THE SOUTH AFRICAN SOCIAL HOUSING SECTOR: A CRITICAL COMPARATIVE ANALYSIS

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ABSTRACT
Tenure status is one of the core elements in the poverty cycle and insecurity of tenure exacerbates poverty. Policy-makers and the legislature should respond to this component of the poverty cycle through the introduction of secure housing options in order to ensure that all individuals can actively participate in society and live autonomous, dignified lives. In a number of jurisdictions, including Germany, the United States and England, legislatures have responded to the plight of the poor during emergency housing (and economic) conditions by introducing social housing sectors as part of the landlord-tenant framework. Key components of social housing is that it is a statutory mechanism that introduces affordable, secure housing options for the poor, which is provided by independent, private institutions and requires continuous state administration since the whole sector is state-driven. The South African social housing sector, which forms part of the landlord-tenant framework, is founded in the Social Housing Act. The operation and aims of the Act (and the current social housing sector, in general) requires critical analyses from a comparative law perspective. Innovative social housing options in the landlord-tenant framework are essential in contributing to the improvement of secure tenure rights for poor households and consequential eradication of poverty. Nevertheless, a paradigm shift regarding the contemporary use of rental housing to provide substantive tenure rights for poor tenants on private property is necessary at both public and private levels in order to, not only engage with this form of housing, but also identify plausible situations where it can be imposed.

Key words: housing, property, Constitution of the Republic of South Africa, 1996, land, land reform, socio-economic rights, statutory interpretation

I INTRODUCTION
The connection between poverty and tenure status is categorical, since tenure status is one of the core elements in the poverty cycle. Insecurity of tenure exacerbates poverty, which is why numerous governments have repeatedly responded to local housing shortages by implementing both welfare-orientated housing policies that aim to make available affordable and secure housing options and legislation that will protect weak property/housing interests. Landlord-tenant law has featured as a popular housing

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option that governments have continually either regulated or utilised to fashion some relief for vulnerable households. In a number of jurisdictions, including South Africa, rent controls were initially imposed in private rental markets with the aim to restrict rents and provide secure occupation rights for private sector tenants, while governments have also introduced public rental sectors, in terms of which local authority stock was used to provide inexpensive rental housing for low-income households.

During the 1970s, when the welfare state emerged in western Europe, this reform was closely connected to the introduction of a new rental housing sector, namely social housing. Public rental housing came to be viewed as a burden on state finances, which consequently decentralised local government as the direct provider of low-cost rental housing. The institutional management of low-cost rental housing transformed and required the participation of the private sector in the emerging social housing sector.

The concept of social housing is not universal. As a point of departure, one may define social housing as ‘good quality, well-located, subsidised housing, managed by independent institutions that use participatory management approaches involving residents.’ Social housing institutions (either for-profit or non-profit) usually provide secure rental housing for lower-income residents – ranging from low- to medium-income households. Social housing tends to offer lower rentals than the private market and in order to keep rents at an affordable level, the market is usually regulated and subsidised by the government. Essentially, the purpose of social housing is to remedy a housing shortage and the extent of the

3 After World War II (and even prior to the war) governments throughout the world intervened in the private rental markets and imposed strict rent controls. S Maass ‘Tenure Security in Urban Rental Housing’ LLD thesis, University of Stellenbosch (2010) chapters 2, 4, 6 & 7. Public rental housing was also a popular housing choice after World War II. In the European welfare states, national governments were often directly or indirectly involved in the provision of housing. Differently, in the free market economies, such as the US, public and subsidised housing represent a small sector of post-war housing construction. In the welfare states, social housing represented a significant proportion of the housing stock. W Jaedicke & H Wollman ‘Federal Republic of Germany’ in W van Vliet (ed) International Handbook of Housing Policies and Practices (1990) 127, 132.

4 See for instance Maass (note 3 above) 2 3, 4.5 & 6.3. In some jurisdictions rent control continues to provide some protection for low-income households.

5 See for instance Maass ibid 4.5 & 6.5. Public rental housing has also not been abolished in its entirety. This form of housing is currently still utilised in South Africa, England and New York City, S Maass ‘Rental Housing as Adequate Housing’ (2011) 22 Stellenbosch LR 759, 765–7; Maass ibid 4.5.2.2, 4.6.3 & 6.5.

6 J Cloete, A Venter & L Marais ‘“Breaking New Ground”, Social Housing and Mineworker Housing: The Missing Link’ (2009) 54 SSB 27, 28. Socialism came to an end and more neo-liberal policies were adopted during the 1980s and 1990s, which led to the privatisation of rental stock in favour of ownership.


8 Direct government in the social housing market is generally declining, while public-private partnerships are becoming more relevant, which is where social housing organisations/ institutions fit the profile, see Cloete; Venter & Marais (note 6 above) 29.

9 Fish (note 7 above) 404.

10 Cloete, Venter & Marais (note 6 above) 29.
shortage should generally determine the duration and scale of the sector.\textsuperscript{11} However, social housing can be structured to serve as either a long-term ‘restructuring’ aspect of the government’s housing policy or it can have a short-term ‘remedial’ objective.\textsuperscript{12}

It has been argued that one of the critical components of the South African anti-poverty policy should be a remedial housing policy and such a housing policy should be focused on low-income households.\textsuperscript{13} The purpose of the remedial aspects of the housing policy should be to address immediate housing shortages\textsuperscript{14} that are experienced by historically disadvantaged groups.\textsuperscript{15} Baumann argues that due to governmental capacity constraints and the shortage of affordable stock for low-income households, private sector institutions should develop and facilitate low-cost housing projects, while the state should merely oversee and complement these projects.\textsuperscript{16}

The first South African social housing sector was recently introduced and the purpose of this article is to critically analyse the objectives, operation and logic of this sector in comparison to certain aspects of both contemporary and previous social housing sectors. The success of a social housing sector depends on a number of factors, including its target market, the participation of the private sector, the imposition of rent restrictions combined with tenure protection measures and its overall objective. The latter is decisive since the purpose of the sector will determine its scale, which should be linked to the extent of the housing shortage and the socio-economic conditions of the people. A social housing initiative is for all intents and purposes welfare orientated; and accordingly, in the South African human rights framework, the social housing sector should strive to give effect to individuals’ housing rights and the right to dignity.\textsuperscript{17}

