RENT REDUCTION AND EVICTIONS DURING DISASTERS

by

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Summary

A national state of disaster was declared in terms of the Disaster Management Act 57 of 2002 followed by an implementation of a national lockdown in an effort to curb the spread of the Covid-19 virus. As a result of the lockdown, a large number of people were unable to work, which adversely affected their financial status, specifically their ability to pay rent.

In this dissertation, I examine whether South African law adequately addresses instances in which one is unable to meet rental obligations due to an unforeseen disaster such as the Covid-19 pandemic. Do adequate rent control measures, such as rent reduction measures, exist to safeguard tenants' security of tenure during disasters as well as ensure the continuation of lease relationships? Furthermore, do existing eviction laws adequately protect tenants facing eviction during disasters when rent control measures fail to protect their security of tenure?

Rent control is an extraordinary form of state intervention which is given effect to through legislation. Essentially, rent control permits tenants to remain in occupation of the leased property after the lease contract has been terminated. State intervention becomes necessary when public interests demand it. I submit that the Covid-19 pandemic is one such instance which required state intervention. Were the regulations promulgated in terms of the DMA sufficient and further will the said regulations apply beyond the Covid-19 pandemic? Can South Africa's property law make use of resilience thinking to assist in carrying forth and elaborating on the DMA regulations.

I found that the regulations promulgated in terms of the DMA were indeed sufficient to cater for the continuation of the lease relationship during the Covid-19 pandemic. Using resilience-thinking as tool to achieve future integration, I found that the same regulations should be carried forward after the pandemic.

Acknowledgments

First and foremost, I would like to give thanks to The Almighty for giving me strength and carrying me through this period. Yours in an unwavering and constant love. All honour and praise be unto You.

To my mother, Connie Morgets. Thank you for being my #1 supporter. Thank you for believing in me and for being my prayer warrior. Your love and encouragement have kept me going. Words fail to articulate my gratitude towards you. Kea leboga. I dedicate this dissertation to you mama.

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CHAPTER 1
INTRODUCTION

1 1 Background

South Africa's current rental housing regime and its regulations exist against a backdrop of a complex land history which has seen vast change over the years.[1] Under the apartheid regime,[2] housing was premised on the notion of racial segregation.[3] This meant that people of colour (i.e., people of black, Indian and coloured decent)[4] were only permitted to live on land designated to them by the government. The land was typically situated on the peripheries of urban areas[5] and was notably smaller in size which led to overcrowding.[6]

The year 1994 ushered in a new democratic dispensation with the promise of a new dawn premised on social, political and economic inclusivity, particularly for persons who were previously marginalised.[7] Black South Africans began to migrate to urban areas in search for employment opportunities.[8] The genesis of the housing shortage as it stands to date may be attributed to the rapid rate at which urbanization occurred.[9]

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[1] SI Mohamed *Tenant and Landlord in South Africa* (2nd ed 2010) 4-13.
[2] Apartheid Definition & Meaning - Merriam-Webster (accessed 26/04/2022). The apartheid system of governance is described as "a former policy of segregation and political, social, and economic discrimination against the non-white majority in the Republic of South Africa".
[3] s 1 Black Land Act 27 of 1913.
[4] S Nkoana *South African Land Reform Complexities, the Marobala O Itsose experience* (2022) 15-23.
[5] South African Human Rights Commission "The right to adequate housing factsheet" 1-7 2 Fact Sheet on the right to adequate housing.pdf (sahrc.org.za) (accessed 23/09/2022).
[6] South African Human Rights Commission "The right to adequate housing factsheet" 1-7 2 Fact Sheet on the right to adequate housing.pdf (sahrc.org.za) (accessed 23/09/2022).
[7] AJ van der Walt *Property in the Margins* (2009) 1-12. See also J Seekings "The 'developmental' and 'welfare' state in South Africa: Lessons for the Southern African region" (2015) 1-22 1-5 The 'Developmental' and 'Welfare' State in South Africa: Lessons for the Southern African Region | Centre for Social Science Research (uct.ac.za) (accessed 27/07/2022).
[8] A Gilbert, A Mabin, M McCarthy and V Watson "Low-income rental housing: Are South African cities different?" (1997) 9 *Environment and Urbanization* 133-148 133. "A significant proportion of the black urban population in South Africa rent accommodation. Surveys conducted in two low-income settlements in Cape Town and Johannesburg show that the rental housing scene is in many ways similar to that found in other Third World cities".
[9] V Watson and M McCathy "Rental housing policy and the role of the household rental sector: evidence from South Africa" (1998) 22 *Habitat International* 49-56 50. "In the post-war years many governments in developing countries took steps to address the housing problems which were emerging as a result of rapid urbanization, growing urban poverty and dilapidated housing stock. Many governments adopted a policy of construction and management of public housing, much of which was for rental, and introduced rent control legislation to hold down rents and improve the security of tenants in private, formal, rental accommodation".

The right to housing is a basic human right recognized by international law,[10] and further recognized in terms of the laws that govern South Africa. Section 26(1) of the Constitution of the Republic of South Africa,1996 (hereinafter referred to as the "Constitution") states that "[e]veryone has the right to have access to adequate housing."[11] Security of tenure is key to realizing the right to adequate housing.[12]

In articulating the importance of security of tenure, *Roisman* eloquently states that:

> "[S]ecurity of tenure is fundamentally important because it is the basis upon which residents build their lives. It enables people to make financial, psychological, and emotional investments in their homes and neighbourhoods. It provides depth and continuity for children's school attendance and for the religious, social, and employment experiences of children and adults. Security of tenure enables tenants to 'fully participate in social and political life'."[13]

It goes without saying that the cost of purchasing a house was not and is still not accessible to the majority of South Africans.[14] Renting as an affordable alternative to owning has gradually grown as a result. Statistics suggest that the demand for rental properties in South Africa (pre-pandemic) sat at around 57.21%. It is worth noting that the Gauteng province is said to account for as much as half of this figure.[15] In view of the size of the South African rental housing sector, it is imperative that adequate laws are enacted to both regulate and advance the landlord-tenant relationship.[16]

One of the instrumental pieces of legislation for achieving this goal is the Rental Housing Act 50 of 1999[17] (hereinafter referred to as the "RHA"). The legislator

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[10] Universal Declaration of Human Rights. UN General Assembly Resolution 217 A (III), 10 December 1948. Article 25 states that, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond his control". See also PHJ Thomas "The Rental Housing Act" (2000) 33 *De Jure* 235-247 235.

[11] Constitution of the Republic of South Africa, 1996 ("Constitution").

[12] SM Viljoen *The Law of Landlord and Tenant* (2016) 20-22. See also G Muller and SM Viljoen *Property in Housing* (2021) 61-62.

[13] FW Roisman "The right to remain: Common law protections for the security of tenure – an essay in honor of John Otis Calmore" (2008) 86 *North Carolina Law Review* 817-858 820.

[14] PHJ Thomas "The Rental Housing Act" (2000) 33 *De Jure* 235-247 235. See also What are the affordable housing options in South Africa? | MyProperty (accessed 27/10/2022).

[15] Rental trends in 2022 | 'Improved tenant payment behavior as churn drops' - Latest News, News (property24.com) (accessed 22/03/2022).

[16] G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 333 "Since the rental housing market is a significant aspect of the South African housing sector, the legislature has passed a number of thorough-going pieces of legislation to regulate and to provide impetus for this market in the furtherance of its constitutional mandate".

[17] Rental Housing Act 50 of 1999 ("RHA").

introduced the RHA in an effort to regulate the rights and duties of residential landlords and tenants insofar as the lease of a residential dwelling is concerned.[18] Disasters[19] such as the Covid-19 pandemic,[20] which was an unforeseen occurrence, posed a threat to rental housing stability. A pertinent question that arises and that will be dealt with in this thesis is whether the inclusion of resilience measures into existing landlord and tenant as well as eviction laws could assist with safeguarding the right to adequate housing, particularly residential dwelling during disasters and beyond.

1 2 Research questions

The research question that this dissertation investigates is whether South African law sufficiently caters for instances where a tenant, with a valid lease agreement,[21] is unable to meet rental obligations on account of an unforeseen occurrence such as the Covid-19 pandemic.[22] More specifically, are there adequate rent control measures, such as rent restriction measures,[23] in place to protect tenants' security of tenure by ensuring the continuation of lease relationships during disasters? Furthermore, do existing eviction laws adequately protect tenants facing eviction during disasters when rent control measures fail to protect their security of tenure? Finally, if not, what measures could be implemented to protect the lease relationship and to protect tenants against evictions during disasters and beyond?

1 3 Hypothesis

[18] SM Viljoen *The Law of Landlord and Tenant* (2016) 67. See also SI Mohamed *Tenant and Landlord in South Africa* (2nd ed 2010) 15.
[19] s 1 of the Disaster Management Act 57 of 2002 defines a disaster as "a progressive or sudden, widespread or localised, natural or human-caused occurrence."
[20] The word "Covid-19" will be used synonymously with the word's "pandemic" and "virus".
[21] s 1 RHA defines lease as "an agreement of lease concluded between a tenant and a landlord in respect of a dwelling for housing purposes".
[22] In the first quarter of the year 2020, South Africa with the rest of the world were thrust into the Covid-19 pandemic. Covid-19 as described by the World Health Organisation (hereinafter referred to as the "WHO") is "an infectious disease caused by the SARS-CoV-2 virus. See also LR Ngwenyama "The position of residential tenants who are unable to pay rent or utility bills during the Covid-19 pandemic" in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy in *Property and Pandemics: Property Law Responses to Covid-19* (2021) 83-100 83.
[23] The reference to rent restriction is inclusive of the concepts of rent reduction, remission of rental, rent escalation and rent de-escalation (i.e., rent restriction can be achieved via rent reduction, rent escalation and remission of rent).

My first hypothesis is that South African law does not provide tenants with rent reduction measures under the RHA. The RHA merely regulates the relationship between landlord and tenant. However, the socio-political and socio-economic circumstances now more than ever before require rent control laws to advance security of tenure, especially during disasters.

My second hypothesis is that existing eviction laws do not provide adequate protection to tenants facing evictions during disasters. While the Constitutional Court has developed the common law in affirming that the Rental Housing Tribunals should rule on unfair practices,[24] the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter referred to as "PIE") should not be the only means of evicting residential tenants.

1 4 Rationale/Motivation

1 4 1 Contextualisation

On the 15th of March 2020, the Minister of Co-operative Governance and Traditional Affairs declared a national state of disaster on account of the Covid-19 pandemic.[25] Subsequently and to contain the spread of the virus, on the 25th of March 2020, lockdown[26] regulations were issued in the government gazette. For the purposes of this discussion, the following sections are highlighted:

> "11(1)(a) For the period of lockdown-
>
> (i) every person is confined to his or her place of residence, unless strictly for the purposes of performing an essential service, obtaining an essential service, an essential good or service, collecting a social grant, pension or seeking emergency life-saving, or chronic medical attention;
> (b) During the lockdown, all businesses and other entities shall cease operation, except for any business or entity involved in the manufacturing, supply, or provision of an essential good or service, save where operations are provided from

[24] See chapter 2, section 2.3.2.1 below. See also *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 556-557.
[25] s 3 of the Disaster Management Act 57 of 2002 ("DMA").
[26] s 1 DMA defines the term lockdown as "lockdown means the restriction of movement of persons during the period which this regulation is in force and effect namely from 23h59 on Thursday 26 March 2020 until 23h59 on Thursday 16 April 2020, and during which time the movement of persons is restricted". Please note the periods and time slots stipulated in the above definition were amended through regulations from time to time.

outside of the Republic or can be provided remotely by a person from their normal place of residence."[27]

The lockdown restrictions curtailed people's movement which consequently meant that the majority of the citizens (those not forming part of what is deemed an "essential service") were unable to work or were required to work from home. The restriction on movement unfortunately led to retrenchments or the reduction of salaries. This had a direct impact on people's abilities to fulfil their financial obligations, including the payment of rent.[28] At the landlord's election and once a notice of intention had been provided, a tenant's inability to meet rental obligations resulted in the termination of the lease agreement.[29] In this instance, should a tenant refuse to vacate the premises, the landlord would in turn be entitled to institute eviction proceedings.[30] It is against this backdrop that the law regarding rent control measures such as rent reductions and eviction laws before and during the COVID disaster will be investigated.

1 4 2 Rent control

Rent control is an extraordinary form of state intervention which is given effect to through legislation.[31] Rent control laws are primarily intended to limit rent increases and provide security of tenure to tenants.[32] Essentially, rent control laws permit tenants to remain in occupation of the leased property after the lease contract has been terminated.[33] State intervention becomes necessary when public interests demand an intervention to regulate an imbalance between the forces of demand and supply.

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[27] Disaster Management Act 57 of 2002. See also SM Viljoen "The impact of the Covid-19 regulations on rent obligations" (2020) *De Jure* 353-368.
[28] Business Insider SA "A third of SA tenants haven't paid their full rent this month – and May could look much worse" The Business Insider reported that "almost 32% of South African residential tenants did not pay their rent in full in April' 2020*"* A third of SA tenants haven't paid their full rent this month – and May could look much worse | Businessinsider (accessed 30 April 2022).
[29] SI Mohamed *Tenant and Landlord in South Africa* (2nd ed 2010) 49-50. It is worth mentioning that a contract of lease should contain a clause detailing the conditions which would permit a cancellation/termination of the lease agreement, one of which would be on account of non-payment of rental. Should such a clause not exist in the lease agreement, a landlord may rely on section 4 (5) RHA which details the landlord's rights against a tenant. Section 4 (5) (c) RHA in particular states that, a landlord may "terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease".
[30] SI Mohamed *Tenant and Landlord in South Africa* (2nd ed 2010) 50.
[31] SM Viljoen *The Law of Landlord and Tenant* (2016) 20-21. See also SM Viljoen *Property in Housing* (2021) 376. See also SM Maass "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 48-50.
[32] SM Maass "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 45.
[33] SM Viljoen *The Law of Landlord and Tenant* (2016) 20-21.

Governments have often implored rent control measures "to amend or regulate the hierarchical domination of property ownership in response to social, economic and political circumstances and requirements".[34] In response to housing shortages faced by white minorities, rent control laws were enacted in South Africa.[35]

Notably, rent control is no longer prominent in South Africa. The Rent Control Act 80 of 1976[36] (hereinafter referred to as the "RCA") was aimed at the security of tenure of white South African tenants.[37] Insofar as this group of persons are concerned, the RCA can be said to have fulfilled its purpose as there was indeed adequate housing for white South Africans.[38] When the RCA was repealed by the RHA in July 2003, the Minister of Housing was tasked with monitoring and assessing "the impact of the phasing out of both rent control and substantive tenure rights on poor and vulnerable tenants".[39] This proved to be a futile exercise because urbanization led to the creation of an entirely new and needless to say larger vulnerable group of tenants who were not taken into consideration when the RCA was phased out.[40]

Rent Control involves;[41]

- Rent Escalation;
- Habitability conditions of a dwelling;[42] and
- Conditions for eviction

[34] SM Maass "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 48.
[35] G Muller and SM Viljoen *Property in Housing* (2021) 107, 379-380. Rent control measures are not without hurdles. If too much regulatory intervention is made into private affairs (such as landlord-tenant relationships), this can negatively impact landlords' decisions to invest in property or continue investing. Consequently, there would be a high demand for urban residential lease properties, which would allow landlords to charge excessive rents. Muller and Viljoen speculate that regulatory invention could have the adverse effect of exacerbating tenure insecurity. See also RC Ellickson "Rent control: A comment on Olsen" (1991) 67 Chicago-Kent Law Review 947–954, 948. See also *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) paras 34–36.
[36] Rent Control Act 80 of 1976 ("RCA")
[37] SM Maass "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 73. See also G Muller and SM Viljoen *Property in Housing* (2021) 107-108.
[38] SM Maass "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 78-79.
[39] SM Maass "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 73.
[40] SM Maass "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 73-81.
[41] SM Maass "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 45, 56. See also G Muller and SM Viljoen *Property in Housing* (2021) 376-377.
[42] s 4B (11) of the Rental Housing Amendment Act 35 of 2014 states that "A landlord must provide a tenant with a dwelling that is in a habitable condition". See also G Muller and SM Viljoen *Property in Housing* (2021) 318-319 wherein the authors explain that the RHAA offers an extensive definition of "habitability" which is an important component in upholding the right to adequate housing.

The aforementioned components are distinct yet interrelated in the sense that they each curtail the landlord's rights to his/her property.[43] Furthermore, these components reduce the threat of eviction for tenants thereby safeguarding security of tenure.[44]
This dissertation will focus on the question of rent escalation as a rent control measure. Rent escalation denotes a contractual clause wherein the contracting parties (being the landlord and tenant) agree to a fixed rental increment after a specified period (usually the duration of the contract of lease). The increment is usually defined as a percentage.[45] The pertinent issue that will be considered is what role, if any, did rent escalations play before and during the Covid-19 pandemic?

During the Covid-19 pandemic, peoples' financial standing was affected consequently impacting upon tenants' ability to pay rental. In light of this, might the concept of de-escalation serve as a viable tool to reduce rent in these circumstances? Can we amend and/or elaborate upon existing laws or measures in an effort to be better equipped for future disasters which may impact upon tenants' ability to pay rent?

1 4 3 Evictions

The RHA governs the relationship between landlords and tenants for the duration of the contractual relationship between the two parties.[46] Once the contract of lease has been terminated, a tenant who refuses to vacate the residential dwelling status changes from lawful occupier to unalwful occupier.[47] It is at this point that provisions outlined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter referred to as "PIE")[48] will be followed by the landlord persuant to an eviction order against the tenant as unlawful occupier.[49]

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[43] G Muller and SM Viljoen *Property in Housing* (2021) 376-377.
[44] G Muller and SM Viljoen *Property in Housing* (2021) 377.
[45] Understanding Rent Escalation Clauses (reoptimizer.com) (accessed 15/07/2022).
[46] RHA Preamble. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 113-114. See also PHJ Thomas "The Rental Housing Act" (2000) 33 *De Jure* 235-247 237. See also T Legwaila "An Introduction to the Rental Housing Act 50 of 1999" (2001) 12 *Stellenbosch Law Review* 277-282. See also SM Maass "Rental Housing as Adequate Housing" (2011) 3 *Stellenbosch Law Review* 759–774 763-764.
[47] G Bradfield and K Lehmann *Principles of the Law of Sale and Lease* (3rd ed 2013) 168-170. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 68-69, 369-370, 377-378.
[48] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE Act").
[49] H Delport "Eviction of a tenant after termination of a lease of residential premises" (2008) *Obiter* 472-476 See also SM Viljoen *The Law of Landlord and Tenant* (2016) 369-371, 376-378.

