlord-tenant framework, these interventions usually take the form of rent control but it can take other, more implicit forms as well. The initial rent control regimes in England, South Africa and New York City emerged during war-time emergency conditions but the nature, development and continued justification of these interventions are remarkably different as they relate to the jurisdictions' socio-economic and political conditions.

Before the beginning of the twentieth century there was little or no government interference in English landlord-tenant law and the private sector represented more than ninety per cent of the rental market. At the end of the nineteenth century, increased urbanisation led to a housing shortage in urban areas. The *Rents Act*

42 Visser 1985 *Acta Juridica* 349. Visser mentions how different countries impose restrictions on rent but the general effect of rent control is that the state can limit the freedom of a landlord to set rent levels. Hirsch *Law and Economics* 64 states that the general effect of these measures is to reduce the landlord's freedom to set rent levels. According to Penny 1966 *SALJ* 494 only abnormal economic conditions can justify the implementation of rent control. Radin 1986 *Philosophy and Public Affairs* 352-353 argues that the justification for state intervention by means of rent control is context sensitive.

43 Van der Walt *Margins* 78.

1915⁴⁴ was enacted to provide security of tenure and restrict rents in the private rental sector.⁴⁵ As a result of increased inflation and continued housing shortages the legislature introduced further regulatory measures, which remained on the statute book for most of the twentieth century and are still in operation.⁴⁶ The socio-economic conditions in South Africa were similar to those in England after the First World War, which led to a housing shortage and the potential exploitation of tenants. The *Tenants Protection (Temporary) Act 7 of 1920*⁴⁷ was enacted to prevent such exploitation by restricting the landlord's right to eject the tenant on expiration of the lease.⁴⁸ In the same year the *Rents Act 13 of 1920*⁴⁹ was passed⁵⁰, which was succeeded by a number of laws⁵¹ that enforced rent restrictions and provided substantive tenure protection for tenants until the end of the century.⁵² Rent control was introduced only in the 1940s in various states and municipalities throughout the United States of America.⁵³ The imposition of rent control was never an unusual statutory intervention.⁵⁴ In 1943 New York City introduced rent control in response to extreme housing shortages.⁵⁵ Currently, rent control, combined with rent stabilisation, is still in force in New York City.⁵⁶

The imposition of rent control in these jurisdictions was initially justified, because its aim was to address "emergency type" housing shortages. Nevertheless, it is still not clear in what other circumstances, absent emergency housing conditions, the state should regulate the private rental market. The imposition and nature of rent control might be misperceived as a straightforward, "temporary" form of state regulation that

44 In 1914 only one per cent of the housing stock in Britain was council housing (also referred to as local authority lettings) while by 1979 32 per cent of the stock was owned by local authorities. This increase was a result of state subsidies that were provided to local authorities (Bright *Landlord and Tenant* 156).

45 Bridge *Residential Leases* 1; Bright *Landlord and Tenant* 184-185. The result of state regulation in the private rental sector was a decline in the supply of housing, which led to a shift in policy with regard to the role of the landlord in the provision of rental housing - more emphasis was placed on the duty of the local government to provide housing (Bright *Landlord and Tenant* 156).

46 The *Rent Act 1915* was succeeded by the *Protection from Eviction Act 1964*, the *Rent Act 1965* and the *Rent Act 1977*. The *Rent Act 1977* is discussed in detail in s 3 of this article.

47 The Act was the first "rent control" statute in South Africa.

48 Cooper *Rent Control Act* 1.

49 The Act is discussed in more detail in s 3.

50 Cooper *Rent Control Act* 1-2.

51 The nature and aims of these laws are discussed in s 3.

52 The phasing out of rent control is discussed in s 4.

53 Keating "Rent Control" 1.

54 Keating "Rent Control" 3.

55 Stegman "Rent Control in New York City" 30.

56 The details of these regulatory measures are discussed in s 3.

requires some emergency housing condition for it to be justifiable. However, the nature of rent control is far more complicated than it might seem, since it can function efficiently only if it is founded on socio-economic policy considerations that reflect the extant housing market; is accepted as a regulatory law that aims to establish a proportionate balance between the interests of tenants and landowners; and is justified on the basis of a housing shortage that might be experienced by only a small sector of the housing market. These aspects of rent control are discussed in the following paragraphs in the contexts of the particular jurisdictions, focusing specifically on English and US law.

2.2 *The nature of rent control*

The landlord-tenant legislation promulgated in England originated from policy considerations in relation to economic and social circumstances. Tenants in the private rental sector faced uncertainty because of the social and economic conditions created by the First World War; therefore the legislature had to intervene in order to provide some stability.⁵⁷ Social and economic circumstances usually influence key reforms in the rental housing market, placing emphasis on policy considerations that could result in transformation⁵⁸ but some of the major reforms are not necessarily connected to these conditions. In some instances reform can take place merely to provide the tenant with a stronger right. Strengthened rights of tenants might result in some balance between the contracting parties with regard to the division of different interests.⁵⁹ If the legislature promulgates laws to achieve certain policies, without taking the socio-economic context into consideration, the resulting policies might not be successful.⁶⁰ The "political will, energy and resources"

57 During the 1970s, when Europe experienced an economic upswing, the government continued to provide this form of protection, although it was motivated by social welfare-orientated housing policies rather than housing shortages: Bright *Landlord and Tenant* 83.

58 During the last century the private rental market declined partially as a result of strict rent control laws. Even though these laws did have an impact on investors that influenced the decline, this was only one of many factors: Bright *Landlord and Tenant* 55. Slum clearance; housing rehabilitation; the increase in owner-occupation; and subsidies and tax allowances contributed to the decline: Balchin and Rhoden *Housing Policy* 123-124.

59 Bright *Landlord and Tenant* 51. The 1987 Law Commission found that an interference with the landlord-tenant relationship is justified when it is necessary to establish a balance between the contracting parties because the freedom to contract is in fact illusory as a result of the unequal bargaining power: UK Law Commission *Landlord and Tenant*.

60 Bright *Landlord and Tenant* 55 and 56.

of a country in relation to its housing system are important when applying regulatory laws.⁶¹

The English landlord-tenant regime has been defined as a regulatory law.⁶² The concept and nature of regulatory law is not easily definable but Bright⁶³ suggests that it is concerned with "state control directed to social and individual action to address problems of social risk or market failure." Blandy argues that regulatory laws either substitute private rights with state control through the use of agencies⁶⁴ or subject private rights to less comprehensive regulatory restrictions. It is sometimes important for regulatory laws to co-exist with and supplement rights-based law. In the context of landlord-tenant relations it is sometimes necessary to grant tenants more than a regulatory right.⁶⁵ One should therefore consider the role and aim of parliament when examining housing policy, because the legislation might override the strong common law rights of landlords in rights-based law to provide better and more secure rights for tenants through regulatory law. The critical question is if the statutory laws are in conflict with rights-based law, and if the correct housing policy is being followed and developed by parliament in each rental housing sector to sustain the optimal balance in the provision of rental housing.

The perceived nature of rent control in the English landlord-tenant regime is useful as a comparative tool since it highlights the context-sensitive dimension of this type of state regulation. Undoubtedly, the regulations will interfere with extant property rights of landowners and the question remains whether this interference is justifiable or not. More importantly, the preliminary question remains whether or not any given state, legislature or society perceives its private rental market as a regulatory law. A private rental market that is perceived as purely contractual and left to the free market would require continuous justification of an "emergency type" for any form of regulation, which could frustrate attempts by the courts and legislature to create an equitable balance between the interests of landowners and tenants. Nevertheless,

61 Bright *Landlord and Tenant* 58.

62 See Bright *Landlord and Tenant* 41; Blandy "Housing Standards" 73, 83-84 and 87.

63 Bright *Landlord and Tenant* 41.

64 Blandy "Housing Standards" 83-84 and 87 describes how landlord-tenant law is regulatory law.

65 Blandy "Housing Standards" 85 explains that the mere regulation of private landlords is an insufficient method to enforce certain standards in the private sector.

the decision to shift a regime from the free market approach towards more stringent regulation should be left to the policy-makers.⁶⁶

On the other hand, the modern perception (and nature) of the landlord-tenant relationship in US law has been influenced by various factors, including urbanisation, industrialisation, consumerism and social consciousness. This has led the courts to view a residential landlord as the party with superior knowledge of the "product" and therefore also with superior bargaining power. At common law, landlords are at liberty to include certain terms and conditions in the lease that may have a harsh impact on tenants, thereby exploiting unequal bargaining power during periods of housing shortages.⁶⁷ The courts can play a role in scrutinising the contracts that are created in the context of unequal bargaining power, but some argue that such a case by case approach could be inefficient.⁶⁸ The position of tenants is seen in a different light, since tenants are allegedly merely interested in establishing a home within the given "product" of the landlord.⁶⁹

66 Underkuffler's theoretical approach to changes in property structures provides a useful perspective to assess and understand the transformation of occupiers' (and more specifically tenants') rights under the South African Constitution. The bases on which previous property regimes were constructed developed according to changes in human needs and conditions, because the composition of property rights in one era could be undesirable in the next. If one agrees that property expresses "an area of individual autonomy and control" it follows that changes in human needs require the transformation of property, and more specifically the protection of property: Underkuffler *Idea of Property* 43. Underkuffler proposes a distinction between the common conception of property and the operative conception of property. According to the common conception of property, individual interests held by legal rights holders are protected by property and these rights are presumptively superior to competing public interests. Individual rights can be limited (or overridden) by public interest of a compelling nature, but limitations must be justified because property rights have presumptive power: Underkuffler *Idea of Property* 44-46. In terms of the operative conception of property, change is imbedded in the concept of property and property rights change according to, and in accord with, general social needs: Underkuffler *Idea of Property* 48-49. Despite her use of the concept of property to define the rights and interests of individuals and society at large, she emphasises that property remains a social institution that reflects decisions made by society: Underkuffler *Idea of Property* 53-54. If the core values of the claimed property right and the core values of the competing public interest are the same, there is no basis for concluding that rights have normatively superior value. It follows that in such circumstances there would be no basis for affording rights presumptive power: Underkuffler *Idea of Property* 74.

67 This dimension of the landlord-tenant relationship is also reflected in English law. The difference is that the relationship between the parties is portrayed as unequal, which requires strengthened tenure protection for tenants in order to balance the different interests.

68 Dukeminier *et al Property* 376. The most obvious objection against a case-by-case approach is the time constraint involved. Interestingly, in *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 the Court opted for such a case by case approach in terms of which the Rental Housing Tribunals should adjudicate unfair practice disputes. However, the effect of the judgment is that the Tribunals can consider the impact of the agreed provisions and nullify (or amend) provisions that have a harsh or unfair impact on either landlord or tenant.

69 Friedman *Friedman on Leases* 1-13.

Arguably, residential tenants attach substantial value to their leased property, because it resembles their homes. The concept of "home" has received extensive consideration during recent years by scholars from both England and the US.⁷⁰ Currently, the concept of "home" refers to much more than the mere physical shelter associated with it.⁷¹ A secure home is also a means of connecting families within a community. It enables individuals to obtain some stability and a sense of belonging, which would contribute towards better social structures and improved individual well-being.⁷² The tenant's interest in the lease, especially with regard to the concept of home, depends on the level of tenure security afforded to him/her by the legislature. If the government's housing policy is aimed at providing better tenure security for tenants, allowing them to occupy leased property for continuous periods, depending on their will and good behaviour, these occupiers can experience a sense of connectedness and establish their place in society.⁷³

Radin's arguments in favour of rent control are useful to the extent that they highlight the different interests of landowners and tenants, although she also places substantial weight on the interests involved according to a moral consensus that might be controversial and unsubstantiated.⁷⁴ She argues that in some circumstances the tenant's non-commercial personal use of her apartment as her home carries more weight, on a moral basis, than the landlord's commercial interest

70 More specific for the purpose of this article, see for instance Fox *Conceptualising Home*; Radin 1986 *Philosophy and Public Affairs* 350-380; Radin 1981-1982 *Stanford LR* 957-1015.

71 The meaning of "home" has also received some consideration in South Africa and in international law. In the South African context see *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35 where Yacoob J found that the right to housing in terms of s 26(1) of the *Constitution* "entails more than bricks and mortar". In the international context the *International Covenant on Economic, Social and Cultural Rights* (1966) makes it clear that the right to housing should include the right to occupy property with security. Michelman 1970 *Harvard Civil Rights- Civil Liberties LR* 214 claims that "adequate housing" is a relative notion and in some circumstances the need for basic shelter, even when the premises are dilapidated and dangerous, will override the ideal of safe housing options for all.