\textsuperscript{11} Ibid 28.
\textsuperscript{12} T Baumann ‘Housing Policy and Poverty in South Africa’ in F Khan & P Thring (eds) \textit{Housing Policy and Practice in Post-Apartheid South Africa} (2003) 85, 86.
\textsuperscript{13} Ibid 85.
\textsuperscript{15} Baumann (note 12 above) 91.
\textsuperscript{16} Ibid 109.
\textsuperscript{17} The Constitution of the Republic of South Africa, 1996, s 26 ensures the right to have access to adequate housing, while s 10 protects individuals’ right to dignity.
II THE SOUTH AFRICAN SOCIAL HOUSING SECTOR – POINTS OF DEPARTURE

The South African government’s commitment to the initiation of a social housing sector is evident in the Social Housing Policy and the Social Housing Act 16 of 2008. The social housing sector is therefore aimed at giving effect to the constitutional right of access to adequate housing. However, its primary objective is not to address the pressing housing shortage, but rather to restructure urban areas by means of social housing projects. These projects entail the construction of rental housing units by social housing agents that deliver affordable, secure housing options for low- to medium-income households by means of project-based subsidies. The social housing policy is therefore not aimed at households earning less than R1,500 per month. Even though the purpose of the sector is dissimilar to mass delivery, considerable scale will be necessary to restructure urban areas. It follows that the mobilisation of the private sector is fundamental in the provision of social housing, since the government does not have the capacity or resources to unilaterally address the housing backlog.

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18 In theory, South Africa currently has three rental housing sectors, namely the private, social and public sectors. The private sector is primarily regulated in terms of the Rental Housing Act 50 of 1999, while the public sector was established in terms of the Community Residential Units Programme: Department of Human Settlements (DHS) National Housing Code Community Residential Units 3(6) (2009). See also Maass (note 5 above) 765–7 for a discussion of the public rental sector and its shortcomings. The difference between the public sector and the social sector is that the public sector is governed by the state, while the social sector is managed by private institutions. The essence of a social rental sector is that the stock is not owned by the state, although the market is often regulated by means of legislation.

19 The Social Housing Programme (also referred to as the Social Housing Policy) forms part of the National Housing Code: DHS ibid. The predecessor of the Social Housing Programme is the 2005 Social Housing Policy: DHS Social Housing Policy for South Africa Towards an Enabling Environment for Social Housing Development (May 2005) <http://www.nhfc.co.za/files/Social_Housing_Policy_May_2005.pdf>.

20 The preamble of the Social Housing Act refers to ss 26(1) & (2) of the Constitution and states that ‘there is a dire need for affordable rental housing for low to medium income households which cannot access rental housing in the open market’.

21 DHS Social Housing Policy (note 19 above) 11–3. The restructuring objective is explained with reference to its three dimensions, namely spatial, economic and social restructuring. The second objective is the introduction of a formal rental sector.

22 The target market consists of households earning between R1,500 and R7,500 per month: DHS Social Housing Policy (note 19 above) 17. The target market consists of households that can access neither homeownership subsidies nor mortgage funds through the formal banking system. Cloete, Venter & Marais (note 6 above) 30–1. The gross rentals must cover the operating costs of the units and not exceed one-third of the household’s monthly income. A minimum of 30 per cent of the rentals must cater for households earning less than R3,500 per month, while a maximum of 70 per cent of the units must cater for households earning between R3,501 and R7,500. Social Housing Regulations s 23.

23 See Cloete, Venter & Marais (note 6 above) 30–1.

24 DHS Social Housing Policy (note 19 above) 41.

25 Cloete, Venter & Marais (note 6 above) 30. See also DHS ibid 25 where the policy emphasises the importance of participation by the private sector.
Authority (SHRA)\(^{26}\) is the administrative body responsible for the efficient functioning of the social housing market.\(^{27}\)

Social housing is defined as:

a rental or co-operative housing option for low to medium income households … provided by social housing institutions or other delivery agents in approved projects in designated restructuring zones with the benefit of public funding.\(^{28}\)

A restructuring zone:

means a geographic area which has been a) identified by the municipality … for purposes of social housing; and b) designated by the Minister in the Gazette for approved projects.\(^{29}\)

Housing projects undertaken in areas outside these restructuring zones are therefore not social housing for purposes of the social housing policy or the Social Housing Act.

The initiation of social housing projects rests with the different municipalities,\(^{30}\) since they have to identify both the demand for social housing and the restructuring zones. In addition, the municipality must take measures to facilitate the delivery of social housing through the conversion of existing non-residential stock and upgrading of existing stock.\(^{31}\) The municipality is obliged to provide access to land and buildings for social development and to provide access for social housing institutions (SHIs) to municipal rental stock.\(^{32}\) The local authority is therefore directly responsible for the establishment of social housing projects, but the construction and management of social housing stock rests with the delivery agents (social landlords).

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\(^{26}\) The DHS ibid 52 mentions the establishment of a Social Housing Corporation (SHC) that will be established to oversee the operation of the social sector. It also states that the functions of the SHC will be laid down in the Act. However, the Social Housing Act does not refer to such a body, but rather makes reference to the Social Housing Regulatory Authority (SHRA), which is regulated in chapter 3 of the Act.

\(^{27}\) See specifically s 11 of the Act for all the functions of the SHRA. The powers of the SHRA are regulated in s 12 of the Act.

\(^{28}\) Social Housing Act s 1. Housing projects developed in terms of the Institutional Housing Subsidy Programme (DHS note 18 above) would therefore not be classified as social housing since the institutional subsidy may be used for social housing development outside these restructuring zones.

\(^{29}\) Social Housing Act s 1.

\(^{30}\) The provincial government must administer the sector. Social Housing Act s 4. National government has a number of administrative and financial responsibilities regarding the sustainable development of the social housing sector. Social Housing Act s 3.