In the case of *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*,[50] the Constitutional Court presided over a matter that involved a dispute between private landlords and low-income tenants.[51] Cameron J articulated the following; "the narrow question in this case is when a landlord may cancel a lease and evict its tenants. Behind this lies the impact of the protection the Constitution affords against eviction."[52]

Section 26(3) of the Constitution states that:

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."[53]

The said provision was used as a defence in the aforementioned case by tenants who averred that if the court were to grant an order of eviction, they would be rendered homeless as there was no affordable alternative accommodation available.[54] Maass writes that the case highlights the tension between the landlord's common law right to evict a tenant once the lease has been terminated and the tenant's constitutional right to access housing and not to be arbitrarily evicted.[55]

The national state of disaster has arguably compounded the plight of vulnerable tenants by increasing the likelihood of them becoming unlawful occupiers. In light of this, I will explore whether the Covid-19 pandemic was regarded as a "relevant circumstance" to be taken into consideration when a court deliberated on whether to grant an eviction order. It will also be determined whether measures other than PIE were introduced to protect tenants against eviction. These considerations will assist in determining if PIE adequately address disaster scenarios wherein further considerations must be made by a court. If not, the focus will turn to establishing what can be done to strengthen protection against evictions for disasters and beyond.

1 4 4 Resilience thinking

[50] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC).
[51] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 534-538.
[52] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 534.
[53] s 26(3) Constitution. See also T Roux "Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law" (2004) 121 *South African Law Journal* 466-492. See also S Wilson "Breaking the tie: evictions from private land, homeless and a new normality" (2015) 30 *Southern African Law Journal* 270-290.
[54] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 562.
[55] SM Maass "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 42.

The concept of resilience thinking has its roots in natural science.[56] It is described as, the ability to withstand disturbance and return to a state of "normal" once the disturbance has passed.[57]

Van der Sijde remarks that evolutionary resilience is most aligned with property law. It denotes the ability to live with change and to further be innovative and transformative in the face of change. This branch of resilience thinking proposes that stability is a state of perfection which can never be achieved.[58]

The law is fluid and subject to change or alteration on account of various factors such as socio-economic and socio-political circumstances at any particular point in time. Evolutionary resilience therefore proposes that systems ought to be able to bend to change. We can use resilience as a tool to measure the efficiency of the systems in place. For example, the moratoria[59] placed on evictions as part of Covid-19 regulations may qualify as an instrument of resilience in that moratoria anticipate that a situation may arise in future which may cause instability and alter the ordinary state of affairs as it were. In this event financial institutions or parties in their individual capacities grant moratoriums for a specified period or on the occurrence of a specified suspensive condition. The effect therefore may result in a review of the current state of affairs and further assist in identifying gaps in the system as it were.[60] How do we carry those forth into our new reality? In view of evolutionary resilience thinking, the issue that will be considered further is which measures of those introduced during the Covid-19 pandemic could be incorporated in existing laws to provide for lease

[56] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An explanatory note on the aftermath of the Covid-19 pandemic" in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021) 352-372 352.
[57] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An explanatory note on the aftermath of the Covid-19 pandemic" in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021) 352-372 354.
[58] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An explanatory note on the aftermath of the Covid-19 pandemic" in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021) 352-372 352-365.
[59] Moratorium Definition & Meaning - Merriam-Webster (accessed 23/09/2022). A moratorium is described as "a legally authorized period of delay in the performance of a legal obligation or the payment of a debt".
[60] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An explanatory note on the aftermath of the Covid-19 pandemic" in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021) 352-372 358.

relationships to continue and for increased protection against evictions during disasters and beyond.

1 5 Limitations/Qualifications

A lease contract can broadly be split into two categories, namely long-term and short-term leases.[61] Long-term leases can be described as those lease contracts wherein the fixed lease term is for a period of ten years or more,[62] as opposed to short-term lease contracts wherein the fixed term is for a period less than ten years.[63] This dissertation will focus on the latter. South African law further draws a distinction between urban and rural leases. The use of the property determines which category it forms a part of.[64] Traditionally, urban leases are used for residential purposes whilst rural leases are used for agricultural purposes.[65] This dissertation will focus on urban residential leases. Lastly, this dissertation will focus on rent escalation and rent reduction as examples of rent control.

1 6 Overview of chapters

This dissertation will be divided into three main chapters. The chapters will focus on the concepts of rent (the escalation or reduction thereof) and evictions as rent control measures specifically in the context of disasters and beyond.

Chapter 2 will focus on current laws. In particular, the Constitution which promotes the right to adequate housing and prohibits arbitrary eviction.[66] Second, the RHA, which regulates landlord-tenant relationships and provides dispute resolution. Finally, PIE outlines the procedural and substantive requirements to be followed to effect an eviction.

Chapter 3 will focus on the regulations ushered in by the DMA during the Covid-19 pandemic. Thereafter, chapter 4 will be a forward-looking chapter. Given the lessons

[61] G Glover *Kerr's law of sale and lease* (4th ed 2014) 367-368.
[62] G Glover *Kerr's law of sale and lease* (4th ed 2014) 519-524. See also G Muller, R Brits, JM Pienaar and ZT Boggenpoel *Silverberg and Schoeman's The Law of Property* (6th ed 2019) 514.
[63] G Glover *Kerr's law of sale and lease* (4th ed 2014) 517-519. See also G Muller, R Brits, JM Pienaar and ZT Boggenpoel *Silverberg and Schoeman's The Law of Property* (6th ed 2019) 514.
[64] G Glover *Kerr's law of sale and lease* (4th ed 2014) 341.
[65] G Glover *Kerr's law of sale and lease* (4th ed 2014) 341.
[66] s 26 Constitution.

learned from the Covid-19 pandemic, the issues that will be considered is what the gaps are that have been identified in our law; and which of the temporary measures identified in chapter 3 may be carried forth and incorporated into law to protect tenants during future disasters and beyond? This chapter will briefly discuss the resilience theory and how this theory justifies incorporating Covid-19 best practices in a post-pandemic world to be better prepared for future disasters. Chapter 5 will be a conclusionary chapter.

A desktop study will be undertaken. Sources to be used include but are not limited to books, journal articles, case law and legislation. Reference to all sources will appear in the bibliography.

CHAPTER 2:
RENT REDUCTION, RENT ESCALATION AND EVICTION BEFORE COVID-19

2 1 Introduction

The history of racial segregation[1] in South Africa as well as the housing shortage[2] and high living costs[3] are only some of the factors that contribute to the unresolved issue of a lack of affordable housing.[4] Renting has subsequently become a common form of tenure, thus making room for growth in the sector.[5] It follows then that preserving the landlord-tenant relationship is important to safeguard "the right to have access to adequate housing".[6] In light of the above, the aim of this chapter is to in a positivistic manner highlight the legal position regarding; the termination of the landlord-tenant relationship due to non-payment of rental; and the eviction of tenants holding over pre the Covid-19 pandemic.

To this end, the chapter is divided into two main parts. The first part describes the law regarding the termination of the landlord-tenant relationship in the situation of non-payment of rental. This is achieved by describing the nature of a contract of lease and the circumstances that allow for rental payment to be remitted. The second part of the chapter will then focus on rent escalation as a rent control measure in light of the landlord's prerogative to escalate the amount of rent, further, the position of the Rental Housing Act 50 of 1999[7] (hereinafter referred to as the "RHA") in this regard will be highlighted. The regulation of evictions at common law that was subsequently developed by the Constitution which then led to the creation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998[8] (hereinafter referred

[1] s 1 Natives Land Act 27 of 1913. See also G Muller and SM Viljoen *Property in Housing* (2021) 2-3.
[2] SM Maas "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 54. See also Why can`t we clear the housing backlog? - IRR - OPINION | Politicsweb (accessed 24/09/2022).
[3] https://housingfinanceafrica.org/countries/south-africa/ (accessed 24/09/2022).
[4] https://housingfinanceafrica.org/countries/south-africa/ (accessed 24/09/2022). The article suggests that South Africa has a housing shortage of an approximately 3.7 million. This figure is estimated to increase annually by 178,000.
[5] G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 333.
[6] s 26(1) The Constitution of the Republic of South Africa, 1996 ("Constitution").
[7] Rental Housing Act 50 of 1999 ("RHA").
[8] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter referred to as "PIE Act").

to as the "PIE Act") will be discussed. Finally, the chapter will highlight the interconnectivity between the RHA and PIE.

2 2 The lease relationship and non-payment of rent

2 2 1 The tenant's obligation to pay rent

A contract of lease creates reciprocal rights and duties for the contracting parties.[9] Landlords are to provide tenants with the temporary use and enjoyment of the dwelling[10] subject to lease.[11] In turn, tenants are obliged to pay a rental amount as compensation for the use and enjoyment of the dwelling.[12] A contract of lease is regarded as being complete when consensus is reached on the below essential elements:

a) the landlord undertakes to grant temporary use and enjoyment of the dwelling to be leased to the tenant; and
b) the rental amount to be paid by the tenant to the landlord.[13]

Glover explains that although some definitions list the term or duration of the contract of lease as being an essential element, parties need not expressly agree upon this.[14]

The duty to pay rent is a tenant's "primary obligation".[15] Without consensus pertaining to the amount of rent to paid, there can be no lease agreement.[16] The general rule is that rent for a contract of lease is quantified in monetary value.[17] The rent payable

[9] G Bradfield and K Lehmann *Principles of the Law of Sale and Lease* (3rd ed 2013) 137-175. See also G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 374-498. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 43-44 108.
[10] s 1 RHA, the word "dwelling" is defined as, "includes any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage or similar structure which is leased, as well as any storeroom, outbuilding, garage or demarcated parking space which is leased as part of the lease".
[11] s 1 RHA, the word "lease" is defined as "an agreement of lease concluded between a tenant and a landlord in respect of a dwelling for housing purposes".
[12] G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 329.
[13] G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 329. See also G Bradfield and K Lehmann *Principles of the Law of Sale and Lease* (3rd ed 2013) 137.
[14] G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 329.
[15] SM Viljoen *The Law of Landlord and Tenant* (2016) 284. Viljoen describes rent as "usually a sum of money, but may be in some other form. It must be certain or ascertainable and may be agreed upon expressly or impliedly". See also G Glover *Kerr's Law of Sale and Lease* (4 ed 2014) 353.
[16] SM Viljoen *The Law of Landlord and Tenant* (2016) 109, 143-144. See also WE Cooper *Landlord and Tenant* (2nd ed 1994) 42.
[17] G Bradfield and K Lehmann *Principles of the Law of Sale and Lease* (3rd ed 2013) 140. See also WE Cooper *Landlord and Tenant* (2nd ed 1994) 44-45. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 108, 144.

must be "certain or ascertainable."[18] A specific amount of rent may be agreed upon by the parties. Alternatively, a formula may be agreed upon to determine the amount of rent and lastly, third parties may be designated to determine the amount of rent.[19] In the case of *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd,*[20] the Supreme Court of Appeal (hereinafter referred to as the "SCA") held that although a definite amount had not been stipulated in clause 9 of the contract of lease, the provisions therein were determinable and therefore the contract was valid and upheld.

Section 4(5) of the RHA affirms a landlord's rights against a tenant. For purposes of this discussion, section 4(5)(a) of the RHA states that a landlord is entitled to "prompt and regular payment of rental or any charges that may be payable in terms of a lease."[21] The parties must further reach consensus on a specific date that rent will fall due. The tenant must ensure that rent is received per the agreed specification.[22] Failure to pay rent promptly and regularly constitutes a breach of contract in terms of common law.[23] However, there is one instance where a tenant's failure to pay rent would not result in a breach of contract.[24] This situation would occur where the landlord breached one of his primary duties under the lease agreement.[25] In this regard, section 4(2) of the RHA stipulates that the tenant is entitled to undisturbed use and enjoyment of the property by highlighting that the tenant has a right to his "privacy".[26] In the event that a tenant's use and enjoyment of the leased dwelling has been disturbed or interrupted, the tenant is entitled to a remission of rent. The circumstances which would render a remission of rent include but are not limited to the following scenarios, where the landlord is in breach of contract, where defects exist on the property which the landlord is obliged to repair, where the tenant has attended to the reparation of defects from his own pocket and is thus entitled to a remittal of rent to recover his costs and in the event that of a material pre-existing defect exists on the leased property.[27] It is worth noting, however, that the entitlement to a remission of rent is not

[18] G Bradfield and K Lehmann *Principles of the Law of Sale and Lease* (3rd ed 2013) 141. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 146.
[19] G Bradfield and K Lehmann *Principles of the Law of Sale and Lease* (3rd ed 2013) 141.
[20] *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A).
[21] s 4(5)(a) RHA.
[22] SM Viljoen *The Law of Landlord and Tenant* (2016) 284-285.
[23] SI Mohamed *Tenant and Landlord in South Africa* (2nd ed 2010) 53.
[24] SI Mohamed *Tenant and Landlord in South Africa* (2nd ed 2010) 53.
[25] G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 359. See also SI Mohamed *Tenant and Landlord in South Africa* (2nd ed 2010) 53.
[26] s 4(2) RHA.
[27] SM Viljoen *The Law of Landlord and Tenant* (2016) 289-290.

absolute and can be limited or excluded by way of agreement between the contracting parties.[28] In other words, even where there has been a breach of contract at the instance of the landlord which resulted in diminished use and enjoyment of the premises, such a breach would not result in a remission of rent if the parties had agreed so at conclusion of the lease agreement.[29]

Rental amounts that are deemed "exploitative"[30] by the Rental Housing Tribunals (hereinafter referred to as the "tribunals") can be set aside and replaced with amounts that are "just and equitable".[31] In deciding on a fair and equitable rental amount, the tribunals are to consider both landlord and tenant and further consider "prevailing economic conditions."[32] A discussion of rent control measures will follow below detailing the monetary value, escalation and reduction of the rent payable.

2 2 2 Rent control, escalation and reduction

2 2 2 1 The concepts of rent control, escalation and reduction

In what economics deems a "free market system", the forces of supply and demand determine the price of goods and services with little to no government interference.[33] Viljoen explains that government intervention is triggered by "excess demand in the private rental market."[34] Rent control measures "suspend [the] normal operation of market forces,"[35] in that the government steps in to regulate the market forces by i.e., regulations and implementing rental ceilings.

A rental escalation refers to the practice of increasing the rental amount payable by a tenant for the use and enjoyment of a dwelling.[36] The escalation would ordinarily take place on an annual basis.[37] It has become standard practice to include an escalation

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[28] *Hyprop Investment Ltd v Sophia's Restaurant CC and Another* 2012 (5) SA 220 (GSJ) 223.See also P Stoop "The Law of Lease" (2012) *Annual Survey of South African Law* 691-699 691-694
[29] P Stoop "The Law of Lease" (2012) *Annual Survey of South African Law* 691-699 692
[30] s 13(4)(c)(iii) RHA.
[31] s 13(5) RHA.
[32] s 13(5)(a) RHA.
[33] Free Market Definition & Impact on the Economy (investopedia.com) (accessed 05/09/2022).
[34] SM Viljoen *The Law of Landlord and Tenant* (2016) 3.
[35] C Visser "Rent Control" (1985) *Acta Juridica* 349-368 349.
[36] M Putman "Lease escalation clauses using the consumer price index how well do they work" (1982) 7 *Oklahoma City University Law Review* 489–512 489.
[37] "Rental Escalations" - what are they? : EasyProperties (accessed 14/09/2022).

clause in a contract of lease.[38] The amount or percentage of escalation must be reasonable.[39]

In the event that a tenant's use and enjoyment of the dwelling is disturbed or interrupted, the tenant may claim a reduction or remission of rent as explained above.[40] Therefore, rent escalation concerns the upward adjustment of rental in keeping with inflation, while rent reduction or remission of rent is about a decrease the amount payable for rental or the extinction of the obligation to pay rent in specified circumstances.

2 2 2 2 Rent escalation and rent reduction within the lease agreement

It has become standard practice to include an escalation clause[41] in a contract of lease, this may be attributed to the rapid rise in the cost of living.[42] The inclusion of an escalation clause may serve as a safety net for both the landlord and the tenant. The clause offers a degree of forecast and certainty, since it clearly defines a pre-determined scope of applicability when the time arrives.[43]

The escalation of rental amounts can be based on numerous measures of calculation. Using the Consumer Price Index (hereinafter referred to as "CPI")[44] appears to be a globally accepted method of calculation. The increase rate is generally pre-determined (unilaterally by the landlord) and contained in the contract of lease. Once the duration of a contract of lease has come to an end, tenants usually have an option to renew the contract bearing that the rent amount will be increased per the stipulated escalation

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[38] G Bradfield and K Lehmann *Principles of the Law of Sale and Lease* (3rd ed 2013) 142.
[39] s 5(6)(c) RHA.
[40] See chapter 2, section 2.2.1 above.
[41] Escalation Clause (What It Is And Why It's Important) (incorporated.zone) (accessed 20/06/2022). An escalation clause is a pre-emptive contractual provision wherein the contract parties agree to adjust or increase the price as it currently stands within a certain time period (i.e., annually) or when a specified condition has been met (i.e., when there has been an inflation increase).
[42] M Putman "Lease escalation clauses using the consumer price index how well do they work" (1982) 7 *Oklahoma City University Law Review* 489–512 489-493.
[43] M Putman "Lease escalation clauses using the consumer price index - how well do they work" (1982) 7 *Oklahoma City University Law Review* 489-512 489.
[44] M Putman "Lease escalation clauses using the consumer price index - how well do they work" (1982) 7 *Oklahoma City University Law Review* 489-512 490. CPI is defined as, "The Consumer Price Index (often called the cost-of-living index) is a statistical measure of the change in prices over time, of a "market basket" of goods and services".

rate.[45] In the event that an escalation rate has not been stipulated (pre-determined), the contracting parties are to negotiate a suitable rate.

Interestingly, although we are accustomed to an escalation clause (which is synonymous with the word "increase")[46] economics teaches us that de-escalation might very well be a possibility. Should modern-day contracts include a de-escalation clause?[47] Such a clause is unlikely to find favour with landlords since it may affect their entitlement to raise rental rates periodically without regard to true economic conditions. The introduction of a de-escalation clause[48] may constitute a rent reduction tool.[49] De-escalation and remission of rental may both serve as tools to achieve a reduction of rent. However, the two are distinguishable in that a remission of rent is dependent on a breach of contract by the landlord,[50] whereas de-escalation will kick in, the cost-of-living declines for payments to be adjusted downward.[51] During the course of this dissertation, I will discuss both methods highlighted above.