72 Bright *Landlord and Tenant* 48. A similar argument is raised by Singer where he argues that if the aim is to protect tenants' interest in their home, one should reconsider property law (and the very concept of property) to deviate from the "romance of ownership". One should rather determine, on the basis of normative criteria, who should have presumptive control of the entitlement in question: Singer *Entitlement* 80-81.

73 Bright *Landlord and Tenant* 48 mentions how the "home experience" differs between private renters and social housing renters; statutory protection provides social tenants with greater tenure security and the opportunity to establish themselves in their immediate community.

74 See specifically Schnably 1993 *Stanford LR* 347-407. See also Ellickson 1991 *Chicago-Kent LR* 950-954; Epstein 1988 *Brooklyn LR* 771.

in reclaiming the apartment.⁷⁵ "Personal" property is "bound up" with a person's personhood to the extent that self-investment in the specific object takes place,⁷⁶ while "fungible" property is held by persons for commercial reasons and is exchangeable.⁷⁷ The connection between the personal property and the individual contributes to self-development and enables the person to participate in society as a fulfilled person.⁷⁸ Radin argues that the tenant's rented property is her home,⁷⁹ which is a justifiable form of personal property, because self-investment has taken place.⁸⁰ The preservation of the tenant's interest in the home therefore becomes "a priority claim over curtailment of merely fungible interests of others."⁸¹ It follows from Radin's personhood perspective that property for personhood necessitates more stringent legal protection than fungible property, because personal property is deemed more important by social consensus.⁸²

Despite extant housing shortages, Radin underlines the fact that measures promoting security of tenure will enable tenants in general to foster and develop a sense of connectedness in the given property. This type of home interest is absent in an unregulated private landlord-tenant regime, because the home interest depends on strengthened levels of tenure security. In addition, Radin places emphasis on the parties' unequal bargaining power, which is evident if one considers the impact of loss.⁸³ If the landlord unilaterally decides to terminate the lease and decide on

75 Radin 1986 *Philosophy and Public Affairs* 360.

76 The notion of property being bound up with the holder was initially introduced by Radin in an earlier article where she extensively analysed the relationship between property and personhood: Radin 1981-1982 *Stanford LR* 957. She argues that the strength of a person's relationship with a specific object could be measured by the pain that person would suffer once the object is lost: Radin 1981-1982 *Stanford LR* 959.

77 Radin 1986 *Philosophy and Public Affairs* 362. Radin also suggests that the distinction between personal and fungible property should actually function on a continuum, because self investment in property is a matter of degree: Radin 1986 *Philosophy and Public Affairs* 363.

78 The function of property in German constitutional law is similar to Radin's perspective regarding personal property. The point of departure is that tenants should be enabled to achieve human fulfilment, and security of tenure forms a vital role in giving effect to this ideal: Maass *Tenure Security* s 7.4.1. The societal function of property, and more specifically the importance of property for human fulfilment, is also highlighted by Alexander and Peñalver. However, the role of the community and the web of social relations it presents is a fundamental consideration in their theory: Alexander and Peñalver 2009 *Theoretical Inquiries in Law* 135.

79 See Fox *Conceptualising Home* 25-27 for a similar argument. See also Michelman 1970 *Harvard Civil Rights- Civil Liberties LR* 217 for the meaning of the concept of the home.

80 See Michelman 1970 *Harvard Civil Rights- Civil Liberties LR* 219, where he explains a similar right not to be uprooted.

81 Radin 1986 *Philosophy and Public Affairs* 365.

82 Radin 1981-1982 *Stanford LR* 978-979.

83 Radin 1986 *Philosophy and Public Affairs* 362.

eviction, the tenant will lose her home, her sense of connectedness and place in society in a matter of months, if not weeks. On the other hand, if the tenant decides for instance to terminate a periodic tenancy the landlord might lose some commercial gain, if anything at all. The landlords' interest is purely commercial and in fact "fungible" as she can merely replace the current tenant, while the tenant's loss could be substantial from a personhood perspective.⁸⁴

Arguably it was as a result of this conception of the landlord-tenant relationship that the US courts started to implement a warranty of habitability in residential rental housing, which has led to new regulations and housing codes throughout the metropolitan cities.⁸⁵ "Residential landlords have become a species of regulated public utility", as Friedman⁸⁶ explains. The implied warranty of habitability forms part of a corpus of various reforms⁸⁷. The risk in imposing these reforms is that landlords would respond by increasing their rents. The result would be a general improvement in the standard of rental housing combined with rent increases, which could possibly be counter-productive. The question is if rent control, combined with some government-assisted housing programmes, could solve this problem.⁸⁸ Rent control generally aims to alleviate undue hardship suffered by tenants as a result of housing shortages, although these laws are also aimed at ensuring a fair return on the landlord's rental housing investment. Rent control is usually combined with housing

84 The unequal impact of eviction for landowners and tenants was acknowledged in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) para 39, where Van der Westhuizen J stated that "[e]viction of the Occupiers will render them homeless. There is no competing risk of homelessness on the part of Blue Moonlight, as there might be in circumstances where eviction is sought to enable a family to move into a home". The reason ("ground"; see s 3) for eviction must be taken into consideration and weighed against the interests of the tenant.

85 The role of federal, state and local governments in "regulating, producing and financing public and private housing tenements" has also been expanded as a result of this modern conception of the landlord-tenant relationship: Friedman *Friedman on Leases* 1-14.

86 Friedman *Friedman on Leases* 1-14.

87 See Dukeminier *et al Property* 361-444 for a discussion of some of these reforms. Notably, the regulatory measures that aim to protect tenants, including restrictions on rent increases, maintenance responsibilities and the prevention of termination, are all included as part of the definition of an unfair practice in the South African *Rental Housing Act* 50 of 1999, which means that the Tribunals can adjudicate these matters: s 13(4)(c) of the Act. In the light of *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2, the Tribunals must adjudicate all unfair practice disputes and weigh the interests of both parties in order to give a fair and just decision. The typical rent control protective measures are therefore implicitly included in the post-1994 *Rental Housing Act* 50 of 1999, since landlords' actions pertaining to maintenance, rent increases and the termination of a lease can all be scrutinised by the Tribunals.

88 Dukeminier *et al Property* 444.

code regulations that compel landlords to rehabilitate rental housing stock, and it encourages the construction of new units.⁸⁹

It seems that the warranty of habitability could in some instances have initiated rent control measures to ensure that landlords do not drive tenants out of their dwellings by increasing the rent because their properties fail to meet the warranty of habitability standards. Increasing the rent and cancelling the lease are therefore mechanisms that landlords could use to circumvent other regulatory measures such as the warranty of habitability. Conversely, strict rent control measures are often criticised on the basis that they can easily lead to more dilapidated buildings as landowners neglect their properties.⁹⁰ The effect is that the dwellings are often rendered unsafe and placed out of the housing market, which could have a negative impact on the quantity of available rental housing stock.

A preliminary conclusion is that regulatory measures, in general, that are imposed in landlord-tenant regimes have diverse aims. However, whether the main purpose of rent control is to restrict rent increases, provide strengthened tenure security for tenants, or enforce a warranty of habitability, it is clear that these aspects are not free-standing principles. They are interdependent as none could succeed without the successful implementation of the others.⁹¹ This highlights the importance of well-researched rental housing policies that should be reflected in rent control legislation, which essentially manifests a movement from a free market towards a regulatory system.⁹² A severe housing shortage, or the mere potential of exploitation by landlords, should generally justify the enactment of rent control laws, although disproportionate bargaining power could also suffice as validation for rent control, especially if security of the home forms part of government policy.

89 Hill *Landlord and Tenant* 295.

90 Olsen 1991 *Chicago-Kent LR* 942-943.

91 These issues are discussed in greater detail in s 5 of this article.

92 The Court's interpretation of the *Rental Housing Act* 50 of 1999 in *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 might manifest a movement in the South African landlord-tenant regime away from a free market in terms of which the landlord and tenant could agree on a ground for termination of the lease towards one where contractual provisions could be overturned by Rental Housing Tribunals on the basis that they constitute an unfair practice. This type of intervention is not analogous to strict rent control since it is not enacted as such. However, the Tribunals are currently empowered to grant substantive tenure protection for tenants by overturning termination clauses and restricting rent increases, which is similar to the essence of rent control. The difference is that the Tribunals can invoke these measures on a case by case basis, which is a more flexible approach that allows differentiation on the basis of need.

2.3 *The justification for rent control*

The state may intervene in the rental housing market for a variety of reasons, including the desire to grant better tenure security for tenants, to develop and improve the supply of affordable housing, or to maintain economic production. The extent to which the state should intervene is uncertain and an unavoidable issue in landlord-tenant law.⁹³ Statutory intervention manifestly restricts the rights of landowners to use their property in the way they see fit, and consequently stimulates some form of resistance by private sector landlords. Initially, the "powerful political and philosophical rhetoric of property" was used in English law to oppose statutory restrictions.⁹⁴ This power of property rhetoric influenced the executive and parliament in placing a restriction on law making.⁹⁵ In the middle ages the majority of writers agreed that the right to property formed part of what was called "the fundamental law of England" which bound parliament and the Crown.⁹⁶ The state has intervened in the English private sector, placing restrictions on the contractual freedom of the parties and therefore effectively limiting the power of landowners. However, the power of property is not undermined by these restrictions, because regulatory interference with property still requires justification.⁹⁷

Similarly, the majority of US rent control laws require some form of housing emergency to justify the imposition of regulations, but in some US states the existence of a housing emergency is not a requirement for such a justification "if the statutes serve the public interest".⁹⁸ A shortage of decent low- and moderate-income housing stock, combined with a period of inflation, could initiate housing policy that aims to protect vulnerable tenants and justify the enactment of rent control laws⁹⁹ because it would be in the public interest.¹⁰⁰

93 *Bright Landlord and Tenant* 52.

94 *Bright Landlord and Tenant* 53.

95 *Bright Landlord and Tenant* 53.

96 *Allen Property* 8.

97 *Bright Landlord and Tenant* 53.

98 *Hill Landlord and Tenant* 295.

99 Rents are usually set at historical levels (referred to as the base rent), which serves as the foundation for all rent increases. The base rent is typically the rent charged six months prior to the enactment of rent control laws. Most rent control laws allow annual rent increases, because the aim is to control rent increases, not to convert landlords into welfare providers: *Hill Landlord and Tenant* 299-300. See Miron 1990 *Urban Studies* 168 for a different view. Miron argues that some modern forms of rent control are referred to as rent regulation, terminology which refers to

From this brief analysis it is evident that severe housing shortages will more often than not justify statutory interference in the private rental market, although a different type of housing shortage can also validate rent control or other forms of tenure protection. If a specific income group - typically lower income households - experiences a housing shortage, it would be just and equitable to impose rent control or similar regulatory measures to provide the required relief. In the absence of such intervention, high-income landowners with investment-backed commercial interests could easily take advantage of housing shortages by increasing rents disproportionately, cancelling leases at random, and refusing to maintain their buildings.

Prior to *Maphango v Aengus Lifestyle Properties*,¹⁰¹ it might have seemed that the South African policy-makers and legislature¹⁰² have not found it necessary to strengthen any tenants' tenure rights, because the courts generally confirmed the common law principle that landowners are entitled to eviction orders once the leases have been terminated. *Maphango v Aengus Lifestyle Properties*¹⁰³ overturned this position and opened up the possibility for Rental Housing Tribunals to provide tenure protection for tenants when adjudicating unfair practice disputes. However, Tribunals can also restrict rent increases and force landlords to adhere to their maintenance responsibilities.¹⁰⁴ These protective measures are not analogous to strict rent control because they are not generally enacted to provide substantive tenure protection for all tenants, neither do they impose strict rent restrictions on all tenancies. The Court's interpretation of the *Rental Housing Act* makes it possible for the Tribunals to impose these measures on a case by case basis where the circumstances of each case would justify the imposition of the protective measures, which allows a more context-sensitive approach to the strengthening of tenure rights.

schemes that screen rent increases with a view to preventing unjustified rent increases, while traditional rent control froze or fixed rents.