\(^{31}\) Social Housing Act ss 5(a) & (b). It is not clear who the owners of the existing stock will be. It seems that it would generally be private owners, since s 5(c) of the Act specifically refers to municipal stock. The stock envisioned in ss 5(a) & (b) will likely be old, dilapidated buildings in urban areas. The delivery agents would have to purchase these buildings from their owners. It is unclear whether the existing private owners would have any motive to actually sell their buildings, except that these types of buildings are usually already either unlawfully occupied or abandoned.

\(^{32}\) Ibid s 5(c). The municipalities must assist SHIs to acquire municipal stock. The municipalities are not obliged to assist the other delivery agents in this regard.
III SOCIAL LANDLORDS – THE ‘THREE-PRONGED’ STRATEGY

To increase capacity, the South African social housing policy envisions a ‘three-pronged’ strategy, which refers to three types of delivery agents, namely SHIs, public-private partnerships and the private sector. One should distinguish between SHIs and all other delivery agents, since a number of the provisions in the Act only apply to the former.

A SHI:

means an institution accredited or provisionally accredited … which carries or intends to carry on the business of providing rental or co-operative housing options for low to medium income households … and managing its housing stock over the long term.

SHIs are viewed as the primary long-term providers of sustainable housing by means of accredited projects and the operation of these institutions are therefore regulated extensively. In addition to a number of functions, including the acquisition, renovation and management of social housing projects, SHIs must ‘re-invest operational surpluses … in further approved projects’. The housing stock can be owned by either the SHI or collectively by groups of residents. SHIs are generally allowed to sell their properties, provided that (a) ‘the grant component of the proceeds receipts from such sale will be used to provide social housing’; (b) the sale will not endanger the security of tenure of existing residents; and (c) they seek permission from the SHRA. The SHRA may not approve such dispossession unless the SHRA has consulted

33 DHS Social Housing Policy (note 19 above) 41–2. In terms of s 13(5) of the Act, all institutions wishing to undertake social housing must apply to the SHRA for accreditation. Section 13(5) states that a SHI must either be a company, a cooperative or any other institution acceptable to the SHRA. It is therefore not clear whether private developers or public-private partnerships will have any role to play in the provision of social housing if they are not accredited. Once accredited, they will have to comply with all the provisions of the Act and operate as SHIs.

34 Ibid s 1. Provisionally accredited SHIs are institutions which have undertaken housing developments with the benefit of an institutional subsidy, ibid s 13(1).

35 Social Housing Act chapter 4 regulates the operation of SHIs.

36 Ibid s 1. Provisionally accredited SHIs are institutions which have undertaken housing developments with the benefit of an institutional subsidy, ibid s 13(1).

37 DHS Social Housing Policy (note 19 above) 17, 51. The subsidies are therefore made available for specific accredited projects, 33.

38 Social Housing Regulations ss 14(1)(b) & (d).

39 Ibid s 14.

40 Social Housing Regulations s 14(1)(i).

41 Ibid s 14.
with the municipality and other SHIs in the area; and is convinced that there is enough social housing in the area.\textsuperscript{42}

It is therefore apparent that SHIs will function as charitable housing institutions because they cannot generate profits from the rent received since the amount of the rents is restricted to merely cover the maintenance costs of the projects.\textsuperscript{43} Any operational surpluses must revert back to approved projects, while the grant component of proceeds received from the dispossession of social housing stock must be used to provide more social housing. Even though SHIs can acquire the social housing stock as private owners, their property rights will be inherently restricted to a greater extent than other private companies (and delivery agents) due to the social housing framework in which they have agreed to provide rental housing.

Some of the deprivations, for instance the restriction to dispose of social housing during a social housing shortage, are arguably in line with s 25 of the Constitution, since the deprivation serves a clear public purpose and has a temporary insubstantial effect on the owner. A mere rationality review would

\textsuperscript{42} Ibid s 14(2). It must therefore be satisfied that there is no need to retain the stock as social housing. This provision constitutes a significant deprivation since the SHI’s right to dispose of their property might be restricted for extended periods of time. AJ van der Walt \textit{Constitutional Property Law} 2 ed (2005) 131 defines a deprivation as ‘properly authorized and fairly imposed limitation on the use, enjoyment, exploitation or disposal of property for the sake of protecting and promoting public health and safety, normally without compensation’. Section 25(1) of the Constitution regulates deprivations and provides that ‘[n]o person may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’. In order to determine whether the deprivation in question, namely the prohibition against the disposal of property in the case of a social housing shortage, is in line with s 25, one should first determine the level of scrutiny appropriate for this analysis. According to First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 4 SA 768 (CC) para 100; AJ van der Walt \textit{Constitutional Property Law} 3 ed (2011) 230 the level of scrutiny would depend on a complexity of relationships. One could argue that in this scenario there is undoubtedly a sufficient link between the means employed (s 14(2)) and ends sought to be achieved (the provision of low-cost housing); the purpose of the deprivation (to ensure the availability of low-cost housing) and the person affected (the SHI); and the purpose of the deprivation and the nature of the property (see para 100 of the \textit{FNB} case for a detailed discussion regarding these relationships). Even though s 25 does not require that the deprivation must be for a public purpose, Van der Walt argues that one can infer this requirement from the non-arbitrariness test: AJ van der Walt (2011) ibid 227–8. In Mkontwana \textit{v} Nelson Mandela Metropolitan Municipality; Bissett \textit{v} Buffalo City Municipality; Transfer Rights Action Campaign \textit{v} Member of the Executive Council for Local Government and Housing, Gauteng 2005 (1) SA 530 (CC) para 38 the court was satisfied with a low level of rationality review since the regulatory means was rationally related to the legitimate government function: AJ van der Walt (2011) ibid 231. Arguably, the limitation on a SHI’s right to dispose of its property is in line with s 25, since it is authorised by law of general application (s 14 of the Regulations) and it is non-arbitrary, because there is a rational and justifiable link between the deprivation and the reason for the limitation, namely the sustainable provision of low-cost housing. A mere rationality review is therefore justifiable since there is a clear public purpose and the effect of the deprivation on the owner is insubstantial. In some instances, specifically in the case where the public purpose for the deprivation is unclear or where the effect of the deprivation is substantial, one would have to scrutinise the deprivation in more depth by making use of a proportionality-type of analyses. See text accompanying note 57 below in this regard.