2 2 2 3 Rent escalation and reduction in legislation

Willis describes the genesis of rent control as follows:

> "[in] almost every instance the hand of the legislator has been forced by some calamitous event or situation which has upset the normal state of affairs–war, depression, earthquake, fire, plague, or some other vagary of history which either destroys the balance of supply and demand, thereby creating a housing shortage, or makes it impossible for tenants to continue to pay their contractual rents".[52]

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[45] s 6(4) Gauteng Unfair Practice Regulations, states that a landlord is to provide the tenant with a written notice two months before increasing the rent.
[46] M Putman "Lease escalation clauses using the consumer price index - how well do they work" (1982) 7 *Oklahoma City University Law Review* 489-512 491.
[47] M Putman "Lease escalation clauses using the consumer price index - how well do they work" (1982) 7 *Oklahoma City University Law Review* 489-512 489-491. Various methods can be used to calculate the rate of escalation. The writer lists the following, "the contractual escalation of rents may be based on numerous measures (indexes) or occurrences such as an increase in real estate taxes, increased operating expenses or a change in the sales volume of the lessee".
[48] What is Escalation & De-Escalation Clause? (charteredclub.com) (accessed 02/11/2022) The article stipulates that a "de-escalation clause is the opposite of an escalation clause. De-escalation clause in a contract calls for a price decrease if there is a decrease in certain costs."
[49] M Putman "Lease escalation clauses using the consumer price index - how well do they work" (1982) 7 *Oklahoma City University Law Review* 489-512 491.
[50] See chapter 2, clauses 2.2.1 and 2.2.2.1 above.
[51] M Putman "Lease escalation clauses using the consumer price index - how well do they work" (1982) 7 *Oklahoma City University Law Review* 489-512 491. See also What is Escalation & De-Escalation Clause? (charteredclub.com) (accessed 02/11/2022).
[52] JW Willis "A short history of rent control laws" (1950) 36 *Cornell Law Review* 54-94 54.

Through legislation, the state can intervene by placing restrictions on rent increases.[53] It is not uncommon for governments across the globe to put restrictions on rent increases. For example, during the sixteenth and seventeenth centuries, the government of France granted rent reductions and rent delays to tenants who were unable to pay their landlords on account of a stagnant economy.[54] Examples, also exist in the South African context. After the first World War, South Africa faced a housing shortage which Maass describes as a ground "for the potential exploitation of tenants."[55] The Tenants Protection (Temporary) Act 7 of 1920 and the Rents Act 13 of 1920 were enacted to curb the effects of the first World War. In other words, these legislative measures were aimed at addressing the housing shortage that the white minority faced in the 1920's.[56] This was practically achieved by restricting rent increases and enabling tenants to remain in occupation of the dwelling despite the expiration of their lease contracts.[57] It is noteworthy that both the aforementioned Acts were intended to operate temporarily.

The Tenants Protection (Temporary) Act 7 of 1920 was South Africa's first rent control legislation.[58] By automatically creating a statutory periodic tenancy after the expiration of a fixed term contract of lease, the Act provided urban tenants with substantive tenure protection.[59] In order to remain in occupation of the dwelling upon the expiration of the contract of lease, the tenant was required to continue paying rent and to continue complying with other conditions which were previously agreed upon.[60] A tenant who complied with the above effectively restricted a landlord's right to evict upon termination of the contract of lease.[61]

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[53] The words, "rent increase" and "escalation" will be used synonymously.
[54] JW Willis "A short history of rent control laws" (1950) 36 *Cornell Law Review* 54-94 58.
[55] SM Maass "Rent control: a comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 48-49.
[56] G Muller and SM Viljoen *Property in Housing* (2021) 107-108. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 2.
[57] G Muller and SM Viljoen *Property in Housing* (2021) 108. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 2.
[58] SM Maass "Rent Control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 59.
[59] SM Viljoen *The Law of Landlord and Tenant* (2016) 7. See also SM Maass "Rent Control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 59.
[60] SM Maass "Rent Control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 59.
[61] SM Viljoen *The Law of Landlord and Tenant* (2016) 7.

The Rent Control Act 80 of 1976[62] (hereinafter referred to as "RCA") was eventually introduced after various extensions and amendments of its two predecessors mentioned above. The RCA was regarded as South Africa's rent control framework.[63] The aim of the RCA was to quite literally control the amount of rent payable and in so doing provide tenants with security of tenure.[64] This was achieved by implementing a rent freeze at the rate charged on the 1st of April 1949.[65] The effect of which was the eradication of rent escalations. The RCA has since been repealed by the RHA.

Section 6(c) of the RHA states that a contract of lease is to contain amongst various specified details, the amount of rental and a "reasonable escalation". It follows then, that the rate of escalation is currently not regulated by law in South Africa. It appears that the RHA has neglected to provide legal certainty regarding what may be deemed as "reasonable".[66]

The Rental Housing Amendment Act 35 of 2014[67] (hereinafter referred to as the "RHAA") which is not yet in force attempts to elaborate and provide guidance on the calculation of an escalation amount. Section 17(fB) reads as follows:

> "[The] calculation method for escalation of rental amounts and the maximum rate of deposits which may be payable in respect of a dwelling and which may be set per geographical area to avoid unfair practices particular to that area"[68]

In other words, in order to prevent unfair practices, each geographical area may determine a method to calculate the rate of escalation of rental amounts and the maximum deposit rate applicable to a dwelling. The aforementioned provision does not appear to provide clarity as it merely states that an escalation amount *may* be set in accordance with a geographical area, essentially constituting a discretionary provision.

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[62] Rent Control Act 80 of 1976 ("RCA").
[63] PHJ Thomas "The Rental Housing Act" (2000) 33 *De Jure* 235-247 235-236.
[64] SM Maass "Rent Control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 63.
[65] SM Maass "Rent Control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41-100 63. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 14.
[66] s 13 RHA provides the Rental Housing Tribunal with authority to determine the reasonableness of an escalation.
[67] Rental Housing Amendment Act 35 of 2014 ("RHAA").
[68] s 15(fB) RHAA.

2 3 Eviction of tenants holding over

2 3 1 Contextualisation

Eviction proceedings usually commence when a contract of lease has been validly terminated, yet the tenant refuses to vacate the property.[69] In these circumstances the tenant becomes a tenant holding over because of his change of legal status from a lawful occupier to an unlawful occupier.[70] At common law, an owner-landlord alleging that his right of ownership has been interrupted would institute the *rei vindicatio* as a remedy.[71] The *rei vindicatio* is a real action wherein an owner can claim his property from whomever is in possession thereof.[72] The owner-landlord need only prove that the tenant is in unlawful possession.[73] A tenant would in turn be required to establish a valid legal reason justifying his continued occupation of the property.[74]

At common law, an eviction order would not be granted to an owner-landlord if the tenant successfully establishes a valid legal right to remain in occupation of the property.[75] Eviction proceedings did not consider the circumstances and consequences of eviction on the tenant.[76] Delport correctly points out that "a tenant

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[69] s 5(5) RHA states that either party wishing to terminate the lease must provide the other party with a one month written notice advising of the intention to terminate the lease agreement. See also H Delport "Eviction of a Tenant after termination of a lease of residential premises" (2008) *Obiter* 472-488 473. See also SI Mohamed *Tenant and Landlord in South Africa* (2nd ed 2010) 73-74.

[70] s 1 PIE Act. See also *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) paras 5,11.

[71] *Chetty v Naidoo* 1974 (3) SA 13 (A). See also Akbar v Patel 1974 (4) SA 104 (T) 104. See also G Muller, R Brits, JM Pienaar and ZT Boggenpoel *Silverberg and Schoeman's The Law of Property* (6th ed 2019) 269-270. See also AJ van der Walt *Property in the Margins* (2009) 56-57. See also EWJ du Plessis "Can estoppel be raised against an eviction of PIE?" (2015) 30 *Southern African Public Law* 434-455 434.

[72] *Chetty v Naidoo* 1974 (3) SA 13 (A). See also *Akbar v Patel* 1974 (4) SA 104 (T) 104. See also G Muller, R Brits, JM Pienaar and ZT Boggenpoel *Silverberg and Schoeman's The Law of Property* (6th ed 2019) 270. See also H Mostert and A Pope *The Principles of The Law of Property in South Africa* (2013) 217. See also Boggenpoel ZT "(Re)Defining the contours of ownership: Moving beyond white picket fences," (2019) 30 *Stellenbosch Law Review* 234-249 236,237.

[73] *Chetty v Naidoo* 1974 (3) SA 13 (A) 15. See also G Muller, R Brits, JM Pienaar and ZT Boggenpoel *Silverberg and Schoeman's The Law of Property* (6th ed 2019) 270. See also AJ van der Walt *Property in the Margins* (2009) 56-57. See also H Mostert and A Pope *The Principles of The Law of Property in South Africa* (2013) 217.See also EWJ du Plessis "Can estoppel be raised against an eviction of PIE?" (2015) 30 *Southern African Public Law* 434-455 435.

[74] *Chetty v Naidoo* 1974 (3) SA 13 (A) 14-15. See also G Muller, R Brits, JM Pienaar and ZT Boggenpoel *Silverberg and Schoeman's The Law of Property* (6th ed 2019) 271. See also AJ van der Walt *Property in the Margins* (2009) 57-58.

[75] *Chetty v Naidoo* 1974 (3) SA 13 (A) 13. See also H Mostert and A Pope *The Principles of The Law of Property in South Africa* (2013) 219. See also H Delport "Eviction of a tenant after termination of a lease of residential premises" (2008) *Obiter* 472-488 472.

[76] H Delport "Eviction of a tenant after termination of a lease of residential premises" (2008) *Obiter* 472-488 475 regarding the PIE Act "It has been said that the PIE Act is essentially socialistic in nature; that it is a piece of welfare legislation formulated upon humanitarian lines, and that the procedures to be

facing an eviction claim at common law has no defence based on equity considerations. Unless the tenant can establish some legal right to remain in occupation despite termination of lease … an eviction order must be granted."[77]

Section 39(2) of the Constitution states that in developing and interpreting law, the spirit, purport and objects of the Bill of Rights must be promoted.[78] In light of this, the common law position regarding evictions as explained above has seen considerable change since the passing of the final Constitution.[79] The Constitution is regarded as supreme law in South Africa.[80] This means that all law (which includes common law, customary law and legislation) must be consistent with the Constitution. Section 25(1) of the Constitution invalidates any law permitting arbitrary deprivation of property.[81] Section 26(3) of the Constitution states that no one may be evicted from their home without an order of court, the provision further invalidates any law permitting arbitrary evictions.[82] These constitutional provisions have changed the landlord's common law right in that before an eviction order is granted, a court must now consider all relevant circumstances, simply alleging that a tenant is in unlawful possession no longer guarantees a successful eviction.

The PIE Act which will be discussed in more detail below is founded on the abovementioned constitutional provisions, particularly section 26(3) of the Constitution. It is worth reiterating at this point that a landlord's right to terminate a contract of lease has remained intact. The point of contention is brought about when a tenant refuses to vacate the property following a termination of the contract. This is then the genesis of eviction proceedings.

2 3 2 Two-stage approach

2 3 2 1 Termination of occupancy right

followed in terms of the Act before an eviction order can be issued have made inroads into the rights of property owners to protect their property against unlawful occupation".

[77] H Delport "Eviction of a Tenant after termination of a lease of residential premises" (2008) *Obiter* 472-488 473.

[78] s 39(2) Constitution.

[79] The Constitution of the Republic of South Africa, 1996. See also G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 333.

[80] s 2 Constitution.

[81] s 25(1) Constitution.

[82] s 26(3) Constitution.

The termination of a contract of lease occurs in one of two ways, the first being upon expiration of the contract of lease through an effluxion of time and the second occurs when either of the parties (landlord and tenant) serve the other with a notice of termination.[83] Once the contract of lease has been terminated, the tenants right to undisturbed use and enjoyment comes to an end and he is obliged to restore the dwelling to the landlord, failure to do so renders the tenant guilty of "holding over".[84]

The RHA has significantly transformed the common law position insofar as the termination of lease is concerned. A landlord may only terminate a contract of lease if such termination would not amount to an "unfair practice".[85] Section 15(f) of the RHA provides a list of practices rendered as "unfair".

The tribunals are a body established in terms of section 7 of the RHA.[86] These bodies are to be established on a provincial level by the relevant Member(s) of the Executive Council (hereinafter referred to as "MEC"). Section 8 of the RHA denotes the functions of the tribunals which is to fulfil the duties imposed upon it by Chapter 4 of the RHA.[87] Section 13(1) of the RHA establishes the scope of the tribunals mandate which entails hearing matters alleged to constitute an "unfair practice".[88] Unfair practice is defined in the Act as *"*a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord."[89]

The importance of the tribunals was affirmed by the Constitutional Court[90] in the case of *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd.*[91] For purposes of the discussion that is to follow, section 26(3) of the Constitution is of particular importance. The section reads as follows, "No one may be evicted from their home, or

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[83] G Muller and SM Viljoen *Property in Housing* (2021) 108-109. A contract of lease may be terminated in various ways which include but are not limited to, termination by way of an agreement, influx of time, breach of contract, operation of law. For purposes of this research paper, it is not intended that the various avenues of termination be discussed. The two grounds of termination highlighted in the main text above are regarded as the primary grounds for termination.
[84] G Muller and SM Viljoen *Property in Housing* (2021) 109.
[85] SM Viljoen "The constitutional protection of tenants' interests: a comparative analysis" (2014) *Comparative and International Law Journal of Southern Africa* 460-489 463.
[86] s 7 RHA reads that, "The MEC may by notice in the Gazette establish a tribunal in the Province to be known as the Rental Housing Tribunal".
[87] s 8 RHA "The Tribunal must fulfil the duties imposed upon it in terms of this Chapter, and must do all things necessary to ensure that the objectives of this Chapter are achieved".
[88] s 13(1) RHA "Any tenant or landlord or group of tenants and landlords or interest group may in the prescribed manner lodge a complaint with the Tribunal concerning an unfair practice".
[89] s 1 RHA.
[90] Constitutional Court of the Republic of South Africa (CC).
[91] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC).

have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." The question before the court in the aforementioned case as articulated by Cameron J relates to, "when a landlord may cancel a lease and evict its tenants. Behind this lies the impact of the protection the Constitution affords against eviction."[92] The manner in which the question has been phrased by the honourable Justice is indicative of the two-stage process that is to take place when a landlord evicts a tenant, namely that the tenant's right of occupation must first be terminated before the landlord may institute eviction proceedings.[93]

The facts of the *Maphango* case are briefly set out as follows; the applicants in this case were tenants who resided in a block of apartments in Braamfontein, Johannesburg.[94] The applicants were tenants to various landlords and as such held different contracts of leases which differed in terms of certain provisions such as, the renewal period, the escalation amount etc.[95] In 2009, the respondent who is a private company, took over (purchased) all the apartments and consequently took over all the lease agreements.[96] After improving upon the building, the respondent sought to increase the rental amounts.[97] The lease agreements were then terminated by way of notice by the responded (in terms of the existing lease agreements, the landlord was entitled to do so).[98] The responded provided the tenants with the option of continued occupation on the basis of the new lease contracts. The reason for termination was that the landlord wanted to increase the rental amounts above the escalation as stipulated in the existing lease contracts.[99] The tenants refused to vacate the premises and refused to accept the terms of the new lease agreements. The tenants reported this matter to the Gauteng Rental Housing Tribunal accusing the respondent of various grievances, including the unfairness of the rent escalation.[100] The landlord instituted eviction proceedings in the High Court before the tribunal had engaged the matter.[101]

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[92] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 534.
[93] SM Maass "Conceptualising an unfair practice regime in landlord-tenant law" (2012) 27 *Southern African Public Law* 652-670 652.
[94] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 534.
[95] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 535.
[96] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 536-537.
[97] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 537.
[98] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 537.
[99] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 537.
[100] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 537-538.
[101] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 538.

The South Gauteng High Court granted the eviction order in favour of the landlord.[102] This matter was appealed and the SCA confirmed the decision of the High Court.[103] However, the Constitutional Court held that it was within the sphere of the tribunal to rule on whether the termination of lease(s) constituted unfair practice.[104] The court explained the role and importance of the tribunal in deciding on whether or not an unfair practice had occurred.[105] The court reserved judgment and the matter was referred to the tribunal to make a determination.[106] The court in this case appears to have been more concerned with the legitimacy of the ground of termination. Quite obviously, it would follow that if the ground for termination is found to be illegitimate, the eviction proceedings would be nullified.

This decision has received much criticism. The court may be applauded for affirming the importance of the tribunals. The court affirmed that the tribunals are to preside over all unfair practice disputes.[107] Consequently, this means that the tribunals have the power to overturn and set aside termination of leases if found to constitute unfair practice.[108]

Section 13(14) RHAA has been specific in declaring that, "the Tribunal does not have jurisdiction to hear applications for eviction orders." Given that the tribunal in section 13(13) of the RHA[109] has been afforded the same status of a Magistrate's Court, it appears misaligned that the tribunal would not have jurisdiction to hear applications for eviction orders.

Maass is of opinion that the distinction between the *Maphango* case and other landlord-tenant eviction cases[110] lie in that the majority of the court held that the RHA (through the tribunals) has the power to invalidate a landlord's reason for termination of a contract of lease. In so doing, the court has aided in providing tenants with

[102] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 539.
[103] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 540-541.
[104] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 554-555.
[105] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 554.
[106] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 557.
[107] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 556-557.
[108] SM Viljoen "The constitutional protection of tenants' interests: a comparative analysis" (2014) *Comparative and International Law Journal of Southern Africa* 460-489 477. The court failed to develop the common law by not making a pronouncement on whether or not, it is prudent that a landlord may cancel an existing lease agreement for the purposes of increasing rent.
[109] s 13(13) RHA states that, "a ruling by the Tribunal is deemed to be an order of a magistrate's court in terms of the Magistrates' Court Act. 1944 (Act No. 32 of 1944)".
[110] *Absa Bank Ltd v Amod* 1999 (2) All SA 423 (W). See also and *Ellis v Viljoen* 2001 (4) SA 795 (C).

"substantive tenure protection". Thus, the contract of lease remains intact while termination thereof is set aside. Tenants whose occupation had become unlawful post the termination of a contract of lease are now permitted to remain in occupation until a tribunal has decided whether a termination constituted an unfair practice. The unfair practice qualification allows for the consideration of socio-economic factors before the tenant's right to occupy the property is formally terminated. It is submitted that the developments in the *Maphango* case regarding unfair practice under the RHA constitute a rent control measure specifically related to the conditions for eviction.[111]

The conditions for eviction are discussed here (pre the eviction stage) because the process falls within both the RHA and PIE Act. Section 5 (5) of the RHA states that a landlord must provide notice to the tenant of his intention to terminate the lease agreement. Should the tenant refuse to vacate, only then can PIE be used.