100 Hill *Landlord and Tenant* 295-296.

101 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

102 A number of authors have argued that the *Rental Housing Act* 50 of 1999 provides limited tenure protection because it does not override the landlord's common law right to evict the tenant on termination of the lease: Van der Walt 2002 *TSAR* 266; Mukheibir 2000 *Obiter* 329; Legwaila 2001 *Stell LR* 281; Badenhorst, Pienaar and Mostert *Law of Property* 429.

103 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

104 See s 13(4)(c) *Rental Housing Act* 50 of 1999.

3 An analysis of rent control

3.1 Background

The *Tenants Protection (Temporary) Act* of 1920¹⁰⁵ introduced rent control in South Africa. The aim of the Act was to provide urban tenants with substantive tenure protection by automatically creating a statutory periodic tenancy at the end of a fixed-term tenancy, provided that the tenant continued to pay the rent on expiration of the lease and complied with the other conditions of the tenancy. Consequently, the landlord could not eject the tenant except on certain grounds, as stated in the Act.¹⁰⁶ According to section 1(1) the Court could eject the tenant if he damaged the property or if the landlord reasonably required the property for his own use.¹⁰⁷ These provisions could be described as the core around which all of the subsequent legislation developed.¹⁰⁸ The Act was succeeded by a number of *Rents Acts*¹⁰⁹ and rent control quickly made its mark on the statute book. It provided substantive tenure protection for low-income households over a period of fifty years.

The South African *Rents Act* 13 of 1920 made provision for additional grounds for eviction. According to section 11 the Court could eject the tenant if the premises were reasonably required by an employee of the landlord or if the tenant had been guilty of creating a nuisance for neighbouring occupiers.¹¹⁰ The *Rents Act* 1920 also introduced rent restrictions as it mandated the Governor-General to constitute rent boards.¹¹¹ The function of the rent boards was to reduce fixed rent and fix reasonable rents.¹¹² The *Rents Act* 1920 did not apply to dwellings situated in an area for which no rent board had been constituted, nor did it apply to dwellings completed after the first day of April 1920.¹¹³ The *Rents Act Extension and Further*

105 See the text accompanying fn 33-34 for more detail regarding the purpose of the Act.

106 Section 1(1) *Tenants Protection (Temporary) Act* 7 of 1920.

107 Both of these grounds for eviction were listed in s 14(2) of the *Rents Amendment Act* 26 of 1940.

108 Rosenow and Diemont *Rents Act* 1.

109 The most important Acts were the *Rents Act* 13 of 1920, the *Rents Amendment Act* 26 of 1940, the *Rents Act* 43 of 1950 and the *Rent Control Act* 80 of 1976.

110 Both of these grounds for eviction were also listed in s 14(2) of the *Rents Amendment Act* 26 of 1940.

111 Section 1 *Rents Act* 13 of 1920.

112 Sections 2, 6 and 7 *Rents Act* 13 of 1920.

113 Section 13 *Rents Act* 13 of 1920.

*Amendment Act 10 of 1922*¹¹⁴ added an additional ground for eviction, namely that the tenant could be ejected if the premises were reasonably required for the purpose of a reconstruction scheme.¹¹⁵ The *Rents Extension Act 20 of 1923* also introduced a new ground, namely that the tenant could be ejected if the landlord's major or married child reasonably required the property.¹¹⁶

As a result of the outbreak of the Second World War South Africa experienced a more severe housing shortage, which initiated a second, stricter wave of regulatory measures in the private rental market.¹¹⁷ The *Rents Amendment Act 26 of 1940*¹¹⁸ repealed previous rents legislation¹¹⁹ and consolidated landlord-tenant law.¹²⁰ Like the previous *Rents Acts*,¹²¹ the landlord could not claim the eviction of the tenant on the termination of the lease if the tenant continued to pay the rent within seven days of the due date and continued to comply with the other conditions of the tenancy, except if a ground for termination¹²² existed. The landlord was in effect statutorily deprived of his right of ejectment.¹²³

The effect of the *Rents Act 43 of 1950* was to (again) amend and integrate landlord-tenant law.¹²⁴ Section 33(1)(d) of the Act excluded all dwellings of which the rent was being controlled or determined under the provisions of another law.¹²⁵ The essential

114 Section 3(a) *Rents Act Extension and Further Amendment Act 10 of 1922*.

115 This ground for eviction was also listed in s 14(2) of the *Rents Amendment Act 26 of 1940*.

116 Section 3 *Rents Extension Act 20 of 1923*.

117 *Cooper Rent Control Act 4*; Rosenow and Diemont *Rents Act 4*.

118 See in general *Cooper Rent Control Act 4*.

119 *Rents Act 13 of 1920*, *Rents Act Extension and Amendment Act 30 of 1921*, *Rents Act Extension and Further Amendment Act 10 of 1922*, *Rents Extension Act 20 of 1923*, *Rents Act Extension Act 29 of 1924*, *Rents Amendment Act 26 of 1940* and War Measure 42 of 1941 (Proc 195 in GG 2952 of 13 October 1941 127).

120 During this period and in response to emergency housing shortages, nationwide rent controls were introduced in the US through the federal Office of Price Administration: Scherer *Landlord-Tenant Law* 118.

121 See s 14(2) *Rents Amendment Act 26 of 1940*.

122 The way in which the legislature consolidated previous rents legislation was evident in this section as it included the six grounds for eviction as they existed at that period. These grounds for eviction have already been described in the previous paragraphs.

123 *Cooper Rent Control Act 156*.

124 *Cooper Rent Control Act 8*.

125 The effect of this provision is evident in consideration of the racially discriminatory laws. Where the apartheid laws determined the rent of black persons ("black" refers to all racial groups other than white persons and this term is used to simplify the explanation of the tenure position of the racial group in question) in the identified areas, application of the *Rents Acts* was excluded. For a detailed discussion of the apartheid laws see Maass *Tenure Security* ss 2.3, 2.4.

object of the *Rents Act* 1950 was to provide tenants with reasonable rentals,¹²⁶ although substantive tenure rights were a "necessary corollary" of the Act.¹²⁷ Kerr¹²⁸ divided the grounds for eviction into five classes, namely (a) the conduct of the tenant;¹²⁹ (b) the needs of the landlord;¹³⁰ (c) previous occupation and the tenant's agreement;¹³¹ (d) reconstruction, rebuilding and town planning¹³² and (e) a saving clause.¹³³

It may be useful to note at this stage how South African rent control legislation developed over thirty years. Initially, the legislature's aim was merely to provide some security of tenure for existing tenants, combined with a limited number of grounds for eviction. Rent restrictions followed in a matter of months and the grounds for eviction quickly expanded as the permanent institution of rent control developed into a sophisticated form of statutory intervention. By the 1950s the original aim of rent control, namely security of tenure, was described as an indispensable consequence of rent restrictions. This shows how the primary purpose of rent control changed in accordance with socio-economic conditions and how interdependent these aspects of rent control are. The dynamic character of rent regulation is evident upon consideration of landlord-tenant law in England and New York City.¹³⁴

126 Landlords were forbidden to charge rents higher than the rate charged on the first day of April 1949: s 2 *Rents Act* 43 of 1950.

127 See s 21 *Rents Act* 43 of 1950 for detail regarding the nature and extent of tenure protection that was provided in terms of the Act.

128 Kerr *Law of Lease* 198-201.

129 In terms of s 21(1)-21(1)(b) *Rents Act* 43 of 1950, tenure security was similar to the previous acts. S 23(2) *Rents Act* 43 of 1950 added an additional ground, namely that the landlord could eject the statutory tenant if he sublet the premises.

130 See s 21(1)(c)-(d) *Rents Act* 43 of 1950.

131 S 21(1)(e) *Rents Act* 43 of 1950 introduced a new ground for eviction. The court could eject the lessee on a specified date if the lessee agreed in writing to vacate the premises on that date and if the landlord had previously personally occupied the premises.

132 S 21(f) *Rents Act* 43 of 1950 provided that if the premises were reasonably required for the purpose of a reconstruction scheme, for instance, the court could eject the lessee. The lessee could also be ejected on the basis of s 21(1)(g) *Rents Act* 43 of 1950 if the local authority reasonably required the premises in a scheme of town improvement.

133 S 21(1) *Rents Act* 43 of 1950 contained a saving clause which gave the court the discretion to add an additional ground if it was deemed necessary in the circumstances. The *Rent Control Act* of 1976 also contained a saving clause in s 28(d)(v) *Rents Act* 43 of 1950.

134 The following paragraphs are included to show briefly how the English and US rent control laws developed in line with socio-economic conditions. The detail regarding the extant legislation is discussed in later paragraphs.

During this period¹³⁵ the private rental market was deregulated in England, which led to the exploitation of tenants. The English *Protection from Eviction Act* 1964 afforded tenants some procedural protection as it required a court order before eviction could take place.¹³⁶ The 1965 *Rent Act* replaced the initial *rent control* provisions in England with a new system of *rent regulation*. Rent control was aimed at freezing rents at historic levels, although making provision for certain increases, while rent regulation included the consideration of the value of the property when determining a "fair rent". The scarcity of housing was irrelevant when determining the rent.¹³⁷ The rental housing market became unattractive as an investment opportunity, which contributed to a decline in private rental housing during the twentieth century. At the end of the 1970s the English private rental sector provided merely thirteen per cent of housing.¹³⁸ The English *Rent Act* of 1977 consolidated the previous *Rents Acts* and provided long-term tenure security for tenants in the private rental market.¹³⁹ Currently, the *Rent Act* 1977 applies only to tenancies granted before 15 January 1989.¹⁴⁰

Contrary to the position in England, the New York State legislature decided not to discard rent control in the 1950s. Based on the recommendation of a Temporary State Housing Rent Commission,¹⁴¹ the justification for the continued imposition of rent control was its temporary status and the persisting housing shortages. New York State Governor Harriman stated that rent control formed part of a "broader housing program" and that it was intended to operate on a temporary basis until the supply of adequate housing increased.¹⁴² In 1950 the *New York Emergency Housing Rent Control Law* made provision for rent control in New York State, although the rent regulation laws enacted during the 1960s could be identified as the core legislation on which the current New York City rent regulation system is based.¹⁴³

135 Between 1950 and 1960 Britain experienced good employment and economic prosperity, which led to an increase in owner-occupation: Bright *Landlord and Tenant* 158.

136 Bright *Landlord and Tenant* 185.

137 Bright *Landlord and Tenant* 185. "Fair rent" was always less than market rent.

138 During this period state subsidies were available to local councils: Bright *Landlord and Tenant* 159.

139 Bright *Landlord and Tenant* 186; Bridge *Residential Leases* 2.

140 Garner *Landlord and Tenant* 165.

141 Stegman "Rent Control in New York City" 31.

142 Stegman "Rent Control in New York City" 31.

143 The legislation includes the *Local Emergency Housing Rent Control Act* 1962 and the *Rent Stabilization Law* enacted in 1969: Scherer *Landlord-Tenant Law* 118.

New York City enacted the *Rent Control Law* in 1962, which is a continuation of federal and state control of rents,¹⁴⁴ and the *Rent Stabilization Law* in 1969. The differences between rent control and rent stabilisation have become "muted" over the years to such an extent that one can hardly establish which system is more stringent.¹⁴⁵ The laws underwent some modification in the 1970s and 1980s but the general aim was to "empower localities to impose rent controls and to govern the terms of the local laws."¹⁴⁶ In 2003, the rent regulation laws in New York State were again extended for a period of eight years.¹⁴⁷

The final wave of rent control in South Africa was marked by the *Rent Control Act 80* of 1976. The *English Rent Act 1977* and the New York City rent regulation laws were also applicable during this final stage of rent regulation in South Africa and a comparison between these laws highlights a number of interesting issues regarding the types of rent restrictions imposed and the concept of statutory tenancy.

3.2 Rent restrictions

The aim of the South African *Rent Control Act* of 1976 was to control the rent of "controlled premises"¹⁴⁸ and to provide substantive tenure security for tenants. To control rentals, the Act froze the rent at the rate charged on the first day of April 1949. The English and New York systems are different since the determination of rents is more flexible and subject to review. Moreover, the local authority is also involved in the process of determining rents. Both the English and New York City systems could therefore strictly be defined as *rent regulation* rather than *rent control* measures.

144 Scherer *Landlord-Tenant Law* 121-122.

145 Scherer *Landlord-Tenant Law* 113: "Rent control, which came first, was traditionally the more stringent with regard to rent setting, evictions, provision of building services, and enforcement."