\textsuperscript{43} Social Housing Regulations s 23(2)(a).
therefore be justifiable.\textsuperscript{44} Other deprivations, discussed in later paragraphs, are more complex and require a proportionality-type of analyses in order to determine whether the deprivation is justifiable and in line with s 25.

The envisioned role and operation of public-private partnerships and private developers are unclear, since both the policy and Act are elusive in this regard. In terms of the policies, public-private partnerships are envisaged in large-scale projects and they ‘will not be structured as build-operate-transfer (BOT) arrangements in which automatic transfer from the private sector to the SHIs takes place after a period of time in which there has been no involvement of SHIs’.\textsuperscript{45} Where transfer of the stock to the SHI is envisaged, the SHI should be actively involved in the project to ensure the sustainable management thereof.\textsuperscript{46} With regard to private sector developments, the policy states that at the end of some private sector development projects, the public sector will retain the stock.\textsuperscript{47} It is not clear whether the private developer would first have to purchase the property, renovate it as social housing units, manage it for social housing purposes and then hand it over to the public sector at the end of the project’s lifetime. Apart from the uncertainty regarding the duration of such a project, it would be senseless for any for-profit private developer to become involved in social housing projects if it did not acquire the stock as private owner. Even if the private developer received grants for renovation purposes and it did not have to purchase the property in the first place, it would still be illogical to operate one of these projects if the public sector would retain the stock since the projects themselves cannot be profitable due to rent restraints.

From a comparative perspective, the reversion of social housing stock owned and operated by a social housing organisation to the state at the end of the social housing project’s lifetime, is unknown. The Mitchell-Lama housing programme in New York City is comparable to the South African social sector, since it is also exclusively charitable. New York State\textsuperscript{48} subsidises and regulates the provision of housing under a number of regulatory systems that are different from the public and private sectors.\textsuperscript{49} One of these subsidised systems of housing is the Mitchell-Lama housing programme, which forms part of the Private Housing Finance Law.\textsuperscript{50} Mitchell-Lama housing may be held by either a not-for-profit corporation or a not-for-profit cooperative

\textsuperscript{44} See note 42 above for a detailed discussion regarding the s 25 analyses. See text accompanying note 57 below for the proportionality-type of analyses.
\textsuperscript{45} DHS Social Housing Policy (note 19 above) 19.
\textsuperscript{46} Ibid 74. The policy does not provide any additional information regarding the function or operation of public-private partnerships. The Act is also silent in this regard.
\textsuperscript{47} Ibid 74. The 2009 social housing policy clearly states that if a private sector developer receives a social housing grant in order to construct and manage social rental housing in one of the restructuring zones, ‘the public sector will retain the stock’ at the end of the project’s lifetime.
\textsuperscript{48} New York State (and specifically New York City) was chosen as the comparative state since it is known for its rental housing shortages and strict rental housing regulatory regime, which aims to accommodate struggling tenants.
\textsuperscript{49} A Scherer Residential Landlord-Tenant Law in New York (2008) 364. These programmes therefore form part of the social sector in the US.
\textsuperscript{50} The private landlord-tenant market in New York City is still regulated: Maass (note 3 above) 6.4.
corporation.\textsuperscript{51} The tenant selection; rent charged; occupancy; and evictions are all government-supervised,\textsuperscript{52} while the suspension of such a non-profit company is made possible through ‘prepayment of government-aided assistance’.\textsuperscript{53} Once the company is dissolved, the property may be withdrawn from Mitchell-Lama regulations.\textsuperscript{54} The premises would then become subject to the Rent Stabilization Law and Code,\textsuperscript{55} which regulates the private rental sector. The social housing stock that formed part of the Mitchell-Lama social housing programme would therefore fall into the private rental market once the non-profit company is dissolved. The German social housing scheme that operated after World War II is discussed in later paragraphs, although it is worth mentioning here that the stock owned by the social housing landlords never lapsed into the public sector, since it was privately held and operated on a for-profit basis right from its initiation.\textsuperscript{56}

It is therefore strange that the South African social housing policy requires that the social housing stock, previously owned and operated by private developers, should fall into the public sector once the project has come to an end. The likelihood of for-profit private developers entering the social housing market therefore becomes questionable, since the market is presumably charitable for both SHIs and private developers. Consequently, a substantial portion of potential private developers would be discouraged from entering the social sector, which would impede the objective of mobilising the private sector in the provision of social housing.

Apart from the impact of this regulation on the willingness of private for-profit developers to participate in the social housing market, the regulation amounts to a significant deprivation. The seemingly random automatic transfer of private property from its owner to the state requires an unequivocal public purpose, since the effect of the deprivation would amount to a complete loss of ownership without compensation.\textsuperscript{57} However, the purpose is unclear. One could speculate that the state would want to acquire control and ownership of the social housing stock once the SHI’s have decided to discontinue the social housing projects – the reason being that the stock would consequently be removed from the social sector and leased in the private rental market, which is unregulated. Nevertheless, this purpose is arguably not justifiable considering the extent of the deprivation.\textsuperscript{58} The automatic transfer of ownership from the SHI to the state at the end of a project’s lifetime is a regulation that is not rationally related to the government function, because both the government function and the extent of the deprivation are unsubstantiated.\textsuperscript{59} Considering

\textsuperscript{51} Scherer (note 49 above) 365.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid 369.
\textsuperscript{54} New York Private Housing Finance Law s 35(3).
\textsuperscript{55} New York City Administrative Code ss 26-504(a)(1)(b).
\textsuperscript{56} M Kleinman Housing, Welfare and the State in Europe A Comparative Analysis of Britain, France and Germany (1996) 94.
\textsuperscript{57} See note 42 above.
\textsuperscript{58} Van der Walt (2011) (note 42 above) 229.
\textsuperscript{59} FNB (note 42 above) para 100.
the effect of the deprivation, a mere rationality review would therefore not suffice and a higher level of scrutiny would have to be adopted in order to determine whether the deprivation is in line with the Constitution.\textsuperscript{60} \textit{FNB} requires a thicker proportionality-type of analyses, which essentially centres on a proportionate relationship between the purpose of the deprivation and its effect. The regulation in the Social Housing Policy that authorises the transfer of social housing stock from SHIs to the state is arguably arbitrary,\textsuperscript{61} since the private owners would be deprived of all their property entitlements without any compensation, while it remains unclear what the purpose of such a severe deprivation would be.