2 3 2 2 Eviction process

It is worth re-iterating that to begin an eviction process, a valid termination must have preceded.[112] At common law, the general practice was that unless a contract of lease expressly stated otherwise, a tenant could be evicted from the leased property for "any reason or no reason at all".[113] The only requirement was that a landlord provide the tenant with a reasonable notice of termination.[114] The common law position quite simply affirms an owner's rights to his property.[115] An owner of a property is entitled to possession thereof and may claim it from whomever is in possession of it.[116] Once an

[111] SM Maass "Conceptualizing an unfair practice regime in landlord-tenant law" (2012) 27 *Southern African Public Law* 652-670 652,653 "Once the private landlord-tenant market is deregulated and rent control is phased out, the common law will resurface".
[112] SM Maass "Conceptualising an unfair practice regime in landlord-tenant law" (2012) 27 *Southern African Public Law* 652–670 655.
[113] FW Roisman "The right to remain: common law protections for the security of tenure – an essay in honor of John Otis Calmore" (2008) 86 *North Carolina Law Review* 817-858 831.
[114] FW Roisman "The right to remain: common law protections for the security of tenure – an essay in honor of John Otis Calmore" (2008) 86 *North Carolina Law Review* 817-858 831.
[115] S Wilson "Breaking the tie: Evictions from private land, homelessness and a new normality" (2015) 30 *Southern African Law Journal* 270–290 270,271.
[116] *Chetty v Naidoo* 1974 (3) SA 13 (A) JA Jansen states the following at paragraph 20 "… there can be little to no doubt that one of its incidents is the right of exclusive possession of the res, with necessary corollary that the owner may claim his property wherever found, from whomsoever holding it".

owner-landlord has established that the contract of lease was validly terminated,[117] he is then entitled to restoration of the property.

Two scenarios are presented in this regard:

1. Where the said owner-landlord acknowledges the existence of a valid lease agreement concluded with a tenant, the onus was on the owner-landlord to prove that the lease had been validly terminated; or
2. Where the owner-landlord avers that a valid contract of lease agreement was not in place, the onus was then on the tenant to prove that a valid contract of lease was indeed in place and as such, the lease had not been validly terminated.[118]

It has been established above that tribunals are the first port of call in the two-stage termination process of a contract lease.[119] Next, the question arises: Are the tribunals competent to hear eviction orders? If so, in order to obtain such a court order, how would a landlord proceed in obtaining such an order?

There has been much uncertainty as to whether PIE was intended to apply to the lease of residential properties, that is the landlord-tenant relationship.[120] As we know from the discussion above, it is required that a valid termination has occurred, the said termination must then be ruled as not being unfair by the tribunal(s).[121] Should a tenant still refuse to vacate the property, only then may a landlord approach the court for an eviction order.

PIE came into effect on 05 June 1998. It was introduced to address the unfair eviction process of the past.[122] It provides for the procedural and substantive protection in the face of eviction proceedings.[123] In the past, the ownership of property was exclusively

[117] A contract of lease may be terminated in various which include but are not limited to, termination by way of an agreement, influx of time, breach of contract, operation of law. For purposes of this research paper, it is not intended that the various avenues of termination be discussed.
[118] S Wilson "Breaking the tie: evictions from private land, homeless and a new normality" (2015) 30 *Southern African Law Journal* 270-290 270.
[119] See chapter 2, section 2.3.2.1 above.
[120] G Glover *Kerr's law of sale and lease* (4th ed 2014) 481. "Whether the PIE Act applied to the eviction of former tenants required the Courts to interpret its provisions".
[121] See chapter 2, section 2.3.2.1 above.
[122] PIE Act preamble. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 11-13.
[123] D Bilchitz and D Mackintosh "PIE in the sky: where is the constitutional frame-work in High Court eviction proceedings? Marlboro crisis committee and others v City of Johannesburg" (2014) *Southern African Law Journal* 521- 537 521.

reserved for white South African's. People of colour were not permitted to own land in urban areas. It is for this reason that;

> "…[the] historical context of South Africa: property law today cannot simply assume that ownership is deserved and that anyone occupying land has no entitlement to be there. The history of dispossession in South Africa created a skewed pattern of ownership and places doubt around the very legitimacy of ownership rights… A past pattern of unjust dispossession requires rectification of the status quo before the justice of existing property relations can be asserted."[124]

PIE gives effect to section 26(3) of the Constitution. The Constitutional Court has been clear in stating that, the application of PIE is not discretionary but mandatory.[125]

Section 2 of PIE denotes that PIE "applies in respect of all land throughout the Republic".[126] PIE prohibits the eviction of "unlawful occupiers" except on authority of an order of a competent court.[127] It is noteworthy that section 8(1) of PIE does not alter the common law position,[128] as previously discussed, at common law a landlord was only permitted to evict a tenant once a court had granted an eviction order.[129]

The definition of "unlawful occupier" is of particular importance as it sets out to whom the Act applies. The definition reads as, "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996)."[130] Delport explains that "a person in charge" as reflected in the definition of unlawful

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[124] D Bilchitz and D Mackintosh "PIE in the sky: where is the constitutional frame-work in High Court eviction proceedings? Marlboro crisis committee and others v City of Johannesburg" (2014) *Southern African Law Journal 521*- 537 525.
[125] *Machele and Others v Maiula and Others* 2010 (2) SA 257 (CC) para 15-16, the Constitutional Court states the following; "The application of PIE is not discretionary. Courts must consider PIE in eviction cases".
[126] s 2 PIE Act.
[127] H Delport "Eviction of a tenant after termination of a lease of residential premise" (2008) *Obiter* 472–488 474.
[128] S Wilson "Breaking the tie: Evictions from private land, homelessness and a new normality" (2015) 30 *Southern African Law Journal* 270–290 270. See also MA Greig "The 'textual hash' in PIE and the lean-to of PISA" (2003) 15 *South African Mercantile Law Journal* 278-284 278.
[129] See chapter 2, sections 2.3.1 and 2.3.2.2 above.
[130] s 1 PIE Act.

occupier refers to a person who may have the legal authority to act on behalf of an owner, such as a landlord.[131]

ABSA Bank Ltd v Amod[132] is an early case which held that PIE does not apply to lease agreements.[133] The applicant sought an eviction order from the court after the responded refused to vacate the leased dwelling.[134] The responded rejected the eviction on the ground that the procedural requirements of PIE had not been complied with.[135] The court rejected the defence. The court held that, "the statute [PIE] must not be presumed to alter the common law".[136] The court affirmed a property owners' common law right to evict and further held that it was not the legislature's intention that PIE apply to contract of lease of a dwelling.[137]

The interpretation regarding the applicability of PIE as articulated in the case of *ABSA Bank Ltd v Amod* was altered by the joint decision of the SCA in the cases of *Ndlovu v Ngcobo; Bekker and Another v Jika*[138] (hereinafter referred to as "*Ndlovu and Bekker*"). It was held that PIE does indeed apply to contracts of lease for residential dwellings.[139] The facts of the case are briefly set out below.

In the case of *Ndlovu v Ngcobo,* Mr Ndlovu (hereinafter referred to as the "appellant") and Mr Ngocbo (hereinafter referred to as the "respondent") concluded a contract of lease wherein the appellant took lawful occupation of a residential dwelling.[140] The respondent subsequently lawfully terminated the contract at which point the appellant refused to vacate the property.[141] The respondent then instituted action in the Magistrate's Court for an eviction order in terms of section 4 of PIE. The court found that the respondent is not an unlawful occupier in terms of PIE and therefore the appellant is not entitled to its protection.[142] This decision was appealed which appeal was subsequently dismissed by the High Court.[143]

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[131] H Delport "Eviction of a tenant after termination of a lease of residential premise" (2008) *Obiter* 472–488 474.
[132] *ABSA Bank Ltd v Amod* 1999 (2) All SA 423 (W).
[133] *ABSA Bank Ltd v Amod* 1999 (2) All SA 423 (W) 430.
[134] *ABSA Bank Ltd v Amod* 1999 (2) All SA 423 (W) 425-426.
[135] *ABSA Bank Ltd v Amod* 1999 (2) All SA 423 (W) 426.
[136] *ABSA Bank Ltd v Amod* 1999 (2) All SA 423 (W) 428.
[137] *ABSA Bank Ltd v Amod* 1999 (2) All SA 423 (W) 430.
[138] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA).
[139] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 125.
[140] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 119.
[141] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 119.
[142] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 119.
[143] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 119.

In the case of *Bekker and Another v Jika*,[144] Bekker and Boch (hereinafter collectively referred to as the "appellants") were the registered owners of a residential dwelling in Port Elizabeth.[145] Mr Jika (hereinafter referred to as the "respondent") was the previous owner of the appellants property.[146] The respondent held a mortgage bond over the property in favour of First National Bank (hereinafter referred to as the "bank").[147] The responded failed to keep up with the obligations due in terms of the mortgage bond agreement and the bank issued summons to attach the property and sell it in a sale and execution.[148] The bank succeeded and obtained default judgement against the respondent.[149] The property was then sold to the appellants.[150] The respondent refused to vacate and on that basis the appellants approached the High Court for an order of eviction.[151] The High Court ruled that the eviction procedure as set out in PIE was indeed applicable to this case.[152] The case was dismissed because the appellants did not comply with the said procedural requirements set out in section 4 of PIE .[153]

Both cases were heard concurrently by the SCA.[154] In both cases, the applicants did not comply with the procedural requirements of PIE. The question before the court related to whether they were obliged to do so.[155] In answering this question, the definition of "unlawful occupier" was of particular importance.[156] Is the term only applicable to individuals who were in unlawful possession at the time of inception (squatters) or does it also apply to those who were once in lawful occupation and then became unlawful?[157] Based on the court's ruling, both cases involve "holding over" since the occupiers did not have the required consent to occupy the premises.[158] The

[144] *Bekker and Another v Jika* 2002 (4) SA 508 (E).
[145] *Bekker and Another v Jika* 2002 (4) SA 508 (E) 509.
[146] *Bekker and Another v Jika* 2002 (4) SA 508 (E) 509.
[147] *Bekker and Another v Jika* 2002 (4) SA 508 (E) 510.
[148] *Bekker and Another v Jika* 2002 (4) SA 508 (E) 510.
[149] *Bekker and Another v Jika* 2002 (4) SA 508 (E) 510.
[150] *Bekker and Another v Jika* 2002 (4) SA 508 (E) 510.
[151] *Bekker and Another v Jika* 2002 (4) SA 508 (E) 510.
[152] *Bekker and Another v Jika* 2002 (4) SA 508 (E) 523.
[153] *Bekker and Another v Jika* 2002 (4) SA 508 (E) 523.
[154] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA).
[155] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 119.
[156] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 120.
[157] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 120.
[158] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 120.

court also held that persons holding over do indeed qualify as "unlawful occupiers" as defined in section 1 of PIE .[159]

The *Ndlovu* case was successful in its appeal at the SCA. It was held that the appellant was indeed an unlawful occupier in terms of PIE.[160] In the *Bekker* case, the SCA held that PIE does indeed apply to ex-mortgage bond holders. The case was dismissed due to non-compliance of the procedural requirements set out in PIE.[161]

The decision of the SCA affirms the interconnectivity between the RHA and PIE in the sense that the case confirms that a valid termination of a lease contract must first occur, and then a tenant will be an unlawful occupier when the provisions of PIE can be enforced. Soon after the judgements in the *Ndlovu* and *Bekker* cases were handed down by the SCA, the Department of Housing at the time advocated amending PIE to exclude landlord-tenant law.[162] There have since been several proposed amendment bills addressing the above.[163] Section 2(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2006[164] (hereinafter referred to as the "PIE Amendment Bill") states that the Act does not apply to eviction proceedings involving tenant's or former tenants.[165]

The proposed amendment per the highlighted section 2(2) PIE Amendment Bill above has not been approved therefore, as demonstrated in the two cases discussed above, the definition of an unlawful occupier currently includes tenant's holding over.

Section 4 of PIE in particular outlines the substantive and procedural requirements that a landlord must satisfy to succeed with an eviction application against a tenant holding over.[166]

Section 4(6) of PIE applies to tenants who have been in occupation of the dwelling for a period of less than six months at the time the proceedings were initiated, whilst section 4(7) of PIE applies to tenants who have been in occupation of the dwelling for a period of more than six months at the time the proceedings were initiated. In both

[159] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 125.
[160] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 125.
[161] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 125.
[162] G Glover *Kerr's Law of Sale and Lease* (4ed 2014) 484.
[163] G Glover *Kerr's Law of Sale and Lease* (4ed 2014) 484-485.
[164] Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2006 issued in GN 1851 GG29501 of 22 December 2006.
[165] s 2(2) PIE Amendment Bill. See also G Glover *Kerr's Law of Sale and Lease* (4ed 2014) 484-485.
[166] G Glover *Kerr's Law of Sale and Lease* (4ed 2014) 486.

instances, the court may only grant an order for eviction if it is just and equitable to do so and after having considered all relevant circumstances "including the rights and needs of the elderly, children, disabled persons and households headed by women". However, in terms of section 4(7) of PIE, the court must investigate whether alternative accommodation can be made available by the municipality or another organ of state or another land owner for the unlawful occupier.[167]

2 4 Preliminary findings

A contract of lease creates reciprocal rights and duties for the landlord and tenant. The tenant's primary obligation is to pay rent to the landlord whilst the landlord's primary obligation is to provide the tenant with undisturbed use and enjoyment of the leased dwelling. Regarding the tenant's primary obligation to pay rent, failure to do so will ordinarily result in a breach of contract except in the instance where a tenant's failure to pay rent is as a result of a breach by the landlord. The tenant may be able to claim a rent reduction in this situation.

South Africa faces a housing shortage, in particular a lack of affordable housing. Rent control legislation such as the Tenants Protection (Temporary) Act 7 of 1920 and the RCA were previously used to combat the lack of affordable housing. This was done by regulating rent escalations and implementing rent ceilings. The rent control legislative frameworks above have been repealed and replaced by the RHA, which regulates landlord-tenant relationships. Unlike its predecessors, the RHA does not provide rent de-escalation and rent reduction measures. In consequence, tenants are at an increased risk of facing termination of their lease because they are unable to keep up with rental payments due to rental increases and/or other unforeseen factors that cause financial strain. However, the RHA has extended powers to the Rental Housing Tribunals in that the tribunals can set aside and replace rental amounts that are deemed "exploitative" [168] with "just and equitable"[169] rental amounts.

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[167] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) para 46 wherein the Constitutional Court held that where an eviction may render persons homeless, alternative accommodation must be made available by organs of state.
[168] s 13(4)(c) (iii) RHA. See chapter 2, section 2.2.1 above.
[169] s 13(5) RHA. See chapter 2, section 2.2.1 above.

Landlords' common law rights of eviction have been considerably altered by the Constitution, which stipulates that no one may be arbitrarily evicted from their homes and that a court must consider all relevant circumstances before granting an order of eviction. Further the RHA provides that a landlord may only terminate a contract of lease if such termination would not amount to "unfair practice".[170] *Maphango v Aengus Lifestyle Properties (Pty) Ltd* affirmed the importance of the tribunals in determining whether conduct constitutes unfair practice.[171] Lastly, PIE provides a set of substantive and procedural requirements that must be met when an eviction order is issued. Prior to *Ndlovu v Ngcobo; Bekker and Another v Jika*, it was unclear whether PIE applied to tenants holding over. It has since been clarified that tenants holding over are unlawful occupiers in terms of PIE. This means that a landlord looking to evict a tenant holding over, must do so in terms of PIE.

The interconnectivity between the RHA and PIE is indicative of the two-stage process that is to take place when a landlord evicts a tenant, namely that the tenants right of occupation must first be terminated before the landlord may institute eviction proceedings.[172]

The creation of the tribunals who are mandated to solely deal with matters relating to the relationship between landlords and tenants is commendable. Empowering tribunals to rule on what may be regarded as "unfair practice" will relieve courts of the pressure of deciding on such matters.

The chapter showed the immense strides that have been made in the protection of tenants against arbitrary evictions. Notably, it appears that tenant's protection against the termination of lease relationships due to inability to pay rental or the full rental as result of circumstances seem to have decreased. This is qualified by the developments in the *Maphango* case which affirm the two-stage approach to eviction and further affirm the powers of the tribunals who are mandated to consider all relevant circumstances before confirming the landlords right to cancel a contract of lease. The

[170] SM Viljoen "The constitutional protection of tenants' interests: a comparative analysis" (2014) *Comparative and International Law Journal of Southern Africa* 460-489 463.
[171] A contract of lease may be terminated in various which include but are not limited to, termination by way of an agreement, influx of time, breach of contract, operation of law. For purposes of this research paper, it is not intended that the various avenues of termination be discussed.
[172] SM Maass "Conceptualising an unfair practice regime in landlord-tenant law" (2012) 27 *Southern African Public Law* 652-670 652.

inability to pay rent is a very real circumstance that must be considered given the state of the economy.

CHAPTER 3
RENT REDUCTION, RENT ESCALATION AND EVICTION DURING COVID-19

3 1 Introduction

It is trite that under ordinary circumstances, the failure to pay rent for the occupation of a residential dwelling constitutes a breach of a lease contract,[1] in which event a landlord is ordinarily entitled to terminate the contract of lease and claim damages if applicable.[2] Should the landlord elect to cancel the contract of lease,[3] a tenant is obliged to vacate the residential dwelling. If the tenant fails to do so, the tenant becomes an unlawful occupier.[4] This change of status from tenant to unlawful occupier entitles a landlord to institute eviction proceedings in terms of sections 4 or 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter referred to as the "PIE Act").[5]

In view of the recent pandemic, the question that arises is if and how the law made provision for firstly, the continuation of the lease relationship and secondly protection against eviction in instances where tenants were unable to meet rental obligations due to circumstances beyond their control such as the Covid-19 pandemic? In this regard, the aim of this chapter is to in light of the above questions, provide an overview of the relevant regulations introduced by the Disaster Management Act 57 of 2002 (hereinafter referred to as "the DMA") during the pandemic. To this end, the first part of this chapter will briefly outline the international and national regulatory framework used to assist in upholding the right of access to adequate housing in spite of the pandemic. The chapter will then explore common law principles which may be used to resist or delay the fulfilment of rental obligations during a pandemic.