146 Scherer *Landlord-Tenant Law* 118.

147 Scherer *Landlord-Tenant Law* 113. In June 2011 the authorities decided to renew rent regulations, although it seems that there are still political negotiations pending a final decision in this regard: Confessore and Kaplan 2011 query.nytimes.com; Wiessner 2011 www.reuters.com.

148 Section 1(iii) *Rent Control Act 80* of 1976.

The English *Rent Act* of 1977 makes provision for the establishment of "fair rents",¹⁴⁹ which are determined by a rent official.¹⁵⁰ The applicant must propose a fair rent, after which the rent officer will ask the other party to make recommendations and, if necessary, oppose the proposed rent.¹⁵¹ When the rent officer decides on a fair rent he will register the rent in the registration area.¹⁵² Consequently, the rent will attach to the land and not the parties.¹⁵³ Section 67(3) makes provision for a new application after two years, although it also states that the parties can apply for the registration of a new rent when the terms of the tenancy change or when the condition of the premises change.¹⁵⁴

The New York City Rent Stabilization system places a restriction on the rent charged by regulating the rent at the beginning of a tenancy as well as annual rent increases.¹⁵⁵ The Rent Guidelines Boards (RGB) establish maximum rent increases for new tenancies and for renewed leases, but special rent increases are also provided for where a landlord is experiencing some form of hardship or where certain improvements were made to the premises.¹⁵⁶ The maximum base rent (MBR) system allows the New York State Division of Housing and Community Renewal (DHCR) to set rent increases in the MBR system for rent-controlled apartments,¹⁵⁷ although landlords are allowed to increase rents annually to a maximum of 7.5 per cent.¹⁵⁸

149 The determined fair rent is the highest rent the landlord can obtain from the tenant. If the contract makes provision for rent increases the landlord is allowed to increase the rent, but not beyond the registered rent: Garner *Landlord and Tenant* 193.

150 In order to create a fair rent, the tenant, landlord, both parties (s 67 *Rent Act* 1977) or the local authority can apply for the registration of a fair rent in a prescribed form to the rent officer.

151 After both parties have had the opportunity to make proposals the rent officer usually consults with the parties and visits the premises: Garner *Landlord and Tenant* 189.

152 Section 66 *Rent Act* 1977 makes provision for the registration of rents in a register created for certain areas.

153 The registered rent will bind future lettings, irrespective of a change in tenant or landlord: Garner *Landlord and Tenant* 189.

154 Partington *Landlord and Tenant* 260 notes that the effect of inflation would tend to increase the registered rent rather than to provide a mechanism according to which the tenant can reduce the rent.

155 The initial rent charged for a rent-stabilised unit has to be registered with the New York State Division of Housing and Community Renewal (DHCR) and is referred to as the "initial legal regulated rent" if the rent was registered after 1 April 1984: § 2521.1 *New York City Rent Stabilization Code* 1987.

156 Scherer *Landlord-Tenant Law* 156-157.

157 The Commissioner of the DHCR (also referred to as the Administrator) may increase rent-controlled rents through such an order: Scherer *Landlord-Tenant Law* 172.

158 § 2201.6(a)(1) *New York City Rent and Eviction Regulations*.

From this brief overview one can conclude that the systems in England and New York allow regular rent increases which should generally soften the burden of rent restrictions on landowners. By allowing regular rent increases the state would regulate the private market in favour of lower income tenants without necessarily shifting wealth from landowners to tenants,¹⁵⁹ especially if the economic prosperity of landowners is a factor that should be taken into account by the relevant authorities. Nevertheless, rent restrictions are a fundamental aspect of rent control even if the aim of the legislation is to provide tenants with security of tenure, because private landowners can otherwise easily circumvent security of tenure measures by increasing the rents. On the other hand, in the absence of rent control, landowners can also circumvent restrictions on rent increases (as stipulated in the lease) by terminating the lease.¹⁶⁰ In *Maphango v Aengus Lifestyle Properties*,¹⁶¹ the Constitutional Court decided that the Rental Housing Tribunals can declare such a termination invalid if it constitutes an unfair practice.

3.3 *Security of tenure*

Like its predecessors, the South African *Rent Control Act* of 1976 provided that the tenant could continue to pay the agreed rent on termination of the lease with the effect that the court could not eject the tenant except on certain grounds.¹⁶² A new relationship would emerge between the statutory tenant and landlord. Cooper describes the relationship as a "statutory relocation", which is akin to a tacit relocation, because "those provisions of the lease incident to the relation of landlord and tenant are renewed but the provisions that are collateral, independent and not incidental to the relation of landlord and tenant are not incorporated in the new

159 See in general Epstein 1988 *Brooklyn LR* 753, 767, 769. Epstein argues that rent control has an unfair effect in the sense that unwilling landlords must provide subsidy to tenants (Epstein 1988 *Brooklyn LR* 755). Olsen 1991 *Chicago-Kent LR* 935-938 refers to this wealth transfer as an "implicit tax" on landlords.

160 See the facts of *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 paras 2, 7, 11, 12, 16, 74 and 78.

161 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

162 Cooper *Rent Control Act* 117. The effect of *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 is different in the sense that the ground for termination, as included in the lease, can be nullified by the Tribunal on the basis that it amounts to an unfair practice. The effect of the negotiated ground or reason for termination can be held to prejudice the tenant's interests and therefore be declared invalid.

letting."¹⁶³ The nature of the tenure security provided to tenants in terms of the *Rent Control Act* was analogous to previous *Rents Acts* and the landowner could terminate the lease only on one of the grounds stipulated in the lease.¹⁶⁴

The *New York City Rent Stabilization Code* provides a different form of tenure security for tenants, requiring that the owner of a rent-stabilised unit must offer a renewal lease to the tenant on expiration of the original lease. The terms and conditions of the renewed tenancy must be identical with those of the expired lease.¹⁶⁵ The landlord can refuse to renew the lease if there is a legal basis for refusal.¹⁶⁶ If the landlord fails to offer renewal without relying on a specified ground for refusal, the tenant may continue to occupy the premises because her continued occupation right is protected by the *New York City Rent Stabilization Law*.¹⁶⁷ The continued tenancy is governed by the terms and conditions of the original tenancy and the landlord is prohibited from increasing the rent.¹⁶⁸

Where a fixed-term rent-controlled tenancy terminates and the tenant remains in the dwelling, the tenant automatically becomes a "statutory tenant". The terms and conditions of the new statutory tenancy are identical with those of the original tenancy, except for those provisions that are inconsistent with statutory restraints.¹⁶⁹ The terminology and nature of protection for rent controlled tenants in New York City are therefore similar to the provisions in the previous *Rent Control Act* of South Africa. Generally, all rent-regulated tenants in New York City who continue to pay their rent on termination of a lease may be evicted only if the landlord is able to establish a clear basis for eviction provided for in the relevant laws and

163 Cooper *Rent Control Act* 159.

164 Section 28 *Rent Control Act* 80 of 1976. The grounds for eviction were analogous to those listed in the previous *Rents Acts*.

165 § 2522.5(g) *New York City Rent Stabilization Code* 1987.

166 The basis for refusal is provided for in the *New York City Rent Stabilization Law* 1969 and the *New York City Rent Stabilization Code* 1987: Scherer *Landlord-Tenant Law* 201.

167 § 2523.5(d) *New York City Rent Stabilization Code* 1987.

168 Scherer *Landlord-Tenant Law* 203.

169 Scherer *Landlord-Tenant Law* 205.

regulations.¹⁷⁰ The rent regulation laws provide a number of grounds that enable landlords of rent-controlled and rent-stabilised units to evict tenants.¹⁷¹

The nature of rent-regulated tenants' rights and the extent of tenure protection afforded to them in terms of the *New York Rent Control Law* (and *Rent Stabilization Law*) were and remain similar to those of pre-1994 South African and English rent control legislation. Section 2(1) of the English 1977 *Rent Act* provides that if the protected tenant remains in the property on expiration of the protected tenancy, he becomes a statutory tenant. The statutory tenancy commences when the protected tenancy concludes. The protected tenancy can end by notice to quit (in the case of a periodic tenancy), forfeiture,¹⁷² effluxion of time (in the case of a fixed-term tenancy) or through any other common law method.¹⁷³ Once the contract ends according to the common law, the statutory code affords the tenant continued occupation rights. The statutory tenancy will arise only through the operation of section 1 of the *Rent Act* or through succession.¹⁷⁴ The landlord can terminate the statutory tenancy if he successfully claims possession in court, based on one of the grounds for possession as stated in the Act.¹⁷⁵

A statutory tenancy in English landlord-tenant law is a personal right and does not provide the tenant with a proprietary interest.¹⁷⁶ The tenancy is created by statute

170 § 2524.1(a) *New York City Rent Stabilization Code* 1987.

171 These grounds are discussed simultaneously with the grounds for eviction in terms of the English *Rent Act* 1977 due to the large number of similar grounds, although reference is made to the relevant system (or systems).

172 Where the tenant has committed a breach of covenant, the remedy enables the landlord to re-enter the dwelling and forfeit the tenancy. UK Law Commission *Termination of Tenancies* Part 2 recommended that the entire remedy should be abolished and replaced with a statutory scheme for the termination of tenancies.

173 Van der Walt *Margins* 99 states that forfeiture, effluxion of time and notice to quit were the three most important ways in which to end a tenancy at common law.

174 Evans and Smith *Landlord and Tenant* 290-294. See Wilkie *et al Landlord and Tenant* 197-200 for an extensive discussion of the succession of statutory tenancy as regulated by the *Rent Act* 1977 and the *Housing Act* 1988. The general rule is that the tenancy will not end as a result of the death of the tenant.

175 Bridge *Residential Leases* 99. Where a landlord institutes a claim for possession based on one of the grounds listed in s 98 *Rent Act* 1977, but excluding the grounds listed in Schedule 15 Part II, the court has a discretion to adjourn the proceedings, stay or suspend the execution of the order or postpone the date of possession: Evans and Smith *Landlord and Tenant* 289-290.

176 In *Keeves v Dean* 1924 1 KB 685 686 Lush LJ found that a statutory tenancy does not provide the tenant with a proprietary interest but rather affords the tenant with a "status of irremovability". A statutory tenancy will bind a successor to the landlord's title but will not prevail against a mortgagee seeking possession in order to realise his security: *Britannia Building Society v Earl* 1990 1 WLR 422 (CA).

and not by agreement, although the terms of the protected tenancy will be adopted in the statutory tenancy, provided the terms of the tenancy are consistent with the *Rent Act*.¹⁷⁷ One can conclude that the Act does grant substantive tenure rights¹⁷⁸ for private tenants in the English landlord-tenant framework through the mechanism of statutory tenancy and by allowing the landlord to repossess the property in limited, statutorily defined circumstances.¹⁷⁹

As against the grounds for possession in the South African and New York City rent control statutes, the English 1977 *Rent Act* makes a distinction between two categories of grounds for possession orders. Section 98(1) regulates the "discretionary grounds", while section 98(2) regulates the "mandatory grounds". Section 98(1) states that the court may grant a possession order only if the court considers it reasonable¹⁸⁰ and is convinced that there is either suitable alternative accommodation¹⁸¹ available for the tenant or one of the circumstances as specified in any of the cases/grounds in Part I of Schedule 15 (also known as the "discretionary cases") prevails.¹⁸² Where the landlord proves one of the discretionary grounds but the court does not consider the possession order reasonable, the landlord will not be able to repossess the property because reasonableness is an "overriding requirement".¹⁸³ The discretionary cases/grounds for eviction are discussed in the following paragraphs.

177 *Bridge Residential Leases* 105. One of the terms included in the statutory tenancy is that the tenant must give notice to quit, either as determined in the protected tenancy or for a period of not less than three months.

178 *Garner Landlord and Tenant* 181 defines "security of tenure" as rights acquired by a tenant through the operation of a statutory code which effectively overrides the common law in order to protect the tenant on expiration of the lease.

179 *Garner Landlord and Tenant* 181. The nature of the statutory tenancy in English law is similar to that in South Africa and New York City.

180 In *Cumming v Danson* 1942 2 All ER 653 655, the court found that in order to establish if a possession order is reasonable, the court has to consider "all relevant circumstances as they exist at the date of the hearing". The court is at liberty to consider any factor, "in a broad-common sense way", that might affect either the landlord or the tenant and may attach the appropriate weight to the given factor: *Garner Landlord and Tenant* 202. The court has to consider the unique circumstances of each case on a fact-based approach. The court considers various circumstances, including the personal circumstances of both parties.