IV FINANCING THE SOCIAL HOUSING MARKET

The national government of South Africa must fund the social housing programme in order to promote the supply of social housing stock,\textsuperscript{62} while the National Housing Finance Corporation is responsible for the provision of access to loan funding.\textsuperscript{63} There are two types of grants available for the effective operation of the social housing sector, namely capacity-building grants and capital grants. SHIs have access to capacity-building grants,\textsuperscript{64} while the capital grant, consisting of a standard component and a top-up component, is available to both SHIs and private sector developers. The standard component is calculated as a proportion of the subsidy required to ensure a viable mixed-rent project, while the top-up component is accessible on a project-by-project basis.\textsuperscript{65} Capital grants are generally accessible to private developers in order to build in areas where it would otherwise be too expensive. The policy also makes provision for a range of tax incentives available for SHIs and not private developers.\textsuperscript{66}

The policy envisions the construction of 50,000 units over the period of five years,\footnote{In 2009 there were 30,000 units and 60 operational housing units, \textit{ibid} 41.} which requires R2.75-billion in grant funding, while nearly the same amount would have to be provided by the private sector in the form of debt. It is therefore imperative that the social housing agents’ projects must be viable in order to secure funding from the private sector.\footnote{DHS \textit{Social Housing Policy} (note 19 above) 79.} Nevertheless, it is unlikely that the private financial sector will provide private funds in the form of debt

\textsuperscript{60} Van der Walt (2011) (note 42 above) 229.
\textsuperscript{61} The deprivation is arguably arbitrary and therefore invalid since it contravenes s 25 of the Constitution. The deprivation might even seem closer to an expropriation since it entails the complete loss of ownership by the private party and consequential acquisition of that property by the state. However, in light of the \textit{FNB} methodology this question should not necessarily arise, since expropriation is classified as a subset of deprivation. If the deprivation is held to be arbitrary, that would be the end of the matter and the expropriation enquiry might not feature at all. Van der Walt (2011) (note 42 above) 341–2.
\textsuperscript{62} Social Housing Act s 3(1)(e).
\textsuperscript{63} \textit{Ibid} s 6.
\textsuperscript{64} Private developers do not have access to these grants, except for BEE firms. DHS \textit{Social Housing Policy} (note 19 above) 67.
\textsuperscript{65} \textit{Ibid} 77–8.
\textsuperscript{66} \textit{Ibid} 79–80.
to charitable organisations that cannot generate profits. The development of
the social housing sector in England is noteworthy in this regard.

The English social sector practically consists of housing association
lettings, which were initially regulated under the Rents Acts – the laws
that principally regulated the private sector. Housing associations received
funds that enabled them to acquire capital and construct new housing
developments. In due course, the government decided to cut back government
subsides but realised that a general decrease in funds for the social sector
was also unsound. To enable housing associations to receive private funds,
they had to be privatised. Housing associations were transferred to the private
sector and subsequently regulated under the Housing Act of 1988. Housing
associations started off as non-profit organisations that provided a limited
amount of housing, but recently these associations have doubled in size and
are functioning like businesses.

This brief comparison shows that housing associations in England were
privatised in order to obtain private funds. It seems that social housing delivery
agents should therefore either acquire public funds and operate as charitable
organisations or receive private funds and carry out their businesses as private
enterprises. One could argue that private for-profit enterprises should be able
to reach more households than exclusively charitable delivery agents – the
reason being available funds. The extent of the housing shortage and the target
market of the social housing initiative should therefore indicate the nature of
the delivery agents, since the scope of the entire sector is dependent on the
nature of the delivery agents.

Evidently, the purpose of the capacity and capital grants made available to
SHIs in the South African social housing programme is to accommodate these
institutions to meet their financial needs in constructing and managing social
housing projects. It is doubtful whether the grants will create incentives for
for-profit private companies to become involved in the social housing market,

In theory, the social sector consists of housing association lettings and local authority lettings. However, local authority lettings are different from housing association lettings since local authority lettings are let by the state as public landlord. Local authority lettings therefore form the public sector, but due to the social nature of these lettings, local authority lettings are included as part of the social sector: Maass (note 3 above) 279–84. In South Africa, the National Housing Code makes a distinction between the public and social sector. For purposes of this article, only housing association lettings will be discussed.

The Rents Act of 1915 was enacted to provide security of tenure and rent control in the private rental sector: S Bright Landlord and Tenant Law in Context (2007) 184–5.


See further Bright (note 70 above) 159.

Ibid 165, 189. The Housing Act came into operation on 15 January 1989 and is currently the principal act regulating private sector tenancies, ibid 203. The Housing Act makes provision for two types of tenancies, namely the assured tenancy and the assured shorthold tenancy. The difference between the two types is mainly the level of tenure security afforded to the tenant in each case. See Maass (note 3 above) 4.6.2 for a detailed discussion of the Housing Act.

Bright (note 70 above) 165–7.
because the regulatory framework is exclusively charitable. This raises a number of questions. Should for-profit private developers have any role to play in a social housing sector? Does a social housing sector, by its very nature, exclude the expertise and efficiency of for-profit private developers, especially when facing extreme housing shortages? Finally, can grants and subsidies made available by the government act as incentives for private developers to become involved in a social housing sector that is essentially welfare orientated? The German social housing sector that operated after World War II serves as a useful comparative example, because it not only answers these questions, but also shows how a social housing sector can basically solve an acute housing shortage. Fundamental to its success was the overarching objective of the government’s policies, namely to lead the people from poverty to a new well-being.