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[1] G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 428. In the event that a tenant has breached the contract of lease (mora), Glover highlights that the remedies available to the landlord would include, "specific performance and damages supplementary to performance, and cancellation and supplementary relief".
[2] See chapter 2, section 2.3.2.2 above. See also G Bradfield and K Lehmann *Principles of the Law of Sale and Lease* (3rd ed 2013) 158.
[3] s 5(5) Rental Housing Act 50 of 1999 ("RHA") states that either party wishing to terminate the contract of lease must provide the other party with at least one month's written notice of his/her intentions.
[4] See chapter 2, section 2.3.1 above.
[5] See chapter 2, section 2.3.2.2 above. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 362-364.

Viljoen describes the concept of rent control as being an extraordinary form of legislative intervention which aims to provide tenants with a security of tenure.[6] Rent control measures in South Africa were in the past anchored on the regulation of rent escalations, habitability conditions and the conditions for eviction.[7] Considering the increased financial strain on households that resulted from the pandemic, it will be useful to explore the concept of a reduction of rent by way of de-escalation as a rent control measure to increase a tenant's security of tenure. A reduction of rent currently applies where a tenant's use and enjoyment of a residential dwelling is compromised due to a defect that is present. Should the tenant accept the defect, he may be entitled to claim a reduction of rent "proportionate to [the] deprivation".[8] This chapter will explore whether the DMA regulations made provision for a reduction of rent and rent de-escalation.

In chapter two, the conditions as well as the processes involved in bringing about the lawful eviction of unlawful occupiers in terms of PIE were highlighted.[9] In this chapter, the pertinent question is whether the same conditions and processes are applicable during the lockdown period where unlawful occupiers are arguably more vulnerable due to the pandemic. Lastly, the chapter will evaluate the interim measures introduced by the DMA, particularly in the context of the continuation of the lease relationship affected by the payment of rent and evictions during the pandemic.

3 2 The COVID-19 pandemic

3 2 1 International regulatory framework

Various organizations across the world have had to work together in creating guidelines for governments to consider. Farha, who is the former United Nations Special Rapporteur on Adequate Housing, issued a guidance note on safeguarding the right to adequate housing during the pandemic. In encouraging persons to abide by lockdown regulations and to stay home the aforementioned guidance note suggests the following:[10]

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[6] SM Viljoen *The Law of Landlord and Tenant* (2016) 20-21.
[7] G Muller and SM Viljoen *Property in Housing* (2021) 376-377.
[8] G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 405-406.
[9] See chapter 2, section 2.3.2.2 above.
[10] L Farha "Covid-19 Guidance Note: Protecting renters and mortgage payers -Special Rapporteur on the right to adequate housing" (2020) *United Nations Human Rights procedures* 1-3 2,3. See also F

- Evictions should be prohibited for the duration of the pandemic. In instances where evictions were granted at the commencement of the pandemic, the execution thereof should be suspended;
- Governments are encouraged to legislate a "rental freeze" and to prohibit rental escalations during the pandemic;
- Where contracts of leases meet the expiration date during the pandemic, the termination thereof should be prohibited;
- The UN recommends that the amount payable for rent should be no more than 30% (thirty percent) of a household's net income. The said recommendation ought to be legislated to ensure landlords do not contribute to tenants being over-indebted. In light of the pandemic and in circumstances where tenants have suffered income reductions, rent should be revised to meet the 30% (thirty percent) requirement;
- A scheme should be set up to assist landlords to make up for the difference of non-payment or reduced rent during the pandemic;
- Banks and other credit institutions should enter into negotiations with landlords who have suffered financially during the pandemic.

It goes without saying that housing was a "frontline defence against the coronavirus".[11] Therefore, governments were encouraged to take decisive measures to guard against the threat of evictions.[12] In an issued statement, Rajagopal, who is the current United Nations Special Rapporteur on Adequate Housing advised that governments should

Dube and A du Plessis "Unlawful occupiers, eviction and the National State of Disaster: Considering South Africa's emergency legislation and jurisprudence during Covid-19" (2021) 65 *Journal of African Law* 333-346 333. "In its attempts to slow the spread of the virus by reducing overcrowding and enhancing social distancing, the government, like some of its counterparts worldwide, threatened persons living in informal settlements with mass removals, prompting the UN special rapporteur on the right to housing to implore governments to desist from such large-scale operations during the pandemic. In April 2020, the government heeded the special rapporteur's call by announcing the cancellation of a planned "de-densification" process that would have seen mass removals of people living in some informal settlements on the pretext of easing congestion and allowing for social distancing. The government committed to work with stakeholders in a united effort against the spread of COVID-19 in informal settlements".

[11] G Muller and A Vadachalam "Guarding against the illegal eviction of unlawful occupiers during a pandemic" 118-141 123-124 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021).

[12] G Muller and A Vadachalam "Guarding against the illegal eviction of unlawful occupiers during a pandemic" 118-141 123-124 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021).

halt all evictions until post the pandemic.[13] Rajagopal reiterates that a failure to safeguard housing may render people vulnerable to contracting the virus which ultimately leads to an increase in the spread of the virus.[14]

Provided below is an overview and an evaluation of the DMA and the regulations thereto which served as the primary legislation used in South Africa during the pandemic. This is done to amongst other things determine whether the guidelines issued by the United Nations (as discussed above) pertaining to the continuation of the rental relationship and the prohibition on evictions were incorporated into the DMA? If so, was this successfully executed? Further, did the South African government establish other interim measures which were implemented during the pandemic?

3 2 2 National regulatory framework: Disaster Management Act

The Covid-19 virus is transmitted through human contact, more specifically, "through respiratory droplets."[15] In an attempt to curb the spread of the virus, the South African government joined nations across the world in calling for and implementing a national lockdown.[16] A national state of disaster[17] was declared in terms of sections 3 and 27 (2) of the DMA, lockdown regulations were subsequently published in the government gazette.

The purpose of the DMA as appears in its preamble is to provide South Africa with:

> "[an] integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters,

[13] G Muller and A Vadachalam "Guarding against the illegal eviction of unlawful occupiers during a pandemic" 118-141 123-124 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021).
[14] G Muller and A Vadachalam "Guarding against the illegal eviction of unlawful occupiers during a pandemic"118-141 123-124 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021).
[15] T Galbadage, BM Peterson and RS Gunasekera "Does Covid-19 spread through droplets alone?" (2020) 8 *Frontiers in Public Health* 1-4 2.
[16] Notice of the national lockdown was published in the Government Gazette (hereinafter referred to as GG). Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 398 in GG 43148 on 25 March 2020.
[17] A national state of disaster was declared and published in the GG No 43096 on 15 March 2020 in terms of section 27(2) of the Disaster Management Act 57 of 2002.

> emergency preparedness, rapid and effective response to disasters and post-disaster recovery."[18]

A disaster as defined in the DMA means "a progressive or sudden, widespread or localised, natural or human-caused occurrence."[19] The occurrence of which either threatens or causes death or injury, damage to property or the environment and is considered as being disruptive in the community.[20]

Section 23(1)(b) of the DMA states that when it has been established that a disaster has occurred, the National Centre[21] must further classify the disaster as either, "local, provincial or national."[22] Chapter 4 of the DMA provides for the process to be followed when a provincial disaster has been declared. Each of the nine provinces are tasked with the establishment and implementation of a framework for disaster management[23] which must be consistent with the provisions of the DMA.[24] Covid-19 was declared as a national disaster as the pandemic affected more than one province.[25]

The government had the option of declaring a state of emergency in terms the State of Emergency Act 64 of 1997 which gives effect to section 37 of the Constitution or declaring a state of disaster in terms of the DMA. The latter was declared.[26] The main differences between the two is that a state of emergency may suspend the rights contained in the Bill of Rights but for the rights to human dignity and life which are "non-derogable rights."[27] A declaration of a state of disaster may limit the rights contained in the Bill of Rights. Further, a simple majority must be passed in Parliament in order for a state of emergency to be declared for a period of 21 (twenty-one) days,[28] whilst the national executive council is responsible for passing a state of disaster. Further, courts are empowered to decide on the validity of a declaration of a state of

[18] Disaster Management Act 57 of 2002 (hereinafter referred to as "DMA").
[19] s 1 DMA.
[20] s 1 DMA.
[21] s 1 DMA "National Centre means the National Disaster Management Centre established by section 8(1)".
[22] s 23(1)(b) DMA.
[23] s 28(1) DMA.
[24] s 28(2).
[25] s 23(6)(a).
[26] https://www.dailymaverick.co.za/article/2020-03-19-covid-19-state-of-disaster-vs-state-of-emergency-whats-the-difference/ (accessed 09/08/2022).
[27] s 37(5)(c) Constitution.
[28] s 37(2)(b) Constitution.

emergency.[29] There is emphasis on parliamentary oversight when a state of emergency has been declared.[30]

The South African government alongside other governments across the world took heed of the guidelines provided by The World Health Organization, The United Nations (hereinafter referred to as "the UN") and Amnesty International in tailor making regulations which would be specific to the circumstances in the country. The issued regulations impacted amongst other things, rental housing and evictions of residential tenants. The government developed a "risk-adjusted strategy"[31] to deal with the Covid-19 pandemic. Initially, a "hard-lockdown" was introduced for a period of twenty-one days, thereafter a "five-tier alert-level system [was created] to manage the gradual easing of the lockdown."[32] Each level was tied to the severity of the pandemic at a given time and restrictions were eased with each descending alert level.[33] Alert level 5 (five) being the highest and alert level 1 (one) being the lowest. It is noteworthy that the regulations were subject to amendment, for example the regulations for alert level 3 (three) in 2020 may differ from the regulations of alert level 3 (three) in 2021.

The lockdown entailed the restriction of movement of persons, goods and services (subject to certain exceptions as outlined in the DMA) within South Africa.[34] The lockdown further restricted the movement of persons outside the borders of South Africa wishing to gain entry into the country.[35]

The consequences of the pandemic coupled with lockdown restrictions have not affected all citizens in the same way. A study conducted in the United States of America for example, suggests that tenants[36] are amongst those who have been

[29] s 37(3) Constitution.
[30] State of Emergency vs State of Disaster in South Africa (mybroadband.co.za) (accessed 09/08/2022).
[31] https://www.politicsweb.co.za/documents/the-proposed-five-level-risk-adjusted-strategy--go#:~:text=%20The%20proposed%20five%20level%20risk%20adjusted%20strategy,are%20encouraged%20to%20take%20additional%20precautions...%20More%20 (accessed 10/08/2022).
[32] About alert system | South African Government (www.gov.za) (accessed 15/06/2022).
[33] G Muller and A Vadachalam "Guarding against the illegal eviction of unlawful occupiers during a pandemic" 118-141 130-133 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021).
[34] Regulation 11B(1)(a)(i) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 398 in GG 43148 on 25 March 2020.
[35] Regulation 11B(6)(a) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 398 in GG 43148 on 25 March 2020. Also see LR Ngwenya "The position of residential tenants who are unable to pay rent or utility bills during the Covid-19 pandemic" 82- 99 83.
[36] The word "tenants" will be used synonymously with the word "renters".

severely affected.[37] The continual increase in the cost of living has meant that many households across the globe (renters and homeowners alike) tend to live from pay-cheque to pay-cheque. The Covid-19 pandemic posed a health risk to all citizens whilst the adopted regulations threatened their livelihood. Collectively, this has exacerbated the situation in that a consequence of the pandemic has been salary reductions, retrenchments, altered employment contracts (i.e., fewer working hours) and perhaps a lack of opportunities to seek alternative and/or further avenues of income.[38] Tenants were unable to keep up with rental payments whilst landlords were unable to keep up with mortgage bond payments. The pandemic has highlighted existing inequalities, "characterized globally by rising housing unaffordability".[39]

The part below turns to the common law regarding the lease relationship. This is done to identify what common law remedies, if any, tenants had at their disposal for the continuation of the lease relationship during the pandemic when they defaulted with their rental payments.

3 3 The lease relationship and non-payment

3 3 1 Common law principles for the continuation of the lease relationship

3 3 1 1 Pacta sunt servanda

Generally, a contract of lease would contain clauses outlining the circumstances under which a contract may be suspended, varied or terminated.[40] What is the legal position when an unforeseen event occurs? Are contracting parties bound to the contract of lease even when it has become impossible to perform? To address these questions, a discussion will follow below highlighting the concepts of *pacta sunt servanda*, supervening impossibility and *force majeure* as common law principles which may be applicable to a tenant's inability to meet rental obligations during the pandemic.

South African law recognizes the principle of *pacta sunt servanda*. The said principle is rooted in common law and is used in the law of contract.[41] The principle simply

[37] L Goodman and D Magder "Avoiding a Covid-19 disaster for renters and the housing market: The renter direct payment program" (2020) *Urban Institute* 1-13 1.
[38] L Farha "Covid-19 Guidance Note: Protecting renters and mortgage payers -Special Rapporteur on the right to adequate housing" (2020) *United Nations Human Rights procedures* 1-3 1.
[39] L Farha "Covid-19 Guidance Note: Protecting renters and mortgage payers -Special Rapporteur on the right to adequate housing" (2020) *United Nations Human Rights procedures* 1-3 1.
[40] D Hutchison and CJ Pretorius *The Law of Contract in South Africa* (2012) 402-408.
[41] N Kubheka "Pacta Sunt Servanda–which approach to follow?" (2019) *Without Prejudice* 36-37 36.

entails that parties to a contact are to be bound to the terms of engagement and obligations as agreed upon by the parties at conclusion of a contract.[42] Parties to a contract would thus be held to adherence thereof.[43] It follows that ordinarily a tenant would be held to adherence insofar as rental payments are concerned, as would a landlord be held to strict adherence insofar as the payment of a mortgage bond.[44] In the case of *Wells v South African Alumenite Company*,[45] the court confirmed that when a contract is entered into "freely and voluntarily", it shall be upheld and enforced by a court of law.[46] The fact that a contract has been entered into freely and voluntarily by the contracting parties gives effect the principle of *pacta sunt servanda*.

The law has developed since the aforementioned case. In the case of *Barkhuizen v Napier,*[47] Barkhuizen (hereinafter "the applicant") entered into a short-term insurance contract with an insurance company represented by Napier (hereinafter "the respondent").[48] In terms of the contract, the applicant was insured against damage to his motor vehicle.[49] The motor vehicle was subsequently damaged "beyond economic repair"[50] at which point the applicant instituted a claim against the respondent.[51] The claim was repudiated on the basis that at the time of the accident, the motor vehicle was used for business purposes and not private purposes as agreed upon by the parties.[52] Two years post the repudiation, the applicant instituted a claim against the respondent in the High Court.[53] The responded once again repudiated the claim on the basis that clause 5.2.5 of the contract stated that, summons for legal action is to be issued within 90 (ninety) days of receipt of the repudiated claim.[54] The applicant averred that the 90 (ninety) day time-limit was contrary to public policy and

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[42] SE Kiraz and EY Ustun "Covid-19 and *force majeure* clauses: An examination of arbitral tribunal's awards" (2020) *Uniform Law Review* 1-29 3. See also D Hutchison, CJ Pretorius *The Law of Contract in South Africa* (2012) 21.
[43] N Kubheka "Pacta Sunt Servanda – which approach to follow?" (2019) *Without Prejudice* 36-37. See also JD Smith "Impossibility of performance as an excuse in French law: the doctrine of force majeure" (1936) 45 *Yale Law Journal* 452-457. Smith illustrates that "while the principle that contracts have the force of law on those who make them and may be revoked only by mutual consent was written therein, this was qualified by the provision that they, might also be revoked for reasons authorized by law".
[44] s 4(5)(a) RHA.
[45] Wells v South African Alumenite Company 1927 AD 69.
[46] Wells v South African Alumenite Company 1927 AD 69 at 73.
[47] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[48] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 2
[49] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 2.
[50] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 2.
[51] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 2.
[52] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 2.
[53] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 3.
[54] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 3.

further unjustifiably limited his right to section 34 of the Constitution which stipulates that:

> "[Everyone] has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or form."[55]

The Constitutional Court recognised the common law principal of *pacta sunt servanda* but contended that it "is not a sacred cow that should trump all other considerations",[56] and further that the principle is subject to the Constitution.[57] The court held that;

> "[While] it is necessary to recognise the doctrine of pacta sunt servanda, courts should be able to decline the enforcement of a time limitation clause if it would result in unfairness or would be unreasonable."[58]

Whilst the sanctity of a contract is recognized, contracts and/or specific clauses in contracts are subject to constitutional scrutiny and if found to be unfair or contrary to public policy, such a contract will not be upheld.[59] In the context of the Covid-19 pandemic, although parties (landlord and tenant) may have agreed to particular terms and conditions such as the payment of rent, such a provision is not absolute and is subject to scrutiny. In the event that a tenant is unable to meet rental obligations due to the pandemic, a court will consider to the merits of each case which may have caused the inability to perform.

3 3 1 2 Force majeure

The unpredictability of factors which may affect the state of affairs as contained in a contract has led to the practice of including a clause which addresses the occurrence of "unanticipated events".[60] *Force majeure* is a common law[61] concept which can be described as;

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[55] s 34 Constitution. See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 5.
[56] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 15.
[57] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 15.
[58] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 70.
[59] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 87.
[60] DR Harms SC "Covid-19 and Force Majeure" (2020) *Law of South Africa* 1-14 1.
[61] For a contrary view see GP Bernhardt and J Fersko "The impacts of the Coronavirus pandemic on real estate contracts: Force majeure, frustration of purpose, and impossibility" (2021) 35 *Probate and Property* 33-42 33. The authors suggest that *force majeure* is not a common law doctrine but a "creature of contract".