181 The alternative accommodation requirement will be satisfied if the landlord obtains a certificate from the local authority certifying that it will provide the tenant with the necessary accommodation or if the landlord arranges accommodation for the tenants from another private landlord: *Garner Landlord and Tenant* 199.

182 This section therefore requires reasonableness and either the availability of alternative accommodation or one of the grounds as provided for in the schedule.

183 *Garner Landlord and Tenant* 202.

If the rent is in arrears or the tenant has breached an obligation in the lease, the landlord can rely on case 1.¹⁸⁴ Case 2 regulates the position regarding nuisance¹⁸⁵ to adjoining occupiers and the use of the dwelling for illegal purposes.¹⁸⁶ If the premises deteriorated as a result of the tenant's neglect, the landlord can rely on case 3.¹⁸⁷ The landlord can rely on case 5 if the tenant gave notice to quit but decided to remain in the premises,¹⁸⁸ while case 6 may entitle the landlord to repossess the premises where the tenant sublet or assigned the property without the landlord's consent.¹⁸⁹ Where the employee ceases to work for the employer/landlord he would be able to rely on case 8 to repossess the property.¹⁹⁰ Where the dwelling is reasonably required by the landlord for residential occupation by himself,¹⁹¹ the landlord can rely on case 9.¹⁹² Where the tenant sublet part of the property and the

184 Curiously, this ground for possession was not explicitly included in the initial *Rents Acts* of South Africa, but Cooper *Rent Control Act* 149-151 states that the tenant would have forfeited protection under the *Rent Control Act* 80 of 1976 if he breached the lease. In New York City, any tenant (including regulated tenants) may generally be evicted for non-compliance, a ground which includes failure to comply with the terms of the tenancy or the tenant's obligations as provided for in the statutes: Scherer *Landlord-Tenant Law* 555. A regulated tenant in New York may be evicted for failure to comply with the lease: § 2524.3(a) *New York City Rent Stabilization Code* 1987.

185 The combined phrase has a wide, non-technical meaning which could include the usage of foul language, verbal abuse (*Cobstone Investments Ltd v Maxim* 1985 QB 140 143) and even the exercise of "undue familiarity" outside the premises (*Whitbread v Ward* 1952 159 EG 494). This ground for possession was introduced in s 14(2) of the South African *Rents Amendment Act* 26 of 1940. Any tenant (including rent regulated tenants) in New York City may be evicted if he creates a nuisance, although the conduct must be of such a nature that it threatens the safety of the other tenants or the landowner: Scherer *Landlord-Tenant Law* 572.

186 The landlord has to prove that the premises itself is connected with the crime: *Schneiders & Sons Ltd v Abrahams* 1925 1 KB 301 311. In New York City, the landlord of a rent-controlled or rent-stabilised unit may institute eviction proceedings based on the ground that the tenant occupies the premises in a manner that is illegal: § 26-408(a)(3) *New York City Administrative Code* 1979. This ground for possession was not included in any of the South African *Rents Acts*.

187 Case 3. This ground for possession was introduced in s 1(1) of the South African *Tenants Protection (Temporary) Act* 7 of 1920.

188 The landlord must have acted as a result of the notice to quit. See Evans and Smith *Landlord and Tenant* 282. This ground for possession was not included in the South African rent control legislation, although a similar ground for eviction exists in New York City: § 2524.3(f) *New York City Rent Stabilization Code* 1987.

189 Evans and Smith *Landlord and Tenant* 282. This ground is relevant for protected tenants only, because a statutory tenant cannot assign a tenancy or sublet the whole of the property. S 23(2) of the *Rents Act* 43 of 1950 introduced this ground for possession in South Africa.

190 Evans and Smith *Landlord and Tenant* 283. This ground for possession was introduced in the South African rent control regime by means of s 14(2) of the *Rents Amendment Act* 26 of 1940.

191 This ground for possession was introduced in South Africa by means of s 1(1) of the *Tenants Protection (Temporary) Act* 20 of 1923. The *New York City Rent Control Law* 1962 and *Stabilization Law* 1969 (§ 26-408(b)(1) and § 26-511(c)(9)(b) of the *New York City Administrative Code* 1979) that govern the eviction proceedings where the landowner reclaims the premises for "personal use and occupancy" are similar in most respects: Scherer *Landlord-Tenant Law* 609.

192 See also Evans and Smith *Landlord and Tenant* 283-285 for a discussion of this ground.

rent payable by the sub-tenant exceeds the registered rent,¹⁹³ the landlord can claim repossession in terms of case 10.

When the court is faced with a claim for possession and the landlord relies on one of the mandatory grounds,¹⁹⁴ the court does not have a discretion to refuse the eviction order based on reasonableness. If the landlord can prove one of the cases in Part II, he will be entitled to a possession order.¹⁹⁵ The landlord can claim possession where he previously occupied the premises as his residence and wishes to repossess his property;¹⁹⁶ purchased the property with the intention of occupying it when he retires, but rented out the property while he worked full-time;¹⁹⁷ or leased his holiday home, out of season, for a longer tenancy, which falls within the ambit of the Act.¹⁹⁸ An educational institution can regain possession where it granted a tenancy, regulated under the English *Rent Act* 1977, for instance during a college holiday,¹⁹⁹ while any landlord can claim possession if he wishes to accommodate a minister of religion.²⁰⁰ Case 16 enables a landlord to repossess property to accommodate his agricultural employee.²⁰¹ Case 19 grants the landlord a right to claim possession where the premises were occupied under a protected short-hold tenancy²⁰² which terminated and converted into a statutory tenancy.²⁰³ If the dwelling is overcrowded²⁰⁴ in a way that renders the occupier guilty of an offence, the landlord can rely on section 101.

193 The subletting of rent-stabilised units in New York City is governed by the *New York City Rent Stabilization Code* 1987 (§ 2525.6) and any violation of this code is a ground for eviction: § 2524.3(h) *New York City Rent Stabilization Code* 1987.

194 Section 98(2) *Rent Act* 1977 regulates the mandatory grounds for possession. These grounds are unique since there is no counterpart in the South African *Rents Acts* or the New York City rent regulation laws.

195 See Wilkie *et al Landlord and Tenant* 192-194 for a brief discussion of these grounds.

196 Case 11.

197 Case 12. See also case 20.

198 Case 13.

199 Case 14.

200 Case 15.

201 The Act requires that the dwelling must have been occupied by such an employee before the current tenancy was granted and the landlord must have given notice to the current tenant of the possible ground for possession.

202 The protected short-hold tenancy was created by the *Housing Act* 1980 and afforded the landlord the means to grant a short fixed-term tenancy without providing security of tenure for the tenant: Garner *Landlord and Tenant* 212.

203 The landlord had to give notice to the tenant and no further tenancy may have been granted after the protected short-hold tenancy.

204 The dwelling has to be overcrowded within the meaning of Part X of the *Housing Act* 1985.

There are a few unique grounds for eviction in the New York City rent regulation laws that are not reflected in the other two jurisdictions. In terms of the *Rent Stabilization Code*, the landowner may evict the tenant if he unreasonably refuses access to the premises.²⁰⁵ If the landlord can establish that the tenant is not using the unit as her primary residence the tenant may be evicted.²⁰⁶ The landlord of a rent-controlled unit in New York City may seek to evict the tenant when she requires the premises for substantial alterations.²⁰⁷ The aim of the alterations must be to subdivide "an under-occupied housing accommodation into a greater number of housing accommodations".²⁰⁸ Where the landlord of a rent-controlled or rent-stabilised unit seeks to demolish the premises, the landlord may institute eviction proceedings.²⁰⁹ Another basis that the landlord of a rent-controlled or rent-stabilised unit in New York City may rely on is where the landlord seeks to withdraw the premises from the housing market.²¹⁰ In terms of the *Rent Stabilization Code*, the landlord can seek permission to refuse to renew the lease where the landowner intends to remove certain unsafe conditions from the premises.²¹¹ However, the landlord must agree to reoffer the renovated unit to the tenant.²¹²

From the discussion it is clear that anti-eviction legislation in the three jurisdictions drastically interfered with the rights of landowners to the extent that landlords' right to terminate leases in terms of the common law was restricted and, consequently, their right to evict tenants was also restricted. In all three jurisdictions the legislation created a statutory tenancy on termination of the contractual lease, which forced landlords to provide housing for continuous periods at restricted rents. Even though some of the grounds for eviction are similar, a number of grounds are unique to that specific jurisdiction, and it is therefore difficult if not impossible to logically align all the grounds for eviction in a coherent manner. The grounds for eviction are context-

205 § 2524.3(e) *New York City Rent Stabilization Code* 1987. § 26-408(a)(6) of the *New York City Administrative Code* 1979 makes provision for eviction where the tenant of a rent-controlled unit unreasonably refuses access to the premises.

206 Scherer *Landlord-Tenant Law* 617.

207 § 26-408(b)(3) *New York City Administrative Code* 1979. This ground for eviction was introduced in South Africa through s 3(a) of the *Rents Act Extension and Further Amendment Act* 10 of 1922. Surprisingly, this ground is omitted from the *English Rent Act* 1977.

208 § 2204.7(a) *New York City Rent and Eviction Regulations*.

209 § 26-408(b)(4) *New York City Administrative Code* 1979.

210 § 2524.5(a)(1) *New York City Rent Stabilization Code* 1987.

211 § 2524.5(a)(3) *New York City Rent Stabilization Code* 1987.

212 § 2524.5(a)(3)(i)-(iii) *New York City Rent Stabilization Code* 1987.

sensitive to the specific jurisdiction and have mostly developed over decades to establish a set of reasons why (and when) eviction should be possible. This set of reasons and its stringency should ideally reflect the particular government's housing policies, specifically the policies that aim to accommodate lower income groups. In addition, the grounds for eviction determine the delicate balance between the landowners' property rights and the tenants' right not to be arbitrarily evicted,²¹³ although this proportionality exercise is squarely based on the relevant circumstances. If the private landowner is entitled to evict the tenant on termination of the lease, based on one of the grounds for possession in the legislation, this eviction right is neither pre-determined nor hierarchical in relation to the tenant's housing interest, but rather derives from the legislation, which aims to protect the interests of both parties.²¹⁴ The current South African landlord-tenant framework is not based on a rent control policy and the rental housing statutes can also not be defined as rent control statutes. It therefore follows that the laws, and specifically the *Rental Housing Act*, do not include a list of grounds for termination of leases. A landlord can therefore not claim termination of a lease and assume that his reason is justifiable because it is included in a predetermined list of grounds for termination. In the light of *Maphango v Aengus Lifestyle Properties*,²¹⁵ the landlord can also not assume that the ground for termination as stipulated in the lease will absolutely entitle him to cancel the lease. If the tenant lodges a complaint with the Rental Housing Tribunal on the basis that the ground for termination constitutes an unfair practice, the Tribunal may scrutinise the landlord's reason for termination and must strike a balance between the interests of both parties.²¹⁶ This balancing exercise should take place in accord with the spirit, purport and objects of the *Constitution*.

A clear indication that government should consider deregulating the private rental market is when lower income groups can access affordable housing elsewhere. This

213 See in general Michelman 1970 *Harvard Civil Rights- Civil Liberties LR* 222-223.

214 In the light of the recent *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 judgment, the Rental Housing Tribunals must ensure an equitable balance between the interests of landowners and tenants when deciding unfair practice disputes. However, the Tribunals have to adjudicate these disputes in an unguided manner since the *Rental Housing Act* 50 of 1999 does not give detail regarding justifiable grounds for termination. It merely states that the ground for termination may not constitute an unfair practice, while an unfair practice is defined as a practice that unreasonably prejudices the rights or interests of the tenant: ss 1 and 4(5)(c) *Rental Housing Act* 50 of 1999.

215 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

216 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 para 49.

is evident from the English and New York City systems, although it is not as obvious when considering the reasons why the South African market was deregulated.

4 Deregulation

The Fouche Commission was appointed by the South African government in 1976 to investigate the need to sustain rent control. The Commission recommended that rent control be phased out over a period of time.²¹⁷ The proclamations²¹⁸ systematically phased out the old *Rents Acts* because "there was an adequate supply of housing for Whites in most metropolitan areas".²¹⁹ A large number of tenants lost rent control protection within a mere three years.²²⁰ It was contended that the effect of rent control was to restrain rental housing development, but the phasing out of rent control did not result in any improvement in the private rental market.²²¹ By 1990 rent control had been phased out in all white residential areas.²²² The *Rent Control Act* was still applicable during this period, but the Act became irrelevant due to the effect of the proclamations.