V THE GERMAN SOCIAL SECTOR

In 1950, more than five-million households in Germany were homeless. In the rental housing market the goal was to control rents at modest levels, while providing financing at low interest rates. The government therefore made available public funds to subsidise housing construction and provided income tax relief for private funds invested in housing. The first social housing programme was introduced and regulated in terms of the First Housing Construction Act of 1950. The Act made provision for social housing that received subsidies and loans at low interest rates from public funds and increased housing construction that was combined with tax exemptions. The project was financed through subsidies and public loans, although it was subject to rent and access control that imposed a ceiling on...
tenants’ income. The loans covered nearly 50 per cent of the construction costs and were provided by the state to private investors and non-profit associations at zero interest. The government controlled the allocation of housing, enforced a minimum standard of housing quality and made provision for tenant protection. However, these conditions were made compulsory for a limited period, because when the loan period terminated, the dwelling ceased to form part of the social sector and became part of the private sector. Social housing subsidies were therefore accessible to private investors on the basis that they would come to an agreement with the government in terms of which they received subsidies and, in return, accepted certain ‘strings attached’.

From 1950 to 1954 the government increased rents due to a rise in building costs, although rents in state-assisted housing remained 15 per cent below average. The Second Housing Construction Act of 1956 made provision for government-assisted interest subsidies, instead of direct government loans. The social rent for these dwellings was controlled, as was the income group that gained access to the dwellings. Between 1950 and 1959 roughly 300,000 social housing units were built annually by private investors who received public grants. This number escalated to between 500,000 and 600,000 in the following years as a result of newly introduced incentives for private investors. The majority of social-housing dwellings were privately owned, although these owners were bound to lease their properties at regulated rents for a minimum of 15 years. During this ‘regulated’ period, the rent and state funds collectively covered the costs of the building owner and might even

83 Wendt (note 80 above) 124. See Wendt 131–2 for more detail regarding the financing of social housing and access control. See also D Kennedy ‘West Germany’ in M Wynn (ed) Housing in Europe (1984) 55, 56.

84 Non-profit housing associations played the dominant role in the social housing programme. The reputation of these associations was damaged during the 1980s as a result of a corruption scandal experienced by one of the biggest non-profit companies. The federal government changed the legal status of these associations to that of profit-orientated entities: H Tomann ‘Germany’ in P Balchin (ed) Housing Policy in Europe (1996) 51, 54.

85 Kleinman (note 56 above) 94. The loan period terminated once all the public money was repaid. Tomann (note 81 above) 925.

86 Jaedicke & Wollman (note 3 above) 133. These strings included guidelines regarding the target market, rent regulation, selling prices and unit sizes.

87 Wendt (note 80 above) 125–6.


89 The purpose of the social housing programme was to induce investment in the rental market by means of subsidies. Tomann (note 81 above) 919.

90 W Heinz ‘The Role of Local Authorities in Meeting Housing Needs’ in A Norton & K Novy (eds) Low Income Housing in Britain and Germany (1991) 83, 87 mention that the previous standard rent, determined by the state, was replaced by a ‘cost rent’. The rent amount merely had to cover the maintenance costs of the developer. Social housing therefore became a risk-free option for investors since all their costs were collectively covered by the state and tenant-occupiers.

91 Kleinman (note 56 above) 94–5.

92 Kennedy (note 83 above) 56. During the 1970s the expense for subsidising social housing amounted to 85 per cent of the total building costs. H Haussermann & W Siebel ‘Housing and Social Welfare Policy’ in Norton & Novy (note 90 above) 127, 129.

93 Kennedy (note 83 above) 57.
have generated a profit for the owner. Once the subsidies were repaid, owners could either rent or dispose of their properties in the open market.  

During the 1960s the state’s role in the provision of housing relaxed as a result of an increase in housing supply and employment. In 1965 the Housing Control Law (WohnungsBindungsGesetz) was enacted with the aim to impose rent controls and restrict the use of public-assisted rental units. These regulations applied ‘until full repayment of public loans ha[d] been made’. Conversely, between 1983 and 1989 the new housing policy’s goal was to relax rent controls, afford assistance to owner-occupiers, reduce subsidies and cease the provision of tax exemptions for social housing. By 1986, federal subsidies for social rental housing were abolished.

In the early 1990s housing shortages resurfaced and the government responded by encouraging private investment in the housing market through tax benefits. Federal subsidies were reintroduced, although this ‘third subsidy system’ was less generous than previous federal subsidies. The housing policy responded to the housing market by addressing the majority of housing needs, although ‘using state activity to support and supplement, not replace, the market’. The German social housing sector is currently to a large extent being phased out as a result of the government’s financing system. In 2001, the government introduced new laws that provide support for private investors and municipal housing companies to accommodate households with access problems by means of affordable rental housing and owner-occupation.

The social housing sector that operated in Germany after the war-time period serves as a useful comparative example. The scale of the German social sector and the number of units it operated for social housing purposes exceed the envisioned role of the social housing sector in South Africa by far. One could argue that one of the reasons for the success of the German social sector was the incentives made available by the government. The government

94 Haussermann & Siebel (note 92 above) 136. Publicly-subsidised housing was therefore not as charitable as one would imagine. The social effect of the German social housing market can therefore be found in the expansion of high standard housing at low prices for persons in dire need of housing. The enrichment of investors was an inevitable side effect.

95 Rent control was partially phased out, while housing benefits were introduced in 1965. Supply subsidies were also extended to owner-occupation and social housing: Kleinman (note 56 above) 95.

96 Rent control was similar to the previous laws in the sense that the rent had to cover the maintenance costs of the unit. Maintenance costs included capital costs, the costs of managing the building and four per cent interest on equity capital: B Spitz ‘The Law of Tenancy’ in Norton & Novy (note 90 above) 109, 112. The rent was neither predetermined nor fixed since it could be increased by the landlord in response to market forces. Since the 1970s, rents increased to such an extent that numerous families in need of social housing could no longer afford social rents.