> "[An] act of God or man that is unforeseen or unforeseeable and out of the reasonable control of one or both parties to a contract, and which makes it objectively impossible for one or both parties to perform their obligations under the contract."[62]

Examples of *force majeure* may include (but are not limited to), natural disasters, lockdown or quarantine restrictions, protests, warfare, and terrorism.[63] For an occurrence to be regarded as *force majeure*, the said occurrence must have been:

a) "irresistible;
b) unforeseeable;
c) external to the debtor [the tenant]; and
d) must have made performance impossible and not merely more onerous or difficult." [64]

When it has been established that the occurrence meets the requirements as outlined above, it is imperative that a causal link exist between the force majeure and the inability to perform obligations.[65]

The *force majeure* clause exists only to the extent that it is included in a contract by the contracting parties.[66] The function thereof is to limit strict liability by absolving either or both contracting parties when there has been non-performance or a delay in rendering an obligation (which would ordinarily constitute a breach of contract) due to an unforeseen occurrence.[67]

The implication of relying on a *force majeure* clause is that the performance of obligations due in terms of the contract will be suspended until the *force majeure* is no longer present.[68] In considering whether the pandemic can be considered as *force*

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[62] DR Harms SC "Covid-19 and Force Majeure" (2020) *Law of South Africa* 1-14 1. See also R Lombardi "*Force majeure* in European Union Law" (1997) 3 *International Trade and Business Law Annual* 81-106 82.
[63] D Hutchison and CJ Pretorius *The law of contract in South Africa* (2012) 410. See also SM Viljoen "The impact of the COVID-19 regulations on rent obligations" (2020) *De Jure Law Journal* 353-368 359.
[64] R Lombardi "*Force majeure* in European Union Law" (1997) 3 *International Trade and Business Law Annual* 81-106 85. See also JD Smith "Impossibility of Performance as an excuse in French law: the Doctrine of force majeure" (1936) 45 *Yale Law Journal* 452-467 454-456.
[65] JD Smith "Impossibility of Performance as an excuse in French law: the Doctrine of force majeure" (1936) 45 *Yale Law Journal* 452-467 454-459. See also https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre/practice-areas/contract-law/force-majeure-an-analysis-of-what-force-majeure-is (accessed 06/06/2022).
[66] D Hutchison and CJ Pretorius *The Law of Contract in South Africa* (2012) 409-410.
[67] R Lombardi "*Force majeure* in European Union Law" (1997) 3 *International Trade and Business Law Annual* 81-106 82,83.
[68] F Dube and P Ncube, "Common Law and Statutory Rights of Residential Tenants during the Lockdown in South Africa" (2021) 84 *Tydskrif vir hedendaagse Romeins-Hollands Reg* 165-179 168.

majeure, it is argued that the consequences of the pandemic such as the lockdown regulations which ultimately led to retrenchments/ reduced work hours/ health related considerations which may have rendered people too sickly to work were irresistible and unavoidable. Further, the pandemic was unforeseeable to persons across the world, needless to say, governments across the world who have been caught by surprise at the magnitude of the pandemic. The consequences of the pandemic fell outside of the tenant's sphere of control which rendered performance (i.e., the payment of rent) impossible. It is therefore proposed that both the Covid-19 pandemic and further, the lockdown restrictions can amount to *force majeure*.[69] The existence of the Covid-19 virus may constitute *force majeure* simply because contracting the virus may render one unable to perform contractual duties. i.e., a tenant who contracts the virus may be unable to work thus earn a salary because he/she is physically unwell. This will then have a direct impact on his/her ability to pay rent.

3 3 1 3 Impossibility of performance

Harms explains that where parties have not included a clause detailing specific events which would constitute a *force majeure* (or where an unspecified event occurs), the parties may rely on the common law defence of supervening impossibility to suspend obligations.[70] As described above, the *force majeure* clause applies only to the extent that it has been imported to a contract by the contracting parties. If such a clause has been excluded, parties may rely on the common law doctrine of impossibility to escape liability.[71]

The performance of obligations due in terms of contracts were affected by the pandemic as well as by measures taken to curb the virus (i.e., lockdown regulations)

[69]JD Smith "Impossibility of Performance as an excuse in French law: the Doctrine of force majeure" (1936) 45 *Yale Law Journal* 452-467 453. See also *Peters Flamman and Co v Kokstad Municipality* 1919 (AD) 427 wherein the court held that, where a supervening impossibility is caused by the government (in this case, by way of the imposed lockdown restrictions), parties may be absolved from performance of obligations.

[70] DR Harms SC "Covid-19 and Force Majeure" (2020) *Law of South Africa* 1-14 1.

[71] GP Bernhardt and J Fersko "The impacts of the Coronavirus pandemic on real estate contracts: Force majeure, frustration of purpose, and impossibility" (2021) 35 *Probate and Property* 33-42 34,35. See also D Hutchinson and CJ Pretorius *The Law of Contract in South Africa* (2012) 278. Hutchinson and Pretorius define *mora debitoris* as "the culpable failure of the debtor [tenant] to make timeous performance of a positive obligation that is due and enforceable and still capable of performance in spite of such failure." In other words, a debtor (such as a tenant) fails to make timeous payment of rent that is due, irrespective of whether it is his fault or not will be held to strict liability to perform.

because of the direct impact impact on people's ability to earn an income and pay rent. Performance may thus become "physically or legally impossible" to execute.[72] The common law recognises that instances may occur which make it impossible for contractual obligations to be executed. Three types of impossibilities are highlighted below:[73]

- Initial impossibility – This type of impossibility arises prior to the conclusion of a contract thus preventing contractual obligations from arising at all. This may be a situation where i.e.; a minor child (without assistance) enters into a contract of lease; such a contract may be deemed as void because a minor does not have the required contractual capacity to enter into a contract.[74] Therefore, the impossibility will be deemed to have been present initially.
- Supervening impossibility – This type of impossibility arises post the conclusion of a contract and where fault cannot be attributed to either of the contracting parties; and
- Subjective impossibility – This type of impossibility is caused by the fault (either intentionally or negligently) of one of the contracting parties.

From the aforementioned three types of impossibility, the doctrine of supervening impossibility is most applicable to the consequences caused by the pandemic because the impossibility of performance (i.e., the tenant's ability to meet rental obligations) arose post the conclusion of the contract.

The requirements to be met by a tenant intending to rely on the doctrine of supervening impossibility as a defence are that the performance must be rendered objectively impossible and not merely burdensome or inconvenient to perform.[75] Further, the impossibility must be rendered unavoidable. In other words, the impossibility occurred

[72] H Beale and C Twigg-Flesner "Covid-19 and frustration in English law" (2020) 1187-1199 1187. See also https://ssrn.com/abstract=3698693 (accessed 22/09/2022).
[73] D Hutchison and CJ Pretorius *The law of contract in South Africa* (2012) 381.
[74] D Hutchison and CJ Pretorius *The law of contract in South Africa* (2012) 151.
[75] *Nogoduka-Ngumbela Consortium (Pty) Ltd v Rage Distribution (Pty) Ltd t/a Rage 2021 JDR 2622 (GJ)* para 33. See also D Hutchison and CJ Pretorius *The law of contract in South Africa* (2012) 381-382.

through no fault of either of the contracting parties.[76] The effect of supervening impossibility is that it extinguishes the obligations of both contracting parties.[77]

The consequences of lockdown regulations have included (but not limited to) retrenchments and reduced working hours, this has consequently affected the financial status of tenants who were then unable to meet rental obligations. The inability to meet rental obligations was made objectively impossible since tenants who no longer in the same (i.e., pre the pandemic) financial position and further, neither the tenant nor the landlord could have avoided the impact of the pandemic. Also, it was through no fault of either of the parties that the tenant was no longer able to afford the agreed upon rental amount.

Despite the availability of the above remedies, the magnitude of the possible disruption which may be caused by the pandemic has called for the legislator to step in and provide interim legislative measures because it was uncertain whether existing laws would be sufficient to address the unique circumstances brought about by the pandemic. The part below details the legislative interventions that were put in place for the continuation of the lease relationship during the pandemic.

3 3 2 DMA Regulations for the continuation of the lease relationship

3 3 2 1 Expiration of lease contracts[78]

A tenant whose contract of lease expired immediately prior to the announcement of the national lockdown as well as a tenant whose contract of lease expired during the lockdown period could not be forced out of the residential dwelling.[79] The contract of lease continued on a month-to-month basis for which rent was to be paid as agreed upon in the initial contract of lease.

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[76] *Nogoduka-Ngumbela Consortium (Pty) Ltd v Rage Distribution (Pty) Ltd t/a Rage 2021 JDR 2622 (GJ)* para 33. See also D Hutchison and CJ Pretorius *The law of contract in South Africa* (2012) 383.
[77] *Nogoduka-Ngumbela Consortium (Pty) Ltd v Rage Distribution (Pty) Ltd t/a Rage 2021 JDR 2622 (GJ)* para 34. See also D Hutchison and CJ Pretorius *The law of contract in South Africa* (2012) 383-384.
[78] Are evictions allowed during Covid-19? Advice for tenants and landlords - Renting, Advice (property24.com) (accessed 07/06/2022).
[79] Regulation 54(2)(a)(ii) and (c) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020. See also Regulation 71 (2)(a)(ii) and (c) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 999 in GG 43725 on 18 September 2020. See also Frequently Asked Questions - Landlords and Tenants during the COVID-19 Lockdown | Western Cape Government (accessed 22/09/2022).

3 3 2 2 Tenants unable to pay rent

One of the implications of the lockdown "stay at home" decree was that it impacted upon people's ability to meet their financial obligations due to the inability to earn an income, which included the inability to meet rental obligations. In an effort to counter this, some of the measures undertaken by governments across the world, to safeguard the right to housing during the pandemic, included halting rent escalations, extending lease contracts which expire during the period of the lockdown, setting up financial schemes to aid struggling tenants and postponing rent payments.[80] Notably, a clause to this effect was not included in the regulations to the DMA. A study conducted by the New York Open Society Institute does not list South Africa as one of the countries that adopted the aforementioned measures,[81] implying that tenants were expected to continue paying rent as would have been done prior to the pandemic.

Under normal circumstances, a tenant has an obligation to pay rent regularly, timeously and in full as stipulated in section 4(5)(a) of the RHA.[82] However, a tenant who has been negatively impacted by lockdown restrictions, (due to i.e., salary reduction and job loss) may find themselves in a position where they are unable to pay rent. As previously mentioned, the regulations promulgated in terms of the DMA did not contain a clause(s) stipulating how payment arrangements were to operate for the duration of the pandemic. However, the DMA stipulated that alternative payment arrangements were to be negotiated between landlords and tenants in good faith, failure to do so may be regarded as unfair practice.[83] Whether this included a payment holiday or a suspension of rent depended on each party's circumstances. Regulation 54(2)(a)(ii) of the DMA[84] further stipulated that failure to negotiate will be regarded as an unfair practice. Although there has not been an outright rent moratorium in South

[80] New York Open Society Institute "Protecting the right to housing during the COVID-19 crisis" (2020) 1-42 11-15 available at: ji-covid_housing_report-2020_12_07.pdf (justiceinitiative.org) (accessed 22/03/2022).
[81] New York Open Society Institute "Protecting the right to housing during the COVID-19 crisis" (2020) 1-42 11-12 available at: ji-covid_housing_report-2020_12_07.pdf (justiceinitiative.org) (accessed 22/03/2022).
[82] s 4(5)(a) RHA.
[83] Regulation 54(2)(a)(ii) and (c) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020. See also Regulation 71 (2)(a)(ii) and (c) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 999 in GG 43725 on 18 September 2020. See also chapter 2, section 2.3.2.1 above.
[84] Regulation 54(2)(a)(ii) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020.

Africa, regulation 54(2)(b) of the DMA[85] prohibited landlords from charging a penalty fee for late payments as this was regarded as an unfair practice. Regulation 54 further empowered the tribunals to determine a procedure to be followed for the urgent hearing of a dispute between landlords and tenants during the pandemic. The tribunals may further restore occupation of a dwelling to a tenant who was evicted.

3 3 2 3 Residential Rent Relief Scheme

To assist landlords and tenants whose finances have been negatively affected by the pandemic, the Social Housing Regulatory Authority (hereinafter referred to as "SHRA")[86] which offers rental housing government subsidies for the benefit of low to medium income households[87] set up the Residential Rent Relief Scheme (hereinafter referred to as the "RRS").[88] The goal of the RRS was to provide temporary relief to tenants and landlords who found themselves in financial difficulty due to the pandemic and further lockdown regulations.[89] The RRS was limited to lease contracts which were in place on or before the 31st of March 2020. Tenants seeking this relief must further have a combined income of R15,000.00 (fifteen thousand Rand). Both tenant and landlord were required to complete and submit the application for relief together. The scheme was meant to run for a duration of six months. Further, only South African citizens could apply for relief.[90] It is disappointing that to date, funds from the RRS have not been dispensed with.[91]

The relief measures that were promulgated via DMA regulations pertaining to non-payment of rent were limited to negotiations between landlords and tenants. In other words, no monetary relief as such was provided to ensure the continuation of the lease relationship. The parties were to negotiate and settle alternative payment

[85] Regulation 54(2)(b) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020.
[86] The Social Housing Regulatory Authority was established in terms of the Social Housing Act 16 of 2008.
[87] SHRA - Social Housing Regulatory Authority | About SHRA (accessed 18/08/2022).
[88] Polity – SHRA is ready for residential rent relief roll-out (accessed 10/06/2022). "The Department of Human Settlements has allocated R600 million to the residential relief scheme, of which, R300 million has been allocated for rental relief to support social housing institutions. The Residential Rent Relief Programme will be made available retrospectively from 1 April 2020. It will run for a period of approximately six months or until funding is exhausted, whichever comes first. Only South African citizens are eligible to apply for relief".
[89] Covid-19 in SA: R600m rental relief funds untouched (iol.co.za) (accessed 10/06/2022).
[90] shrafaqonrrrp.pdf (jhc.co.za) (accessed on 10/06/2022).
[91] Government R600m rental relief scheme still untouched | News24 (accessed 10/06/2022).

arrangements. Failure to do so will be regarded as unfair practice by the tribunals. In light of this, it is safe to say that rent de-escalation, rent escalation, and rent reduction were not expressly incorporated into the DMA.

3 4 Eviction of tenants holding over

3 4 1 Alert levels

It comes as a surprise that in spite of the pandemic and the increased vulnerability of unlawful occupiers, statistics suggested that there has been an increase in the number of prohibited (in the sense that due process has not been followed) evictions.[92] The introduction of lockdown regulations as an extraordinary legal framework has thus been a necessary intervention by government.[93]

A consequence of the pandemic has been the negative impact on people's financial status which has caused a strain on renter households, this has subsequently resulted in an increased threat of eviction.[94] To this end, the DMA regulations have introduced a moratorium[95] on all evictions. The discussion to follow will be limited to the first year of the pandemic being the year 2020 and each alert level insofar as evictions are concerned.

At inception of the pandemic and in terms of the regulations for alert level 5 a blanket prohibition was placed on all evictions. Regulation 11CA stipulated that, "no person may be evicted from their place of residence, regardless of whether it is a formal or informal residence or a farm dwelling, for the duration of the lockdown".[96] The regulation essentially created a moratorium on the eviction of unlawful occupiers,

[92] F Dube and A du Plessis "Unlawful occupiers, eviction and the National State of Disaster: Considering South Africa's emergency legislation and jurisprudence during Covid-19" (2021) 65 *Journal of African Law* 333-346 335.
[93] F Dube and A du Plessis "Unlawful occupiers, eviction and the National State of Disaster: Considering South Africa's emergency legislation and jurisprudence during Covid-19" (2021) 65 *Journal of African Law* 333-346 346.
[94] EA Benfer, D Vlahov, MY Long, E Walker-Wells, Jr JL Pottenger, G Gonsalves and DE Keene "Eviction, health inequity, and the spread of Covid-19: Housing policy as a primary pandemic mitigation strategy" (2021) 98 *J Urban Health* 1-12 1.
[95] Moratorium Definition & Meaning | Dictionary.com (Accessed 17/06/2022) "A *moratorium* is most commonly an official suspension or delay of some activity. *Moratorium* often specifically refers to the postponement of the requirement to make some kind of payment, such as rent".
[96] Regulation 11CA of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 465 in GG 43232 on 16 April 2020.

which included tenants holding over. At this early stage of the pandemic, courts could neither hear eviction applications nor grant orders to that effect.[97]

The prohibition against evictions reflected in regulation 11CA[98] is an example of an interim legislative provision. "Housing has become the frontline defence against the coronavirus"[99] since an effort to curb the spread has mandated people to "stay home".[100] As previously discussed, the virus is spread through human contact, the rational being that, staying home is likely to reduce human contact. It has become paramount to protect and safeguard residential dwellings.[101] Not having a residential dwelling or being evicted therefrom during the pandemic could be a matter of life and death in that one would be more exposed to contracting the virus.[102]

On 1 May 2020, alert level 4 came into effect.[103] The eviction of unlawful occupiers as per alert level 5 was still prohibited. However, landlords could now make applications to court and courts could grant eviction orders with the caveat that such orders were to be stayed and suspended until the last day of alert level 4, except where the court deemed it unjust and inequitable to suspend the execution of the granted order.[104]

Alert level 3 came into effect on 1 June 2020.[105] The prohibition of the eviction of unlawful occupiers mirrors the prohibition as outlined under alert level 4, except that where an eviction order was granted, such an order was to be stayed and suspended until the last day of alert level 3.[106]

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[97] F Dube and A du Plessis "Unlawful occupiers, eviction and the National State of Disaster: Considering South Africa's emergency legislation and jurisprudence during Covid-19" (2021) 65 *Journal of African Law* 333-346 336.
[98] Disaster Management Act Regulations in GN 465 GG 43232 of 16 April 2020.
[99] L Farha "Covid-19 Guidance Note: Prohibition of evictions -Special Rapporteur on the right to adequate housing" (2020) *United Nations Human Rights procedures* 1-3 1.
[100] RB Frank "A critique of myopic Covid-19 regulations pertaining to immovable property rights" (2022) 25 *Journal of Legal, Ethical and Regulatory Issues* 1-8, 1-3.
[101] R Waldron "Experiencing housing precarity in the private rental sector during the covid-19 pandemic: the case of Ireland" (2022) *School of Natural and Built Environment, Queen's University Belfast* 1-23 1-3 https://doi.org/10.1080/02673037.2022.2032613.
[102] L Farha "Covid-19 Guidance Note: Prohibition of evictions -Special Rapporteur on the right to adequate housing" (2020) *United Nations Human Rights procedures* 1-3 1.
[103] Regulation 15 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 480 in GG 43258 on 29 April 2020.
[104] Regulation 19 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 480 in GG 43258 on 29 April 2020.
[105] Regulation 3 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 608 in GG 43364 on 28 May 2020.
[106] Regulation 36 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 608 in GG 43364 on 28 May 2020.

Alert level 2 came into effect on 18 August 2020. The eviction of unlawful occupiers was still prohibited under this alert level, however, where such an order was granted, it was to be stayed and suspended until the last day of the national state of disaster, unless a court deemed it unjust and inequitable to stay and suspend a granted order. The regulation further listed factors to be taken into consideration by the court. The factors included, public interest which demands that all persons have a place to reside to protect the health system at large; other regulations which restrict the movement of persons; the impact that the pandemic may have on evicted persons; the need to balance the interests of all affected parties to avoid prejudice in any form and whether alternative accommodation would be available for evicted persons. Further, the court was mandated to (where necessary) contact the relevant MEC to assist with emergency accommodation for evicted persons.[107]

Alert level 1, which was the least stringent level came into effect 18 September 2020. Regulation 70 prohibited the eviction of unlawful occupiers.[108] The said regulation mirrored the conditions as set out in alert level 2.