The *Rental Housing Act* of 1999²²³ repealed the *Rent Control Act* of 1976 and on 31 July 2003 all protection in terms of the previous rent control legislation ended.²²⁴ During the three years following the commencement of the *Rental Housing Act* the Minister of Housing²²⁵ had to monitor and assess the impact of the phasing out of both rent control and substantive tenure rights on poor and vulnerable tenants. The Minister also had to respond to suffering tenants and alleviate their hardship by means of a newly introduced special national housing programme. Vulnerable tenants could be categorised on the basis of their age, income, or any other form of vulnerability.²²⁶ According to the Western Cape Rental Housing Tribunal, no official steps were taken to comply with this obligation. According to the Tribunal no action

217 RSA *First Report on Rent Control*.

218 See Maass *Tenure Security* 85-90 for a discussion of the phasing out of rent control in South Africa.

219 RSA *First Report on Rent Control*.

220 RSA *Hansard* 8424.

221 Mohamed *Tenant and Landlord* 4.

222 Mohamed *Tenant and Landlord* 3-4.

223 Section 18 *Rental Housing Act* 50 of 1999.

224 Mohamed *Tenant and Landlord* 7.

225 Sankie Mthembu-Mahanyele was the Minister of housing during this three-year period.

226 Stassen and Stassen 2000 *De Rebus* 56.

has been taken to alleviate any hardship suffered by vulnerable tenants, because the government did not assess the rental housing sector while phasing out rent control and the security of tenure it provided for tenants.²²⁷

The position in England regarding the phasing out of strict rent control was fairly similar to that in South Africa, although the *Rent Act* 1977 still applies to tenancies created before 15 January 1989 and the *Housing Act* 1988 ensures some security of tenure through assured tenancies.²²⁸ Initially the English *Rent Act* 1977 consolidated the previous *Rents Acts* and provided long-term tenure security for tenants.²²⁹ The law of residential leases was in a "reasonably coherent and comprehensive state" in 1979,²³⁰ but after the Conservative Party was elected in 1979 the policy changed, moving away from the aim to grant better tenure security for tenants and towards increasing the supply of private rental housing.²³¹ Security of tenure was gradually phased out, especially through the introduction of "short-hold" tenancies,²³² which afforded landlords the means to regain possession on expiration of the lease.²³³ The private rental sector increased by 25 per cent from 1988 to 1999, but currently the sector represents merely eleven per cent of the housing stock in England.²³⁴

227 Western Cape Rental Housing Tribunal 2003 www.capegateway.gov.za. The report indicates that approximately 3000 properties in the Western Cape were affected by the repeal. In *Jackpersad v Mitha* 2008 4 SA 522 (D) 532A-G Swain J held that the "crux of the obligation imposed on the Minister is that the tenants in question must be 'poor and vulnerable'": 532I-533A. Cameron J's interpretation in *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 of the nature and objects of the *Rental Housing Act* 50 of 1999 that replaced the previous rent control regime introduced a new perspective on the post-1994 landlord-tenant regime, which incorporates protective measures for both landlord and tenant. This includes security of tenure measures even though it is not explicitly stated as such.

228 In terms of the *Housing Act* 1988 the private landlord can choose to provide either an assured tenancy or an assured short-hold tenancy. The latter does not ensure substantive tenure protection for tenants. The result of the short-hold regime, introduced by the *Housing Act* 1988 and the *Housing Act* 1996, has been a general decline in assured tenancies. Currently almost 90 per cent of the private rental sector consists of assured short-hold tenancies: *Bright Landlord and Tenant* 203. See Maass *Tenure Security* s 4.6.2 for a discussion of the *Housing Act* 1988.

229 *Bright Landlord and Tenant* 186; *Bridge Residential Leases* 2.

230 *Bridge Residential Leases* 2.

231 *Bridge Residential Leases* 3.

232 Where the tenant occupies the property with an assured short-hold tenancy the landlord merely needs to prove that the tenancy has terminated and that notice requiring possession has been served to the tenant: *Garner Landlord and Tenant* 214.

233 *Bridge Residential Leases* 4.

234 *Bright Landlord and Tenant* 168. Currently it seems that the English private market is also on the verge of experiencing a supply shortage: Association of Residential Letting Agents 2011 www.arla.co.uk; Joseph Rowntree Foundation 2002 www.jrf.org.uk.

It is noteworthy that the purely private rental sector in English law currently represents a small percentage of the rental housing market. The majority of lettings in English law are either housing association²³⁵ lettings or council housing²³⁶ lettings. Collectively, these lettings constitute the social sector, which is occupied mostly by the poor and marginalised on a long-term basis.²³⁷ The benefits of social housing were confirmed by the Hills review,²³⁸ which found that social housing provides stability and security for low-income tenants as well as an improved quality of housing (especially compared with the quality of housing these households could afford in the private market).²³⁹

In 1989²⁴⁰ housing associations became part of the private sector and consequently the English *Housing Act* 1988 regulated housing association tenancies.²⁴¹ Recently these associations have doubled in size and are functioning like a business.²⁴²

Initially, council tenants had periodic leases that could be ended by a notice to quit. Even though there was no statutory system of protection, the local councils "exercise[d] their powers in a public-spirited and fair way in the general public interest".²⁴³ In 1966 the local authority housing stock had expanded to 27 per cent of the housing stock.²⁴⁴ The Tenant's Charter that was introduced in 1980 ensured protection for local council tenants in the event of eviction.²⁴⁵ The Charter was adopted in the English *Housing Act* 1985.²⁴⁶

235 Mullins and Murie *Housing Policy* 178 define housing associations as "independent, non-profit-distributing organizations governed by voluntary boards to provide mainly rented housing at below market rents".

236 Council housing lettings are also referred to as local authority lettings. These lettings form part of the social sector, although in South African terms it would be known as the public rental sector.

237 Bright *Landlord and Tenant* 8.

238 Hills 2007 sticerd.lse.ac.uk 34.

239 Hills 2007 sticerd.lse.ac.uk 69-70.

240 Bright *Landlord and Tenant* 165.

241 Bright *Landlord and Tenant* 189. The Housing Corporation encouraged assured tenancies instead of short-hold tenancies, although housing associations are still at liberty to lease property on a short-hold tenancy basis.

242 Bright *Landlord and Tenant* 165-167.

243 *Shelley v London County Council* 1948 1 KB 274 (CA) 283.

244 *Bridge Residential Leases* 2-3.

245 *Harrison v Hammersmith and Fulham London Borough Council* 1981 1 WLR 650 (CA) 661.

246 Bright *Landlord and Tenant* 189. At the end of the 1970s, council housing became a significant form of tenure that provided housing to a reasonably high percentage of tenants, while housing associations provided relatively less accommodation: Bright *Landlord and Tenant* 158-159.

For the greater part of the twentieth century, private sector tenants in England enjoyed extensive security of tenure combined with rent control, while council housing tenants' security was legally insubstantial, because it was unregulated until the legislature enacted the *Housing Act 1985*. The *Housing Act 1985* currently regulates local authority tenancies and provides these tenants with substantive tenure rights.²⁴⁷ An important matter to consider in the light of the policy decisions of parliament is the efficiency of the private rental housing market. One could argue that if the private rental market is functioning efficiently there is no need to impose extensive security of tenure or rent control measures,²⁴⁸ provided that there is some mechanism affording efficient tenure protection for those members of society who need it. The English social sector makes rental housing available for lower income groups and the level of tenure security provided to such households is high because the households are financially and socio-economically vulnerable. The aim of this sector is to provide homes to these households and to ensure long-term occupancy that would allow marginalised individuals to actively participate in society and live fulfilled lives. The efficacy of the English landlord-tenant system could be found in its ability to provide different forms of rental housing, with different levels of security of tenure, to various individuals with diverse needs. Arguably, the protection granted in the private sector has decreased because there is no longer a need to impose strict rent control or security of tenure measures in this sector, while there is such a need in the social sector, because this sector makes accommodation available for the poorest members of society. The availability of stock in the social sector has a direct impact on the justification of deregulation in the private sector. If the social sector can accommodate disadvantaged and vulnerable groups, the private sector should generally be able to uphold deregulation. However, if there is a housing shortage in the social sector, some vulnerable groups would automatically seek housing options in the private sector, which could lead to exploitation by private landowners. This is also apparent in the New York City landlord-tenant regime if one considers the availability of housing in the social sector.

247 See Maass *Tenure Security* s 4.6.3 for a discussion of the Act.

248 See in this regard Penny 1966 SALJ 494; Radin 1986 *Philosophy and Public Affairs* 352-353.

Federal,²⁴⁹ state and local laws and regulations regulate public housing in New York State.²⁵⁰ To determine if an applicant is eligible for public housing, the authority must consider the applicant's household income;²⁵¹ household composition; citizenship status; and his probable behaviour as a public housing tenant.²⁵² Generally admission is allowed on a "first come, first served" basis, although the New York City local housing authority may determine that some groups should receive priority. Priority is given to persons in need, including the homeless.²⁵³ Housing authority accommodation is in high demand because the rents are low and the maintenance of the premises is good. The housing authority is burdened with numerous applications for public housing and would regularly seek to evict unauthorised occupiers to accommodate the housing backlog.²⁵⁴ Generally tenants occupying public rental housing in New York City are protected to such an extent that they cannot be evicted without good cause and one can conclude that they occupy land with security of tenure.²⁵⁵

The rental housing market in New York City is both interesting and comparable to the rental housing market in England. For most of the twentieth century the private rental market in England provided housing to the majority of tenants, who included low-income tenants. The private rental market was regulated to protect all tenants. As the housing policy changed to increase the supply of private rental housing the market was deregulated, but during this period the social housing market increased and contributed to the provision of housing for low-income households. Currently the private sector can sustain deregulation because the social housing market is

249 The federal government is involved in the provision of housing for low and moderate income households through federally subsidised housing that is either owned by the government (also referred to as the Public Housing Program) or owned by private for-profit or not-for-profit parties. The Section 8 Program involves the provision of rent subsidies and forms the greatest part of the Public Housing Program: Scherer *Landlord-Tenant Law* 268. See Maass *Tenure Security* s 6.5.3 for a discussion of the Section 8 Program.

250 42 *United States Code Annotated* §§ 1437.

251 The families' income must be categorised as "lower income" or "very low income" according to § 1437a(b) of 42 *United States Code Annotated*.

252 Scherer *Landlord-Tenant Law* 270.

253 Scherer *Landlord-Tenant Law* 273.

254 Scherer *Landlord-Tenant Law* 288.

255 The housing authority is required to give adequate notice of the proposed termination to the tenant and to state the grounds for eviction: 42 *United States Code Annotated* § 1437f (d)(B)(iv). Tenants occupying public housing in New York City may be evicted on the ground of "non-desirability", which includes behaviour of the tenant that constitutes some danger to the safety of neighbours: New York City Housing Authority Management Manual – Chapter 7 3(b)(1)-(5).

providing a type of "safety net"²⁵⁶ for vulnerable occupiers. The social housing market is regulated quite extensively to protect vulnerable occupiers through the provision of affordable and secure rental housing.²⁵⁷ The private rental market is therefore not burdened with the indirect duty of providing housing for low-income households, because affordable secure rental housing is made available by the social housing sector.

The position in New York City is different. The percentage of private rental housing in New York City is high, especially in comparison with the limited public rental housing stock.²⁵⁸ The City has a large private rental housing market and thirty per cent of the market is unregulated. Tenants in the unregulated section of the market are paying more than the market rent, while tenants in regulated apartments either pay ten to forty per cent below the market rent or fifty to ninety per cent below the market rent, depending on the type of rent regulation applicable.²⁵⁹

In New York City the public rental sector is not providing the required number of housing units for low-income households. The New York City private rental market is therefore burdened with the indirect duty of accommodating low-income households. Previously the US courts held that rent regulation measures were constitutionally justifiable in the light of the housing crisis because landlords could exploit tenants.²⁶⁰ The justification for rent regulation subsequently shifted to the provision of secure, affordable rental housing for a small, specified group of low-income individuals. If the leases of low-income tenants who occupy regulated rental housing in the private market expire, their chances of acquiring public rental housing would be very slim, because the availability of public housing is limited. The aim of the regulations is therefore to avoid an increase in homelessness and one can conclude that the more recent justification for rent regulation in New York City is therefore based on the public interest.