97 Ibid.

98 Kleinman (note 56 above) 96.

99 Ibid 97.

100 Ibid.

101 The German state rather enables social services than act as the direct provider of social services: V Busch-Geertsema ‘The Changing Role of the State in German Housing and Social Policy’ (2004) 4 European J of Housing Policy 303, 305.
subsidised public funds for housing construction, while it also provided income tax relief for private funds invested in housing. The state therefore created incentives for private investors to invest in the social housing market, which were directed at the alleviation of housing shortages by providing affordable, secure rental housing for low-income households.

The South African social housing initiative does not create similar types of incentives for private investors to invest in the social housing market, nor does it motivate private developers to participate in the construction and operation of social housing – the grants and subsidies are simply too insubstantial, especially when considering the fact that the social housing stock will revert to the public sector at the end of the project’s lifetime. The South African target market also differs from the previous German social sector since it is aimed at low- to medium-income households. In light of the success of the German social sector it is questionable whether private developers and investors should not play a more prominent role in the provision of social housing for the impoverished. The current laws and policies in South Africa that are aimed at accommodating households earning less than R1,500 per month fail to provide some form of immediate relief. Recent case law shows that numerous evictees that fall in the category of low-income households are unable to find alternative accommodation in either the private market or the public sector – the government simply does not have a programme in place to accommodate these households. It is therefore clear that the purpose of the South African social housing sector, namely to upgrade urban areas, the nature of the delivery agents, being exclusively charitable and the reality of acute housing shortages for socio-economically vulnerable households do not correspond.

Finally, one of the essential characteristics of the German social sector was the imposition of rent control, combined with tenure protection for tenants. This characteristic is also present in the current New York City Mitchell-Lama housing programme. Curiously, the South African social housing sector does not make provision for strengthened tenure rights.

VI Security of Tenure

The primary tenure option in the South African social housing sector is rental housing, while collective forms of ownership serve as alternative tenure options. Section 2(1)(h) of the Social Housing Act states that government and SHIs must ensure secure tenure for residents in social housing stock. The

102 See for instance *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC); *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC); and *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* [2012] ZACC 26.


104 DHS *Social Housing Policy* (note 19 above) 18.
extent of tenure protection for social housing tenants is based on the provisions in the Housing Act 107 of 1997 and the Rental Housing Act 50 of 1999.\textsuperscript{105}

The level of tenure protection will therefore be similar to that of private tenants in the private rental market, which is unsettling since the private sector does generally not make provision for strong tenure rights for tenants.\textsuperscript{106} The overall aim of the social housing initiative, which is to provide affordable, secure rental housing options for low- to medium-income households, would be frustrated if tenants occupied units with insecure tenure. Social landlords are at liberty to, for instance, negotiate periodic tenancies that offer insubstantial tenure protection for tenants.\textsuperscript{107} The social housing framework therefore fails to properly prescribe how social tenants will be enabled to occupy social housing on a continuous basis and consequently establish a home.\textsuperscript{108} Secure occupation rights in the landlord-tenant framework are usually provided by means of rent control statutes that regulate rents and predetermine the grounds for termination of the lease.

The Mitchell-Lama programme in New York City is noteworthy in this regard since it ensures substantive tenure protection for its social sector tenants by prescribing the grounds for termination of the lease. If the social housing landlord cannot prove one of the grounds for termination of the lease, the tenancy will continue and accordingly afford the tenant enhanced tenure protection. The grounds for termination of the lease include behaviour of the tenant that amounts to nuisance; violations of the agreement or failure to comply with the lease obligations; or failure by the tenant to use the unit as his principal residence.\textsuperscript{109} It follows that if the tenant adheres to the terms and conditions of the tenancy, he/she will in all probability enjoy substantive tenure protection on a continuous basis and termination would be very difficult if not impossible. This type of tenure protection is currently absent in the South African social housing sector, which unnecessarily renders social sector tenants who are already vulnerable at risk, since insecure tenure aggravates poverty and homelessness.

The South African social housing policy also refers to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and the plausibility of granting eviction orders as a result of non-payment of rent, provided that there must have been a reasonable warning period.\textsuperscript{110} This ground for eviction does not seem exclusive and it should in principle be possible for a social landlord to terminate a lease on a different ground

\begin{thebibliography}{9}
\bibitem{105} Ibid 25, 81.
\bibitem{106} Maass (note 5 above) 764.
\bibitem{107} These tenancies can be terminated on written notice by either party without having to acquire the permission of the other party or any outside authority. WE Cooper \textit{Landlord and Tenant} 2 ed (1994) 61–5.
\bibitem{108} One should keep in mind that the overall aim of the social housing sector is to give effect to s 26(1) of the Constitution, which ensures the right to have access to adequate housing. See specifically Maass (note 5 above) 769–72 where it is argued that secure tenure forms part of the concept of ‘adequate housing’.
\bibitem{109} Scherer (note 49 above) 367.
\bibitem{110} DHS \textit{Social Housing Policy} (note 19 above).
\end{thebibliography}
and evict the tenant by relying on PIE. However, in light of the recent Constitutional Court judgment in *Maphango v Aengus Lifestyle Properties*, the landlord’s ground for termination of the lease may not amount to an unfair practice. The judgment is relevant to the private market since it centres on the correct interpretation of the unfair practice provision in the Rental Housing Act, although it might also be relevant to the social market since the extent of tenure protection for social sector tenants is based on the Rental Housing Act. The effect of the judgment is not to provide substantive tenure protection for tenants in general. It introduces a mechanism in terms of which tenants can oppose the ground for termination of the lease on the basis that it will have an unfair effect on the tenant’s rights or interests. This form of protection can be accessed on a case-by-case basis and the tenant would have to approach a Rental Housing Tribunal and prove that the ground for termination amounts to an unfair practice. The court held that s 4(5)(c) of the Act contains two requirements that a landlord must satisfy if he wishes to terminate the lease, namely that there must be a ground for termination in the lease and the ground (or reason) for termination may not amount to an unfair practice. In light of the general scheme of the Act, the court established that a Tribunal’s determination of an unfair practice would override the contractual agreement between the parties.

VII SOCIAL HOUSING IN PRACTICE

In South Africa, the interim social housing programme came into existence in 2006. There were 17 projects launched during the three funding cycles (2006 to 2010) in different municipalities across South Africa. In order to provide some insight into the social housing initiative, one of the major social housing institutions in Johannesburg, namely the Johannesburg Social Housing Company (JOSHCO) is explained in the following paragraphs.