3 4 2 The regulations and the application of PIE during COVID

Despite the prohibition on evictions, it appears that evictions were still underway at the peak of the Covid-19 pandemic. Moreover, evictions were undertaken without the required court order.[109] The circumstances pertaining to the case of *South African Human Rights Commission v City of Cape Town*[110] came to the attention of South Africans when a video of a naked man being dragged out of a shack by the Anti-Land Invasion Unit (hereinafter referred to as "ALIU") circulated on social media.[111] The ALIU is employed by the City of Cape Town (hereinafter referred to as "the respondents") to identify and determine which structures (if any) may be demolished

[107] Regulation 53 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020.
[108] Regulation 70 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 999 in GG 43725 on 18 September 2020.
[109] s 26(3) Constitution.
[110] *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC). See also F Dube and A du Plessis "Unlawful occupiers, eviction and the National State of Disaster: Considering South Africa's emergency legislation and jurisprudence during Covid-19" (2021) 65 *Journal of African Law* 333-346 337-343.
[111] *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC) para 1.

on land occupied by unlawful occupiers.[112] The South African Human Rights Commission (hereinafter referred to as "the applicants") instituted a two-part urgent application in the high court.[113]

In part A, the applicants sought an urgent interdict to prevent the respondents from demolishing structures (occupied or unoccupied) and consequently evicting persons during the national state of disaster without a court order.[114] The applicants relied on the rights provided for in section 26(3) of the Constitution and section 8(1) of PIE which similarly prohibit arbitrary evictions and stipulates that evictions and/or demolitions may not take place without a court order, thereby consequently invoking their constitutional right to access courts.[115] Further, in light of the pandemic, the applicants relied on Regulation 36 of the alert level 3 regulations which prohibits evictions for the duration of alert level 3.[116] Should a court grant an order for eviction, the order is to be stayed and suspended until the last day of alert level 3 except where deemed just and equitable by a court to not stay and suspend the order.[117] The respondents argued that at the time the demolitions occurred, the structures were not occupied and further that the demolished shacks were in the process of being constructed and construction had not been completed.[118] Section 1 of PIE defines a structure as "…any other form of temporary or permanent dwelling or shelter".[119] In this regard, the respondents conceded that evictions and/or demolitions of occupied structures was not permitted

[112] *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC) para 1. See also F Dube and A du Plessis "Unlawful occupiers, eviction and the National State of Disaster: Considering South Africa's emergency legislation and jurisprudence during Covid-19" (2021) 65 *Journal of African Law* 333-346 341.
[113] *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC) para 5.
[114] *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC) para 5-7.
[115] s 34 Constitution. See also *South African Human Rights Commission v City of Cape Town* 2020 (WCC) para 38.
[116] Regulation 36 (1) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 608 in GG 43364 on 28 May 2020. See also F Dube and A du Plessis "Unlawful occupiers, eviction and the National State of Disaster: Considering South Africa's emergency legislation and jurisprudence during Covid-19" (2021) 65 *Journal of African Law* 333-346 340,341.
[117] Regulation 36 (2) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 608 in GG 43364 on 28 May 2020. See also F Dube and A du Plessis "Unlawful occupiers, eviction and the National State of Disaster: Considering South Africa's emergency legislation and jurisprudence during Covid-19" (2021) 65 *Journal of African Law* 333-346 340,341.
[118] *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC) para 2.
[119] s 1 PIE Act.

without a court order.[120] The court granted the interdict and held that the said evictions constituted arbitrary action.[121]

In part B, the respondents contended that unoccupied structures and structures that were in the process of being erected were not protected by the sections highlighted above from the Constitution, PIE and the DMA regulations as they do not qualify as "homes".[122] On that basis, the respondents contended that they were entitled to counter-spoliate unoccupied structures and did not require a court order to demolish such structures.[123]

Counter-spoilation is a common law remedy which is used to restore possession to persons who have been unlawfully deprived of their property.[124] The remedy is not concerned with the question pertaining to ownership of the property, in other words, ownership is irrelevant.[125] "As a general rule, a possessor who has been unlawfully dispossessed cannot take the law into his or her own hands to recover possession."[126] However, when the dispossessed possession is recovered instantaneously (i.e., while the unlawful possession is in process), the possessor may act to recover it.[127] The respondents in this regard contended that the defence of counter-spoilation was available to them "at any stage before an informal structure becomes a home."[128] The court rejected this and stated the applicants had perfected their possession because recovery was not immediate.[129]

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[120] *South African Human Rights Commission v City of Cape Town* 2020 (WCC) para 39.
[121] *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC) para 6.
[122] *South African Human Rights Commission v City of Cape Town* 2020 (WCC) para 40.
[123] *South African Human Rights Commission vs City of Cape Town* [2021] 2 SA 565 (WCC) para 13.
[124] ZT Boggenpoel and J Pienaar "The continued relevance of the mandament van spolie: recent developments relating to dispossession and eviction" (2013) *De Jure* 998-1021 1002. See also G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 379-380, 477-480. See also G Bradfield and K Lehmann *Principles of the Law of Sale and Lease* (3rd ed 2013) 151-154, 165. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 188-191.
[125] ZT Boggenpoel and J Pienaar "The continued relevance of the mandament van spolie: recent developments relating to dispossession and eviction" (2013) *De Jure* 998-1021 1002. See also G Glover *Kerr's Law of Sale and Lease* (4th ed 2014) 379-380, 477-480. See also G Bradfield and K Lehmann *Principles of the Law of Sale and Lease* (3rd ed 2013) 151-154, 165. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 188-191.
[126] G Muller, R Brits, JM Pienaar and ZT Boggenpoel *Silverberg and Schoeman's The Law of Property* (6th ed 2019) 353-354.
[127] Counter-Spoilation is a common law remedy which is used to restore possession to persons who have been unlawfully deprived of their property.[127] The remedy is not concerned with the question pertaining to ownership of the property, in other words, ownership is irrelevant.[127]
[128] *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC) para 83.
[129] *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC) para 83.

In answering the question as to whether unoccupied structures and those that were in the process of being erected qualify as a home as provided for in the Constitution, PIE and the DMA regulations, the court turned to section 39(2) of the Constitution which requires that when interpreting legislation, the spirit, purport and objects of the Bill of Rights must be promoted.[130] The court held that it is irrelevant whether a structure is complete, incomplete or in the process of being built, the most important consideration is whether a structure is capable of providing shelter.

The court held that the remedy of counter-spoilation cannot be used to evict and/or demolish structures and that the respondents had misinterpreted the remedy. As a result, the respondent's actions were invalid and unconstitutional since the applicants had already perfected their possession of the property. Additionally, the court ruled that counter-spoilation does not substitute for PIE.

The aforementioned case is indicative of the fact that despite the existence of PIE, which seeks to guard against "self-help" and the abuse of power, the shortcoming appears to be in the implementation or rather lack thereof of the law. It can be argued that PIE (per section 4(1)) and the Constitution (per section 26(3)) tacitly exclude the common law defence of counter spoilation as it sets out a court procedure to be followed and further that the only way to bring about eviction is via a court order.

It is further argued that the adequacy of PIE during a disaster is limited as highlighted by Muller and Vadachalam.[131] According to the authors, PIE is limited in its application during disasters because of its generality and limited judicial precedent. [132]

3 5 Preliminary Findings

Notwithstanding that there had been countless instances in history (such as world wars one and two) which should have better prepared the world for a "societal force majeure," safeguarding and protecting the right to adequate housing has proven to be a mammoth task, even more so amidst the Covid-19 pandemic. The guidelines

[130] s 39(2) Constitution.
[131] G Muller and A Vadachalam "Guarding against the illegal eviction of unlawful occupiers during a pandemic" 118-141 129-130 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021).
[132] G Muller and A Vadachalam "Guarding against the illegal eviction of unlawful occupiers during a pandemic" 118-141 129 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021).

pertaining to the continuation of the rental relationship and the prohibition on evictions issued by international organisations such as the UN[133] were helpful to South Africa in that they served as a yardstick to measure ourselves against.

The economic hardship brought about by the pandemic did not go unnoticed by the government. To provide temporary relief to tenants and landlords, interventions such as the RRS were set up albeit that the implementation of this particular intervention was unsuccessful. The concept of a reduction of rent was not expressly included in the DMA regulations. However, parties were encouraged to negotiate in good faith and settle on alternative payment arrangements,[134] which may have included the reduction of rent.

In addition to the DMA regulations, tenants could have further relied on common law principles to safeguard the continuation of the lease relationship.[135] The principle of *pacta sunt servanda*[136] dictates that parties are bound to the terms agreed upon at conclusion of their agreement.[137] This principle was developed by the court in the case of *Barkhuizen v Napier*[138] wherein it was held that despite the principle of *pacta sunt servanda,* agreements or clauses found to be unfair or unreasonable would not be upheld.[139] The court may consider it unfair or unreasonable not to consider the tenant's change in circumstances if he or she had agreed to pay a specified rental amount before the Covid-19 pandemic (which might have led to a change in financial circumstances).

The common law principle of *force majeure*[140] would only be useful to tenants to the extent that such a clause had been included in the contract of lease.[141] If so, a tenant may reply on this principle to limit liability.[142] In the absence of a *force majeure* clause in the lease agreement, tenants could have relied on the common law principle of

[133] See chapter 3, section above.
[134] Regulation 54 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020. See also Regulation 71 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 999 in GG 43725 on 18 September 2020.
[135] See chapter 3, section 3.3.1 above.
[136] See chapter 3, section 3.3.1.1 above.
[137] See footnote 277 above.
[138] *Barkhuizen n Napier* 2007 (5) SA 323 (CC).
[139] *Barkhuizen n Napier* 2007 (5) SA 323 (CC) para 70.
[140] See chapter 3, section 3.3.1.2 above.
[141] See footnote 301 above.
[142] See footnote 303 above.

impossibility of performance[143] to limit or suspend their obligations. Supervening impossibility would be most applicable as the impossibility occurred post the conclusion of the lease agreement. Fault cannot be attributed to either of the parties.

The prohibition on evictions which first appeared in Regulation 11CA of the DMA on the other hand was a successful measure which complemented the existing PIE Act as it broadened the scope of application.

[143] See chapter 3, section 3.3.1.3 above.

CHAPTER 4
RENT REDUCTION, RENT ESCALATION AND EVICTION BEYOND COVID-19

4 1 Introduction

The national state of disaster[1] was declared on 15 of March 2020[2] and came to an end on 5 of April 2022.[3] The effect was that all regulations and directives issued in terms of the Disaster Management Act 57 of 2002 (hereinafter referred to as the "DMA") were repealed with the exception of specified transitional regulations to remain in place for a limited period of thirty days.[4] The transitional regulations were notably limited to health regulations such as the wearing of masks.[5] The government has not made any transitional regulations insofar as the continuation of the lease relationship and residential evictions are concerned.

In view of the above, this chapter is intended to be forward-looking post the Covid-19 pandemic. The aim is to determine if the Covid-19 regulations pertaining to rental housing and residential evictions should be carried forth into the future despite the end of the national state of disaster and how this could take place. To answer the question of whether regulations should be carried into the future; in the first part of the chapter, the shortcomings of the Covid-19 regulations will be discussed briefly, followed by an exploration of the resilience theory. In addressing the question of how the regulations can be carried into the future, relevant aspects of the Rental Housing Amendment Act 35 of 2014[6] (hereinafter referred to as the "RHAA") will be canvassed in the second part of the chapter. This part will also provide recommendations as to how some of the measures discussed in chapter 3 can possibly be incorporated into the RHAA as resilience measures.

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[1] s 6 Disaster Management Act 57 of 2002 ("DMA") defines a disaster as; "a disaster is a national disaster if it affects- (a) more than one province; or (b) a single province which is unable to deal with it effectively".
[2] A national state of disaster was declared and published in the GG No 43096 on 15 March 2020 in terms of section 27(2) of the Disaster Management Act 57 of 2002.
[3] Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 1986 in GG 46195 on 04 April 2022.
[4] SA exits National State of Disaster | SAnews (accessed 04/07/2022).
[5] Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 1986 in GG 46195 on 04 April 2022.
[6] Rental Housing Amendment Act 35 of 2014 ("RHAA"). It is worth noting that although the RHAA was assented to on 05 November 2014 by former President Zuma, it has not yet been implemented.

4 2 Rent relief and eviction measures during Covid-19 and beyond

4 2 1 Continuation of the lease relationship post Covid-19

In spite of the imminent threat of non-payment of rent as a consequence of the pandemic, tenants were to maintain rental payments as ordinarily would have been done prior to the pandemic.[7] The only residential housing relief was in the form of the *Residential Rental Relief Scheme* (intended to assist distressed landlords and tenants),[8] ultimately the scheme only benefited social housing institutions[9] and not landlords and tenants in their individual capacities.[10]

In the event that tenants were unable to meet rental obligations, the parties were encouraged to negotiate in good faith and reach a suitable interim solution.[11] The relationship between landlord and tenant is inherently one of unequal bargaining power in favour of the landlord as the more dominant party of the two in the contractual relationship. In addressing the question of unequal bargaining power, the court in the case of *Barkhuizen vs Napier*[12] comments that in a country as unequal as South Africa, it is not inconceivable that many people conclude contracts without understanding what they are agreeing to and with no appreciation of bargaining power.[13] Moreover, in highlighting the dominance of the landlord over the tenant, Mohamed writes that tenants are abused in several ways which include: the illegal eviction of tenants by locking them out of the leased dwelling, charging unreasonably high rental amounts, failure by the landlord to maintain the leased dwelling by performing repairs, the disconnection of power and water supplies in an effort to push tenants out and the failure to reimburse tenants of their security deposits when the contract of lease has expired.[14] It follows then that leaving it in the domain of the parties to negotiate in good

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[7] s 4(5)(a) and (b) Rental Housing Act 50 of 1999 (RHA). See also Chapter 3, section 3.3.2.2 above.
[8] SHRA is ready for residential rent relief roll-out (polity.org.za) (accessed 20/07/2022). See also Chapter 3, section 3.3.2.3 above.
[9] s 1 Social Housing Act 16 of 2008 defines social housing institution as "an institution accredited or provisionally accredited under this Act which carries or intends to carry on the business of providing rental or co-operative housing options for low to medium income households (excluding immediate individual ownership and a contract as defined under the Alienation of Land Act, 1981 (Act No. 68 of 1981), on an affordable basis, ensuring quality and maximum benefits for residents, and managing its housing stock over the long term".
[10] Moratorium on evictions must be extended - Ndifuna Ukwazi & Co. - DOCUMENTS | Politicsweb (accessed 06/07/2022).
[11] Regulation 54(2)(b) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020. See also Chapter 3, section 3.3.2.2 above.
[12] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[13] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 65.
[14] SI Mohamed *Tenant and Landlord in South Africa* (2nd ed 2010) 1.

faith[15] is not only an oversimplification of the true state of affairs in the rental housing sector, but a failure on governments part to protect vulnerable residential tenants. The DMA regulations failed to take into account the unequal bargaining power that exists in the relationship between landlords and tenants.[16] Where parties were unable to reach a suitable compromise, tenants may have found their lease relationships being terminated and found themselves subsequently being evicted from their homes, once the national state of disaster was terminated.

4 2 2 Evictions post Covid-19

Perl writes that it is yet to be seen whether a consequence of the pandemic will be an increase in the number of persons experiencing homelessness due to unfavourable economic conditions.[17] The definition of homelessness includes persons facing impending evictions.[18] An article which appeared in the Sunday Times newspaper for example estimated that debtors are up to 6 months behind on financial obligations.[19] With the eviction moratoria coming to an end, tenants may find themselves in a position where they are unable to catch up on arrear rental payments and further unable to afford alternative accommodation.[20] Since the announcement made by President Ramaphosa that the DMA regulations would come to an end, there have been calls by social justice movements and civil society organizations for government to implement transitional regulations by extending the moratorium placed on evictions or to include the DMA regulations in regulations under PIE, the RHA and other statutes.

The implementation of the DMA regulations insofar as the continuation of the lease relationship and residential evictions has not been without shortcomings. It is proposed, however, that certain aspects of the regulations should continue despite the end of the national state of disaster. The regulations can be used as a vehicle for

[15] Regulation 54(2)(b) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020.
[16] SM Maass "Rent control: A comparative analysis" (2012) 15 *Potchefstroom Electronic Law Journal* 41–100 50-53.
[17] L Perl "Homelessness and COVID-19" (2020) *Congressional Research Service* 1-15 1. This data is yet to be collected.
[18] L Perl "Homelessness and COVID-19" (2020) *Congressional Research Service* 1-15 1.
[19] Some tenants are six months behind on rent due to Covid-19 (timeslive.co.za) (accessed 06/07/2022).
[20] L Perl "Homelessness and COVID-19" (2020) *Congressional Research Service* 1-15 1.

transformation because the limitations and gaps in our systems and laws pertaining to the lack of rent control measures have been exposed.

Having been hit with the Covid-19 pandemic, we are becoming more aware of the concept of resilience thinking. Could resilience thinking aid in the development of more permanent disaster preparedness measures in the RHAA?