256 Bright *Landlord and Tenant* 157.

257 See Maass *Tenure Security* ss 4.5.2 and 4.6.2 for a discussion of social housing regulations in England.

258 Stegman "Rent Control in New York City" 29.

259 Tucker *Zoning* 49.

260 See the discussion of *Block v Hirsh* 256 US 135 (1921) and *Edgar A Levy Leasing Co v Siegel* 258 US 242 (1922) in Maass *Tenure Security* s 6.6.2.

The rent control laws in South Africa were enacted by the apartheid legislature to provide strengthened tenure protection for white tenants and the reason for deregulation was simple, namely that there was an adequate supply of private rental housing for white tenants. Even if the Minister of Housing did monitor the effect of deregulation, she would probably not have identified any need for the continuation of rent control, because there was no longer a housing shortage for the group of households it previously provided protection for. The effect of deregulation in South Africa was therefore insubstantial and one could argue that it was justifiable and necessary to repeal the *Rent Control Act*. However, if the Minister assessed the private rental market *in general* and not only with respect to the group of households who previously benefitted from these restrictions, she might have detected a shortage of affordable rental housing options for low-income previously disadvantaged households, who were deliberately excluded from the previous rent control regime. *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*;²⁶¹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39²⁶² and *Maphango v Aengus Lifestyle Properties*²⁶³ confirm the shortage of rental housing options for low-income households. In comparison with the English and New York City landlord-tenant regimes, one could argue that the current South African social rental sector is not functioning as a "safety net" type of final housing resource for low-income households, because the effects of eviction from private rental housing for lower income households is often homelessness. If a small percentage of low-income occupiers struggles to find affordable housing in the private rental market, state intervention in the form of rent regulation is usually a justifiable mechanism that can provide some form of relief. Nevertheless, the private rental sector should be able to uphold deregulation, even during a housing shortage, if the social sector is functioning efficiently and providing decent affordable rental housing for those groups which cannot access the private market.

Currently this is not the case in South Africa since the emerging social sector is not functioning optimally yet. *City of Johannesburg Metropolitan Municipality v Blue*

261 *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA).

262 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2011 4 SA 337 (SCA).

263 *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA).

Moonlight Properties 39;²⁶⁴ *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*²⁶⁵ and *Maphango v Aengus Lifestyle Properties*²⁶⁶ indicate that poor, previously disadvantaged black households currently form part of the private sector and these tenants are experiencing a housing shortage. The justification for rent regulation in New York City is based on a general fight against increased homelessness and is therefore noteworthy in this regard since the arguable need for rent regulation in the South African private market also forms part of a constitutional objective to protect individuals against homelessness. The argument for rent regulation in the South African private rental market is different from the argument in New York City since all South Africans have a constitutional right to have access to adequate housing (section 26) and all previously disadvantaged persons who currently occupy land with insecure tenure are entitled to legally secure tenure in terms of appropriate legislation (section 25(6)). To give effect to the Constitution one could argue that the Court's interpretation in *Maphango v Aengus Lifestyle Properties*,²⁶⁷ to provide strengthened tenure protection for tenants, is justifiable, especially since the state is currently struggling to meet the housing demands.²⁶⁸

The English landlord-tenant regime also shows the importance of a well-established social sector and how such a sector can contribute to the provision of secure rental options for low-income individuals. Arguably, the social sector in South Africa should be expanded to accommodate the majority of vulnerable households, who are struggling to find housing options in the private market. In addition, the current laws and policies that form the social sector should be amended to ensure substantive tenure protection²⁶⁹ for social sector tenants since these tenants generally require long-term tenure protection in order to settle in their communities and social networks. Section 2(1)(h) of the *Social Housing Act* 16 of 2008 states that

264 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2011 4 SA 337 (SCA).

265 *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA).

266 *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA).

267 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

268 See for instance *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) and the reluctance of the city to adhere to the court order: SAPA 2012 www.legalbrief.co.za.

269 Maass and Van der Walt 2011 SALJ 451.

government and social housing institutions must ensure secure tenure for residents in social housing stock. The extent of tenure security must be based on the general principles as stated in the *Rental Housing Act*. At this stage it is unclear whether or not the Court's interpretation of the *Rental Housing Act* in *Maphango v Aengus Lifestyle Properties*²⁷⁰ would have any impact on the possibility of strengthened tenure protection for social sector tenants.

In the interim, the recent Supreme Court of Appeal decisions show that the courts are struggling to find an equitable balance between the common law rights of private landowners to evict unlawful tenants, the tenants' rights to have access to adequate housing (and the right not to be rendered homeless) and the shortage of public housing options. The innovative approach of the Constitutional Court in *Maphango v Aengus Lifestyle Properties*²⁷¹ is therefore supported since it introduced a measure in terms of which Tribunals can provide tenure protection for private sector tenants on a case by case basis. This approach also avoids most of the criticism raised against strict rent control measures.

5 Criticism against rent control: the call for a different approach

The statutory construction of rent control manifestly shows how the legislature can afford tenants substantive tenure protection while also restricting rent increases, and this form of protection might seem attractive at first if one considers its aims. However, the criticism against the strict imposition of rent control is incontrovertible and therefore briefly discussed in the following paragraphs to highlight the need for a more flexible approach to rent regulation in South Africa.

A number of authors have convincingly argued that rent control statutes are futile if not combined with the maintenance responsibilities of the landlord.²⁷² Unsurprisingly, private landowners who are subject to rent control measures are more often than not looking for ways to drive tenants out of their buildings, for instance by refusing to

270 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

271 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

272 Ellickson 1991 *Chicago-Kent LR* 949; Olsen 1991 *Chicago-Kent LR* 942-943; Miron 1990 *Urban Studies* 167.

adhere to their maintenance responsibilities.²⁷³ Rent control therefore reduces levels of cooperation between landlords and tenants, but arguably reduces levels of cooperation in society at large as well. Robert Ellickson argues that the effect of rent control is to lock landlords and tenants into a long-term uncooperative relationship.²⁷⁴ Another indirect effect mentioned by Ellickson is the negative impact that rent control could have on the labour market, since tenants would choose to retain the benefits of controlled rent rather than to undertake a new job elsewhere.²⁷⁵ This lock-in outcome has a negative effect on tenants' mobility,²⁷⁶ which leads to other social concerns, including the accessibility of affordable rental accommodation for potential tenants.

One of the major objections against rent control is the adverse effect that it would have on local housing markets. Economists argue that by interfering with landlords' profits, rent control will discourage new construction, cause under-maintenance and lead to more dilapidated buildings in areas where there are extant housing shortages. Based on this consideration, property lawyers and economists have argued that rent control is counter-intuitive as it causes greater housing shortages.²⁷⁷ Richard Epstein has even argued that rent control amounts to an uncompensated taxing of landlords that should be unconstitutional.²⁷⁸ The United States Supreme Court did not agree and upheld the restriction on the right of landowners to evict tenants on expiration of the lease and thought rent restrictions to be justified in the light of the prevailing socio-economic circumstances.²⁷⁹

273 Michelman 1970 *Harvard Civil Rights- Civil Liberties LR* 214 describes how landlords' failure to maintain their buildings started to develop into "a tortuous affront to the dignity of tenants".

274 Ellickson 1991 *Chicago-Kent LR* 948.

275 Ellickson 1991 *Chicago-Kent LR* 948.

276 Ellickson 1991 *Chicago-Kent LR* 952.

277 Epstein 1988 *Brooklyn LR* 753, 767 and 769. Epstein argues that rent control has an unfair effect in the sense that unwilling landlords must provide some subsidy to tenants: Epstein 1988 *Brooklyn LR* 755. Olsen 1991 *Chicago-Kent LR* 935-938 refers to this wealth transfer as an "implicit tax" on landlords. This was also highlighted by Cameron J in *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 paras 34-36.

278 Epstein 1988 *Brooklyn LR* 744-745. From an economic perspective, Epstein argues that rent control is inefficient and bad public policy. Rent regulation disregards the rules of supply and demand, with the effect that it creates housing market distortions, which negatively affect both landlords and low income households: Epstein 1988 *Brooklyn LR* 759-760. With reference to Radin's personhood argument, Epstein maintains that the essence of Radin's analysis is to provide preferential treatment to some individuals, which is in conflict with the idea of an open society based on equal opportunities: Epstein 1988 *Brooklyn LR* 771.

279 See Maass *Tenure Security* s 6.6 for a discussion of the constitutionality of rent control in the US.

Even though these arguments against rent control have been opposed on the basis that they are not substantiated, South African policy-makers and the legislature should be wary of implementing a strict rent control regime, especially since these schemes carry substantial administrative costs for the government and private landlords.²⁸⁰ In the light of the potential negative effects of rent control, including the legislative complexity concerning rent control measures;²⁸¹ the substantial administrative costs for the government; and the negative impact that this type of intervention could have on the housing market in general, one would rather avoid such a stringent form of statutory intervention in the South African private rental market, especially if the beneficiaries are to be only a limited number of low-income vulnerable tenants. In the absence of rent control measures (and a clear underlying policy to that effect), the Court in *Maphango v Aengus Lifestyle Properties*²⁸² created the possibility for Rental Housing Tribunals to strengthen the tenure rights of marginalised tenants to such an extent that their lawful occupation could be kept intact permanently or for a stipulated period. Ideally this type of intervention should occur only in extraordinary circumstances, once the Tribunal has weighed the interests of both parties and made a reasonable decision concerning termination and eviction on the basis of a proportionality test.²⁸³

The German approach is noteworthy in this regard, because the German *Civil Code*²⁸⁴ restricts rents²⁸⁵ and ensures the security of tenure for all tenants, which is considered an integral part of landlord-tenant law without the strict imposition of rent control measures.²⁸⁶ Kleinman²⁸⁷ argues that "[t]he price for consumers is moderated by a combination of state controls and competitive market pressures". The restrictions placed on the rights of landowners are not perceived as emergency

280 Miron 1990 *Urban Studies* 182. See also Epstein 1988 *Brooklyn LR* 770.

281 Ellickson 1991 *Chicago-Kent LR* 949.

282 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

283 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 para 49.

284 *Bürgerliches Gesetzbuch (BGB)*. Landlord-tenant law is regulated in Book 2, Title 5 of the *BGB*. See *Bundesministerium der Justiz* 2012 www.gesetze-im-internet.de for all English *BGB* translations.

285 Even though rents are unregulated, landlords can increase the rents only by reference to the rents of other leases in the vicinity during the preceding three years: Kleinman *Comparative Analysis* 105.

286 See Maass *Tenure Security* s 7.2 for a historical analysis of rent control in Germany.

287 Kleinman *Comparative Analysis* 106.

statutory interventions since the tenant protection measures are included in the German *Civil Code* and therefore form part of private law on a permanent basis.

Generally the landlord or the tenant may terminate the lease (fixed-term or periodic) without giving notice of termination to the other party, provided that there is a compelling reason.²⁸⁸ A compelling reason is deemed to exist if either party cannot reasonably be expected to continue with the lease until the lease expires or until the end of the notice period.²⁸⁹ The tenant would generally also be able to terminate the lease where the property is in such a condition that it endangers her health, whereas either party can argue that there is a compelling reason to terminate the lease where the other party continuously disturbs the domestic peace.²⁹⁰

In addition, the *Civil Code* protects tenants who rent residential property for an indefinite period by providing that the lease may be cancelled only in accordance with the *Civil Code* and subordinate legislation.²⁹¹ A lease for an indefinite period of time may be terminated by the landlord only by giving notice if she has a justified interest²⁹² in terminating the lease.²⁹³ The tenant may object to the notice of termination and require the continuation of the lease if the expiration of the lease would cause a hardship to the tenant that is not justifiable, even when taking into account the justified interest of the landlord.²⁹⁴ Hardship suffered by the tenant includes the scenario where he is unable to find suitable alternative accommodation on reasonable terms.²⁹⁵ If the tenant's objection is successful the lease continues for

288 Van der Walt refers to these grounds as "abnormal cases" for cancelling the lease: Van der Walt *Margins* 88.

289 A compelling reason also includes the case where the lessee is in default on payment of rent: *BGB* § 543. The list of compelling reasons in *BGB* § 543 is not exclusive.

290 *BGB* § 569. This provision applies to leases for definite periods (fixed-term tenancies) and indefinite periods (periodic tenancies). These grounds form part of what Van der Walt refers to as "abnormal cases" for cancellation: Van der Walt *Margins* 88.