The company is mandated by the City of Johannesburg to manage both public rental stock and public hostels; renovate public hostels; and develop new rental housing stock. JOSHCO’s projects consist of different categories, namely

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111 Note 102 above.
112 Rental Housing Act s 4(5)(c) states that the landlord has the right to ‘terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease’. Section 13(1) empowers any tenant or landlord to lodge a complaint with the Rental Housing Tribunal concerning an unfair practice, which is defined in s 1 of the Act as ‘a practice unreasonably prejudicing the rights or interests of a tenant or a landlord’.
113 *Aengus Lifestyle Properties* (note 102 above) para 50.
114 Ibid para 51.
115 SHRA <http://www.shra.org.za/investment/funded-projects>. For example, the City of Cape Town has accommodated 80,000 people in social housing apartments. The City of Cape Town chose its social housing institution partners, including non-profit accredited SHIs and private companies by means of a tender process in 2004: Cape Town Government <http://www.capetown.gov.za/en/Housing/SocialHousing/Pages/Partners.aspx>. Social housing projects are currently being implemented across South Africa and the success of these projects is still unclear.
One of the ‘hostels to homes’ projects is the City Deep Village project, which is a redevelopment programme. This project received a capital investment from the City of Johannesburg, a social housing restructuring grant from the national government and additional funding from local government and the Development Bank of Southern Africa. This clearly shows that the input from private banks is limited. One can therefore assume, for now, that the social housing sector will generally be funded with public funds and operated by charitable organisations. The reach of the sector is consequently restricted.

The redevelopment of the hostels should eventually make 654 units available to a variety of households since the unit types are diverse, including bachelor flats and three-bedroom apartments. The rentals range from R650 to R1,945 per month, which confirms the target market as low- to medium-income households.

In order to successfully apply for social housing at JOSHCO, South African applicants must be legally accountable, have dependents, earn less than R7,500 per household, be on the National Housing Waiting List and not have received a subsidy previously. Successful applicants have to sign a lease agreement that is in line with the Rental Housing Act, while it also makes provision for annual rent increases and it prohibits subletting. Tenants are required to pay rent on the first day of each month and failure to make such payment might lead to legal action. If tenants have financial problems they can discuss their position with the JOSHCO revenue department, who might allow late payment. However, rental arrears, breach of lease conditions or unlawful occupation can all result in eviction. The extent of tenure protection for social sector tenants is therefore limited to that of the private market, which is contract-based and insignificant.

VIII CONCLUSION

The newly introduced South African social housing sector is a long-awaited innovation that can contribute to the alleviation of acute housing shortages and consequently also supports the fight against poverty. It seems that the social sector will form part of the housing policy on a long-term basis and that the delivery agents will continue to act as social landlords for extended periods of time since the social housing stock can only be privatised once the need for social housing has been phased out. This objective is different from the previous German social housing sector in terms of which the social sector operated for a limited period, although it had an immediate and long-lasting

118 See <http://www.joshco.co.za/hostelstohomes.php> for the different types of projects in each category.

119 One of the inner-city projects is the BG Alexander project, in terms of which one of the decaying bad buildings in the Johannesburg inner city were redeveloped into communal housing. JOSHCO also makes provision for emergency housing and the Linatex House is an example of one of these projects <http://www.joshco.co.za/larasabel.php>.

120 See <http://www.joshco.co.za/citydeep.php>.

The previous German social housing sector was robust in the sense that it basically solved the German housing crisis in a relatively short period of time by means of attractive incentives for private developers and private investors. Once the private developers settled their public loans, the social housing stock was removed from the social sector and considered part of the private sector. The landlord-tenant relationship between social landlord and tenant was consequently also deregulated. However, even though the social housing regulations were phased out, the housing stock continued to accommodate the German population in the private rental market. The initial social housing market therefore had an enduring effect, since the private landlord-tenant market continues to provide secure housing for a large percentage of the German population.

The South African social housing policy is therefore not structured as a remedial interim measure aimed at accommodating the impoverished. Both its long-term restructuring objective and target market might frustrate its potential in essentially addressing the current needs of the people. It has also been argued that the political emphasis placed on social housing as a tool for integration in urban areas is inherently biased since remote areas have not been considered as part of the social housing policy. One could argue that the social housing sector should be more flexible in the sense that it should be utilised by different municipalities across the country. The need for affordable secure rental housing should perhaps indicate the necessity for a social housing project, rather than the fact that it falls within an urban reconstruction area. Local government should be dynamic and inventive in its approach towards the utilisation of social housing projects. Nevertheless, the ideology of a vigorous social housing sector will be frustrated if it is dependent on government funds and operated by exclusively charitable organisations. The mobilisation of the private sector in both operating and financing some of the projects is essential, which necessitates some amendments to the current policy. Ideally, the South African social housing framework should entice the private sector to invest and actively participate in the provision of social housing by means of attractive incentives. From a comparative perspective it should be plausible for the social rental sector to contribute to the alleviation of housing shortages on a substantial scale and the effects would be immediate.

Finally, the absence of substantive tenure protection for social sector tenants affirms the age-old presumptive power of ownership, which is arguably not in line with the transformative purpose of the Constitution. The social housing sector, which now forms part of the South African landlord-tenant regime, should serve as a welfare-orientated statutory reform that strengthens tenants’ occupation rights by taking into account socio-economic and contextual circumstances before tenancies are merely cancelled and tenants consequently evicted. The required level of tenure protection should be analogous to typical rent control legislation, which basically prohibits cancellation of the lease in

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122 Cloete, Venter & Marais (note 6 above) 28.
the absence of a statutory ground for termination. This type of legislative restriction on the landowner’s right to freely use and dispose of its property is justified when considering the purpose of the deprivation, which is to give effect to the beneficiaries’ basic housing needs. However, deprivations of this kind cannot be imposed indefinitely, which is why it should serve as an interim measure, aimed at empowering the occupiers to eventually generate higher incomes and rent in the private market.