291 Van der Walt *Margins* 87.

292 Such a justified interest exists where the lessee has culpably and significantly breached his contractual duties; where the landlord requires the leased premises for his own use; or where the landlord would be denied from making sufficient economic use of the premises if the lease was sustained, which would result in an excessive loss for the landlord: *BGB* § 573(2). The list is not exclusive.

293 *BGB* § 573(1). Increasing the rent is not a justified reason to terminate the lease. Van der Walt *Margins* 88 refers to these grounds for cancellation as the "normal cases", because the lease is cancelled in accordance with the agreed prescribed procedures and requirements.

294 *BGB* § 574(1). Van der Walt *Margins* 89 believes that through this provision the interests of the tenant are balanced against those of the landlord.

295 *BGB* § 574(2).

an appropriate period, taking into account all relevant circumstances. The terms of the original contract would remain intact, except where the landlord cannot be reasonably expected to continue with the lease under the previous terms. In such a case the terms may have to be amended.²⁹⁶

When considering fixed-term tenancies, the point of departure is that the landlord must state a valid reason for entering such a tenancy and the reason must be in accordance with the *Civil Code*.²⁹⁷ If the initial reason for the fixed-term lease still exists four months prior to termination of the fixed-term lease, the tenant may demand an extension of the lease for an equal period of time. However, if the initial justification for a fixed-term lease no longer exists, the tenant may demand an extension for an indefinite period.²⁹⁸

One can conclude that the general grounds for termination of the lease, namely where there is a compelling reason or the landlord has a justified interest in cancelling the lease, are similar to the grounds for eviction in rent control statutes. However, the grounds for termination that form part of the German *Civil Code* are not decisive, because the tenant's defence on the basis of a hardship that he could suffer as a result of termination can override the landlord's interest in cancelling the lease. The hardship provision is arguably a mechanism that allows the court as the final decision-maker to weigh the interests of both parties before granting termination of the lease. This provision incorporates some measure of context-sensitivity as the courts can consider the impact of termination on the specific tenant or his family and judge on the grounds of personal circumstances whether it would be just and equitable either to grant the termination of the lease or not.

Arguably, the Constitutional Court in *Maphango v Aengus Lifestyle Properties*²⁹⁹ developed a similarly flexible mechanism that enables the Rental Housing Tribunals

296 BGB § 574a(1).

297 The landlord must prove that he would prefer to end a lease after a fixed period with the aim to acquire the dwelling for his own use; or to repair the dwelling; or to lease the dwelling to a person rendering services to him. Only if the landlord can prove one of these grounds may a fixed-term lease be entered into: BGB § 575(1). Fixed-term tenancies are therefore the exception in German landlord-tenant law.

298 BGB § 575(3).

299 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

to provide substantive tenure protection for a certain category of tenants in exceptional cases.³⁰⁰ A tenant should be able to approach a Tribunal and argue that the ground for termination constitutes an unfair practice because the effect of termination would be to unreasonably prejudice the tenant's interests. This would typically be the case where termination and eviction would cause a disproportionate burden for the tenant, for example if the tenant would be rendered homeless. In such a case the Tribunal would act as the final decision-maker and judge on the basis of fairness and equality, taking into account the specific circumstances of both parties, if the effect of expiration of the lease would amount to a unfair practice – a practice that unreasonably prejudices the rights or interests of the tenant. If the court finds in favour of the tenant and decides to provide some measure of tenure security, it should set aside the termination of the lease. The effect would be to create a tenancy similar to a "statutory tenancy" as developed in the jurisdictions referred to above, although the origin of the tenancy would not be legislation but rather a judicial decision. The terms and conditions of the contractual tenancy would remain intact, except if the landlord could show that it would not be just and equitable. The Rental Housing Tribunal should have a wide discretion in determining the outcome of each case and aim to accommodate both parties. This does not mean that the landlord would be deprived of his right to terminate the lease. It merely means that the ground for termination would have to be lawful.

6 Concluding remarks

Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele;³⁰¹
City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39³⁰²
 and *Maphango v Aengus Lifestyle Properties*³⁰³ suffices to show that low-income, previously disadvantaged tenants in South Africa are currently struggling to find

300 As stated by Van der Westhuizen J in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) para 86: "Because the demand necessarily exceeds the availability of resources, any housing policy will have to differentiate between categories of people and to prioritise." This statement could be interpreted to allow differentiation between tenants on the basis of their personal circumstances to determine who should be protected in their home more stringently. One would have to prioritise according to need.

301 *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA).

302 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2011 4 SA 337 (SCA).

303 *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA).

suitable affordable rental housing options, which indicates that there is a shortage of both private and social housing. The New York City landlord-tenant framework evidently shows how the private rental market is indirectly burdened with a duty to provide affordable, secure accommodation if alternative housing options are exhausted.³⁰⁴ The English landlord-tenant system also highlights the importance of a well-functioning social sector and the impact that such a sector would have on the private sector, namely that the private sector would be able to uphold deregulation. In the absence of an efficient social sector, the burden to accommodate low-income tenants indirectly rests on the private sector, which eventually creates unavoidable frictions between the parties since they have unequal bargaining power and there is the possibility of exploitation by landlords. In reaction to the likelihood of abuse, the policy-makers and legislators impose rent control measures to provide some form of protection for these lower income tenants.

In the absence of a constitution that mandates the legislature to enact laws that would give effect to the right of access to adequate housing and the right not to be arbitrarily evicted, the apartheid legislature drastically interfered with private landowners' common law right to evict tenants on termination of their leases and it placed restrictions on rent increases. Both the New York City and English legislatures enacted similar laws (absent the constitutional mandate to that effect),³⁰⁵ because it was justifiable in the context of the housing shortages of the time. In general, rent control statutes aim to provide tenure protection for tenants and restrict rent increases. These regulatory laws are usually imposed in a general fashion which provides protection for all residential tenants or a certain category of occupiers, dependent on the type of housing they occupy. In the light of the landlord-tenant regimes analysed above one can also conclude that these types of interventions regulate landlord-tenant relationships for lengthy periods of time, and

304 In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) the City submitted that it lacked the resources to accommodate the evictees in emergency accommodation: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) paras 68, 70, 79. However, at paras 74, 75 the Court disagreed and held that the City lacked resources because it had not budgeted for vulnerable evictees from private buildings. The Court confirmed the SCA decision that the City was indeed capable of meeting the occupiers' need.

305 Michelman 1970 *Harvard Civil Rights- Civil Liberties LR* 211 believes that if a statute makes provision for the right to housing, the absence of a constitutional right to that effect would be immaterial.

that once the market is regulated it becomes exceedingly difficult to deregulate it. Rent control has been rightly criticised for being counter-intuitive since it exacerbates housing shortages.

The Constitutional Court's approach in *Maphango v Aengus Lifestyle Properties*³⁰⁶ signifies a substantial transformation in the South African landlord-tenant regime since it empowers Rental Housing Tribunals to grant tenants substantive tenure protection. Tenants can approach these Tribunals and hold landlords accountable for unfair practices, namely exploitive rents, grounds for termination that unreasonably prejudice tenants' interests, and inadequate maintenance. A significant distinction between this approach and the protective measures included in rent control statutes is that the burden of proof rests with the tenant firstly to approach the Tribunal and secondly to convince the Tribunal that the landlord's practices are unfair. The Tribunals are therefore enabled to provide protection for tenants on a case by case basis and strike a balance between the interests of both parties. At this stage it is unclear what interests the Tribunals would take into consideration and whether or not the Tribunals would be able adequately to weigh the interests of both parties.

Even though this judicial development is welcomed, it raises some concerns with regard to landlords' property rights and specifically landlords' constitutional property rights (section 25 of the *Constitution*), since Tribunals are now at liberty to set aside contractually agreed grounds for the termination of leases without any statutory guidance. The *Rental Housing Act* fails to provide any information regarding legitimate grounds for termination, a lacuna which might have to be filled in future. The grounds listed in the rent control legislation should serve as a starting point to determine which grounds for the termination of a lease should generally be upheld. However, German landlord-tenant law shows that a statutory ground for the termination of a lease should not be imposed in an absolutist fashion, and prefers to place a heavier burden on the tenant to prove why the lease should not come to an end. The *Maphango v Aengus Lifestyle Properties*³⁰⁷ decision should be applauded for its innovative interpretation of the *Rental Housing Act* since it introduced a mechanism for strengthening tenants' rights. This mechanism is also not applied in a

306 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

307 *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2.

universal fashion since it can be accessed by the specific tenant only if he/she wishes to approach the Tribunal and argue against the landlord's practices. This allows a more flexible and context-sensitive approach to landlord-tenant disputes in terms of which the Tribunals can consider all of the relevant circumstances and decide each matter on its own merits.

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List of abbreviations

Brooklyn LR	Brooklyn Law Review
Chicago-Kent LR	Chicago-Kent Law Review
CRU Programme	Community Residential Units Programme
DHCR	New York State Division of Housing and Community Renewal
Harvard Civil Rights- Civil Liberties LR	Harvard Civil Rights- Civil Liberties Law Review
MBR	Maximum base rent
RGB	Rent Guidelines Boards
SALJ	South African Law Journal
Stanford LR	Stanford Law Review
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

RENT CONTROL: A COMPARATIVE ANALYSIS**S Maass*****SUMMARY**

Recent case law shows that vulnerable, previously disadvantaged private sector tenants are currently facing eviction orders – and consequential homelessness – on the basis that their leases have expired. In terms of the case law it is evident that once their leases have expired, these households do not have access to alternative accommodation. In terms of the *Constitution*, this group of marginalised tenants have a constitutional right of access to adequate housing and a right to occupy land with legally secure tenure. The purpose of this article is to critically analyse a number of legislative interventions, and specifically rent control, that were imposed in various jurisdictions in order to provide strengthened tenure protection for tenants. The rationale for this analysis is to determine whether the current South African landlord-tenant regime is able to provide adequate tenure protection for vulnerable tenants and therefore in the process of transforming in line with the *Constitution*. The legal construction of rent control was adopted in pre-1994 South Africa, England and New York City to provide substantive tenure protection for tenants during housing shortages. These statutory interventions in the different private rental markets were justified on the basis that there was a general need to protect tenants against exploitation by landlords. However, the justification for the persistent imposition of rent control in New York City is different since it protects a minority group of financially weak tenants against homelessness. The English landlord-tenant regime highlights the importance of a well-structured social sector that can provide secure, long-term housing options for low-income households who are struggling to access the private rental sector. Additionally, the English rental housing framework shows that if the social sector is functioning as a "safety net" for low-income households, the private sector would be able to uphold deregulation. In light of these comparisons and the fact that the South African social sector is not functioning optimally yet, the question is whether the South African private sector is able to provide the required

* Sue-Mari Maass. BComm (Law) LLB LLD (US). Senior lecturer, Department of Public, Constitutional and International Law, UNISA (maasss@unisa.ac.za). Thanks to Professor AJ van der Walt and Dr M Du Bois for reading and commenting on this piece. Their help is always greatly appreciated.

level of tenure protection for struggling tenants. Recent case law shows that tenants are at liberty to lodge unfair practice complaints with the Rental Housing Tribunals on the basis that the landlords' ground for termination of the lease constitutes an unfair practice. The Court defined an unfair practice as a practice that unreasonably prejudices the tenants' rights *or interests*. This judicial development signifies some transformation in the private sector since it allows the Tribunals to scrutinise landlords' reasons for termination of tenancies in light of tenants' personal and socio-economic circumstances. The Tribunals are therefore empowered to weigh the interests of both parties and decide whether to confirm termination of the lease or set aside such termination. In light of this recent development, the Tribunals can provide strengthened tenure protection for destitute tenants on a case by case basis, which incorporates a flexible context-sensitive approach to the provision of secure housing rights in the landlord-tenant framework. This methodology is similar to the German approach. Even though this judicial development is welcomed, it raises some concerns with regard to landlords' property rights and specifically landlords' constitutional property rights since Tribunals are now at liberty to set aside contractually agreed grounds for termination of leases without any statutory guidance. The legislation fails to provide any information regarding legitimate grounds for termination, which might have to be rectified in future. The grounds listed in the rent control legislation should serve as a starting point to determine which grounds for termination of a lease should generally be upheld. However, German landlord-tenant law shows that a statutory ground for termination of a lease should not be imposed in an absolutist fashion but rather place a heavier burden on the tenant to prove why the lease should not come to an end.

KEYWORDS: *Constitution*; landlord-tenant law; rent control; rent regulation; development of the common law; comparative law; housing law; statutory interpretation