4 3 Resilience-Thinking

Statistics revealed that urban areas[21] accounted for a higher transmission rate of the Covid-19 virus in comparison to rural areas.[22] This may be attributed to various factors, including the high usage of public transportation and concentrated population.[23] Marginalized persons in urban areas have been most affected by the emergence of the Covid-19 virus. This has since placed a spot-light and directed attention to the plight of vulnerable city dwellers.[24]

It is crucial that property (the ideology thereof)[25] is resilient in order to withstand social evolution and environmental change (whether foreseeable or unforeseeable).[26] Butler writes that "an effectively functioning property system needs resilience to adapt, to self-correct, to make the adjustments needed to handle changing socioeconomic, cultural, political, and biophysical conditions".[27] Property is prone to resist change[28] for various reasons such as its symbolism of wealth and power, persons in possession of

[21] Difference Between Urban and Rural (with Comparison Chart) - Key Differences (accessed 18/07/2022) The aforementioned source distinguishes between urban and rural and defines the terms as, "based on the density of population, development, amenities, employment opportunities, education, etc. human settlement is majorly divided into two categories i.e., Urban and Rural. Urban refers to a human settlement where the rate of urbanisation and industrialisation is high… urban areas are highly populated".
[22] Difference Between Urban and Rural (with Comparison Chart) - Key Differences (accessed 18/07/2022) "rural settlement, is one where the rate of urbanisation is quite slow…rural areas have comparatively less population than the urban ones".
[23] S Afrin, FJ Chowdhury and M Rahman "Covid-19 pandemic: Rethinking strategies for resilient urban design, perceptions, and planning" (2021) 3 *Frontiers in Sustainable Cities* 1-13 2.
[24] S Afrin, FJ Chowdhury and M Rahman "Covid-19 pandemic: Rethinking strategies for resilient urban design, perceptions, and planning" (2021) 3 *Frontiers in Sustainable Cities* 1-13 2.
[25] B Davy "Dehumanized housing' and the ideology of property as a social function" (2020) 19 *Planning Theory* 38-58 49. Property in this context does not denote a physical structure but rather the idea of property as a social function.
[26] LL Butler "The resilience of property" (2013) 55 *Arizona Law Review* 847-908 847.
[27] LL Butler "The resilience of property" (2013) 55 *Arizona Law Review* 847-908 891.
[28] AJ van der Walt *Property in the Margins* (2009) 12-26.

it want the *status quo* to remain in their favour.[29] By creating a resilient property system, we can adjust the *status quo* as when change is knocking at the door and/or as when there is a need to level the playing field.[30]

Humans do not have the ability to predict all acts of nature or acts of God: the Covid-19 pandemic has been a prime example of this. It is therefore important that economic policies and regulatory framework such as legislation be based on resilience in order to withstand any future disturbance.[31] Below, the notion of resilience will be established followed by a distinction between two approaches to resilience-thinking. Lastly, what is the relevance of resilience-thinking in property law? How can the notion of resilience-thinking contribute to the implementation of Covid-19 regulations regarding the continuation of the lease relationship and residential evictions?

Resilience can be described as the ability of a system to "anticipate, prepare for, respond to, and recover from a disturbance"[32] as to absorb and/or minimize damage caused by any shock to a system.[33] Martin elaborates by stating that it is important to pay attention to the degree of the disturbance because a system is likely to recover from a minor or insignificant disturbance as opposed to a severe disturbance.[34] This is particularly relevant in the case of the Covid-19 pandemic as it has been apparent that larger economies such as the USA have been able to quickly recover from the impact of the pandemic unlike developing economies such as South Africa which still battle with the aftermath of the pandemic.[35] Moreover, the disturbance need not be of a physical nature to be regarded as having been disruptive.[36] This has proven to be true in that the threat to property has not been of a physical nature but more on account

[29] LL Butler "The resilience of property" (2013) 55 *Arizona Law Review* 847-908 891.
[30] LL Butler "The resilience of property" (2013) 55 *Arizona Law Review* 847-908 891.
[31] S Syal "Learning from pandemics: Applying resilience thinking to identify priorities for planning urban settlements" (2021) 10 *Journal of Urban Management* 205-217 206.
[32] J Simmie and R Martin "The economic resilience of regions: Towards an evolutionary approach" (2009) *Cambridge Journal of Regions, Economy and Society* 1–17 2.
[33] A Rose "Modeling regional economic resilience to disasters: a computable general equilibrium analysis of water service disruptions" (2005) 45 *Journal of Regional Science* 75–112 78.
[34] J Simmie and R Martin "The economic resilience of regions: Towards an evolutionary approach" (2009) *Cambridge Journal of Regions, Economy and Society* 1–17 2.
[35] International Bank for Reconstruction and Development / The World Bank "Inequality in Southern Africa: An assessment of the Southern African customs union" (2022) 1-132 5.
[36] A Rose "Modeling regional economic resilience to disasters: a computable general equilibrium analysis of water service disruptions" (2005) 45 *Journal of regional science* 75–112 76.

of the regulations put in place by government.[37] Below, a distinction will be drawn between two approaches to resilience-thinking.

4 3 1 Equilibrium Resilience

The initial understanding of resilience is based on the idea of the existence of a point of stability and further the speed at which a system can return to a point of equilibrium after a disturbance has occurred.[38] A successful system according to this approach is thus based on the ability of a system to maintain the *status quo* that existed before the disturbance. Maintaining the *status quo*, however, is not necessarily a good thing. For example, if an existing system exacerbates poverty or marginalizes vulnerable members of society, it would not be beneficial for the status quo to remain intact. This approach does not account for situations of constant change and transformation.[39] Moreover, property ownership in South Africa is riddled with inequality, maintaining the status quo in this regard would not be ideal.[40] The inequality may be attributed to various factors such as South Africa's former system of governance based on apartheid which precluded people of colour from being property owners or having any real form of tenure security.[41] A report compiled by the World Bank revealed that South Africa is the most unequal country in the world.[42] Statistics further reveal that in 2021,sixteen million, three hundred South Africans lived below the international poverty margin.[43] This means that people are unable to afford basic necessities such as food and shelter. The General Household Survey which is compiled by Statistics South Africa revealed that social grants during the pandemic (specifically in 2021)

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[37] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 366 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[38] J Simmie and R Martin "The economic resilience of regions: Towards an evolutionary approach" (2009) *Cambridge Journal of Regions, Economy and Society* 1–17 2,3. See also S Meerow, JP Newell and M Stults "Defining urban resilience: A review" (2016) 147 *Landscape and Urban Planning* 38–49 40,41.
[39] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[40] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 353 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[41] s 1 Black Land Act 27 of 1913.
[42] International Bank for Reconstruction and Development / The World Bank "Inequality in Southern Africa: An assessment of the Southern African customs union" (2022) 1-132 9.
[43] • South Africa: national poverty line 2021 | Statista (accessed 20/07/2022).

ranked as the "second most important source of income for households."[44] Maintaining the *status quo* in this case would not be beneficial for the majority of society.

4 3 2 Evolutionary Resilience

Evolutionary resilience on the other hand does not presume a state of equilibrium.[45] This approach is based on the idea that a system constantly evolves and as such, systems must be built to be adaptable.[46] A point of equilibrium is flexible and subject to change. Stability according to this approach is a moving goal-post and therefore the system must be prone to adaptation. Evolutionary resilience is concerned with the ability of systems to transform and embrace change by being innovative. This is in line with the notion that law is a fluid concept and susceptible to review and transformation.[47]

4 3 3 Resilience and property law

Using resilience-thinking to evaluate a legal system's ability to regulate social and natural systems, as well as using resilience-thinking to determine goals (something to strive to achieve in the future) [48] are both valuable approaches to property law. The operation thereof in property law according to Lovett is based on the occurrence of an event which leads to "radically changed circumstances".[49] The characteristics are that the said event must be;[50]

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[44] General Household Survey, 2021 | Statistics South Africa (statssa.gov.za) (accessed on 20/09/2022)
[45] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372, 352-356 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[46] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 352-356 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[47] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 352-356 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[48] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 358-360 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[49] JA Lovett "Property and radically changed circumstances" (2007) 74 *Tennessee Law Review* 463-568 469. See also E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 362 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[50] JA Lovett "Property and radically changed circumstances" (2007) 74 *Tennessee Law Review* 463-568. See also E van der Sijde "What can (South African) property lawyers learn from resilience thinking?

- "sudden" – With regard to the Covid-19 pandemic, it is submitted that it was indeed sudden and that the country (further the world at large) did not have time to both prepare for and adjust to the changes that had to be implemented;
- "unexpected" – it is submitted that the pandemic was unexpected in that the magnitude thereof was not predicted by organizations such as the World Health Organization which is tasked with keeping the world abreast with disease outbreaks;
- "intense[ly] disruptive"- It goes without saying that the pandemic has disrupted the normal way in which engagements between people, businesses, schools, places of work (to mention a few) occur; and
- "geographical pervasiveness" – The pandemic affected the world at large; no country was spared from the effects thereof albeit to varying degrees.

Lovett further explains that when an event is regarded as having (negatively) radically changed circumstances, parties to a property relationship are likely to face four problems in relation to the subject of their agreement, being the leased premises.[51] The problems include:[52]

- Whether or not the leased premises and/or the relationship between the tenant and landlord can be preserved amidst the radically changed circumstances, if so, how?
- Will the relationship between the involved parties be able to continue where there has been a substantial alteration of the leased premises and/or of the nature of the relationship between the tenant and landlord (i.e., where the tenant is now unable to meet rental obligations thus altering the nature of the contractual relationship);

An exploratory note on the aftermath of Covid-19" 352-372 362-365 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).

[51] JA Lovett "Property and radically changed circumstances" (2007) 74 *Tennessee Law Review* 463-568. See also E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 362 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).

[52] JA Lovett "Property and radically changed circumstances" (2007) 74 *Tennessee Law Review* 463-568. See also E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 362 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).

- What the dynamics will be between the tenant and landlord in the event that either of the parties wish to terminate the agreement of lease; and
- What are the prospects (if any) of re-entering the agreement of lease once terminated?

Resilience is based on the "fairness and efficiency" with which the four problems stated above can be resolved.[53] Despite the four problems listed above, resilient property regimes are able to quickly respond to the impact brought about by the event that radically changed circumstances with the aim of preserving the leased premises and the relationship between the parties. In South Africa, it can be said that the Covid-19 regulations were aimed at preservation of the landlord and tenant relationship.

Financial assistance should be implored to assist the parties and to further ensure that one party is not more burdened than the other. Resilient property regimes are able to take advantage of seemingly unfavorable situations. In South Africa, an example of this would be the decision by the South African Reserve Bank to lower interest rates in an effort to assist homeowners financially, the lower interest rates have led to consumers taking advantage and purchasing homes and/or paying down as much of their bonds as possible.[54] Insofar as the landlord-tenant relationship, one can imagine that lower interest rates may have alleviated the financial burden off of landlords resulting in a willingness to accept lower rentals in favour of the continuation of the lease relationship.

The pandemic has exposed systemic loopholes which we now have an opportunity to rectify. This is in line with evolutionary or transformative resilience which is based on the idea of flexibility and adaptation.

4 4 Recommendations

The Covid-19 pandemic is likely to further worsen an already unfavourable housing situation. In light of this, it is important to evaluate whether interim solutions introduced

[53] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372,362-363 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[54] Lockdown and lower interest rates are changing South Africa's property market (businesstech.co.za)(accessed 20/07/2022).

by the regulations to the DMA adequately provides for a permanent solution during disasters and beyond.[55] It is argued that the said regulations to the DMA should still be relevant and applicable post this specific disaster.

Regarding the question of how the DMA regulations will be carried forward post-pandemic, it is proposed that since the RHAA has not yet been implemented, some of the regulations introduced by the DMA may be opportune to be included as permanent changes implemented by the RHAA after the pandemic is over.

The RHAA aims to enhance tenants' rights whilst addressing a number of shortcomings in the RHA. Some of the proposed amendments in the RHAA are highlighted below.

Sections 4A and 4B RHAA concisely set out the rights and obligations of landlords and tenants. Non-compliance or interference with these rights and duties may lead to criminal liability which entails a fine or imprisonment for up to 2 years.[56] Criminal offences include; disconnecting municipal services such as water and electricity, locking tenants out of the residential dwelling, non-compliance with a ruling of the Rental Housing Tribunals (hereinafter referred to as the "tribunals") and a failure to reimburse tenants with their security deposits after the contract of lease has expired.

As highlighted earlier in this chapter, the relationship between landlords and tenants is one of unequal bargaining power between the two parties.[57] Accordingly, the legislature attempts to strike a balance by establishing the Rental Housing Information Offices to advise landlords and tenants of their reciprocal rights and obligations under section 14(1)(A) of the RHAA.

Section 15(Fb) RHAA states that:

> "[The] calculation method for escalation of rental amounts and the maximum rate of deposits which may be payable in respect of a dwelling and which may be set per geographical area to avoid unfair practices particular to that area."

As a form of state intervention aimed at regulating how much rental escalation is payable, the provision aforementioned is reminiscent of a rent control measure.

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[55] G Muller and A Vadachalam "Guarding against the illegal eviction of unlawful occupiers during a pandemic" 118-141 118-119 in ZT Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021).
[56] s 16(Aa) and 16(Bb) RHAA.
[57] See chapter 4, section 4.2.1 above.

The aforementioned section could be made more resilient by adding a subsection that provides for a cap or maximum percentage of an increase in rent a landlord may make. Currently, the standard practice is that lease agreements include a clause stipulating a 10% annual rental increase.[58] It is recommended that the rate be standardized and subject to review by the government on an annual basis. Additionally, contracting parties should be empowered to negotiate a lower rate than the standardized percentage.

It is recommended that a section that provides for a rental freeze be included in the RHAA. Historically, rental freezes were implemented as a rent relief measure.It is recommended that the government should be able to implement a rental freeze during i.e., an economic recession thus providing a reprieve to tenants. The DMA regulations stipulate that parties may negotiate alternative payment arrangements between themselves.[59] Similarly, it is recommended that contracting parties should have the power to negotiate and implement a rental freeze.

It is further recommended that a section related to rent de-escalation should also be added to the RHAA. In contrast to the above, should a situation arise where certain costs decrease, i.e., a significant decrease in property tax and levies or a significant decrease in the repo-rate, there should be a correlating de-escalation in rent. The government should conduct periodic reviews to determine whether a rental de-escalation should be implemented. Contracting parties should also have the power to negotiate and implement rent de-escalations. The introduction of de-escalation in rental may not be feasible in that landlords are unlikely to agree to it because it may prejudice them. We are yet to see the implementation hereof in South Africa and elsewhere in the world.In terms of the amended section 7, each of the 9 designated provincial MEC's are to within the first financial year following the commencement of the RHAA establish a Rental Housing Tribunal.[60] The importance of the tribunals was both stressed and affirmed in the case of *Maphango and Others v Aengus Lifestyle*

[58] Average Annual Rental Increase In South Africa - 2022/2023 (safacts.co.za) (accessed 16/11/2022).
[59] Regulation 54 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020. See also Regulation 71 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 999 in GG 43725 on 18 September 2020.
[60] s 7 RHAA.

Properties (Pty) Ltd.[61] In line with this, section 13 RHAA extends the powers of the tribunals. Section 13(4)(c) RHAA in particular states that the tribunals are empowered "to make any ruling that is fair and just to terminate any unfair practice,"[62] including among others, exploitative rentals. Section 17A RHAA provides that appeals against the decisions of the tribunal may be brought before a High Court. Empowering the tribunals to make rulings on exploitative rentals will assist in addressing the issue of unequal bargaining that exists between landlords and tenants.[63] In light of the possibility that tribunals may scrutinize rental amounts, landlords may be more inclined to maintain reasonable rates. It is recommended that including a subsection specifying that landlords will be fined if they are found to be exploitative will make this measure more resilient. This may encourage accountability and fairness.

Mohammed proposed replacing tribunals with "landlord-tenant courts" and granting them high court status for matters relating to rental housing.[64] This may enhance the resilience of the RHAA. Not only would this alleviate pressure from high courts and magistrate's courts, it would provide for easier access for landlords and tenants and ensure a speedy resolution.

Regulation 70 of the DMA stipulates that a court may grant an eviction order if it is "just and equitable" to do so having given due consideration to the outlined factors such as, the need for public interest which requires that all persons have access to a place of residence to protect not only their own health but that of the general public; the impact of the disaster on all parties; prejudice that may be caused to the applicant if there is a delay in executing an eviction order; whether or not evictees will have immediate access to alternative accommodation and whether the evictee is causing harm to others or poses a threat to life.[65] Section 4 of PIE which is concerned with eviction applications of private persons stipulates that a court is to "consider all relevant circumstances including, the rights and needs of the elderly, children, disabled persons and households headed by women.[66] As seen above, the DMA regulations provide a wider scope of consideration than those outlined in PIE. It is recommended

[61] *Maphango and Others v Aengus Lifestyle Properties* 2011 (5) SA 19 (SCA).
[62] s 13(4)(c) RHAA.
[63] See chapter 4, section 4.2.1 above.
[64] SI Mohamed *Tenant and Landlord in South Africa* (2010) 14.
[65] Regulation 70(2)(a) -(i) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 999 in GG 43725 on 18 September 2020.
[66] s 4(6) and 4(7) PIE Act.

that the factors outlined in PIE be expanded to include those reflected in regulation 70 of the DMA. This will provide a broader scope of consideration for courts. Furthermore, it is recommended that these factors be applied generally, rather than just in disaster situations.

The moratoria on evictions during the lockdown period is yet another example of a resilient measure. This ensured (albeit temporarily), a tenant's continued tenure at a dwelling.[67] However, this measure has its flaws in that, a tenant is likely to be held liable for arrear-payment of rent (i.e., where the tenant was unable to pay rent during the lockdown). Further, once the lockdown regulations are lifted, a landlord may then proceed with eviction proceedings leaving tenants without a home and indebted to the landlord.[68] It is recommended that eviction moratoriums only be implemented in disaster situations as an emergency measure. This is because of the gravity of other problems likely to follow once the moratorium is lifted. It will be necessary for government coordination to ensure that relief funds are implemented as soon as the moratorium is lifted.

In conclusion, it would be beneficial for private parties and the government to build resilience into the private rental market. In a letter written to South Africans addressing the end of the national state of disaster, President Ramaphosa writes that the pandemic has presented an opportunity for the country "to reconstruct a society that is more inclusive, more humane, founded in equal opportunity for all, and that protects the most vulnerable."[69] Economies around the globe are yet to recover from the financial instability caused by the pandemic. South Africa in particular had already been experiencing an "economic downturn" pre the Covid-19 pandemic.[70] Likewise, individuals have not recovered from the instability caused by the pandemic.

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[67] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 365-366 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[68] E van der Sijde "What can (South African) property lawyers learn from resilience thinking? An exploratory note on the aftermath of Covid-19" 352-372 365-366 in Z Boggenpoel, E van der Sijde, MT Tlale and S Mahomedy (eds) *Property law and pandemics* (2021).
[69] CYRIL RAMAPHOSA: State capture report, end of COVID restrictions will change SA (ewn.co.za) (accessed 04/07/2022).
[70] Socio-Economic Rights Institute of South Africa (SERI) 2020, Submission on The Impact of the COVID-19 Crisis in Housing Rights, pp. 1-35 22, http://www.seri-sa.org/images/SERI_submission_SR_COVID_19_9_July_2020.pdf (accessed 04/07/2022).

It is important that the promotion of the right to adequate housing include an assessment of financial hurdles that prevent access and how those barriers can be gradually reduced.[71] In explaining why rent control is "advisable if not unavoidable",[72] Willis in a remarkably concise and articulate manner points to the degree of monetary flexibility of items in a family's monthly budget.[73] He gives the example that if i.e., the cost for food were to increase, a family may adjust their food basket accordingly (purchase cheaper food, purchase food in bulk, decrease the purchase of luxury food items etc), if the cost for clothing were to increase, cloths can be made, cheaper clothing may be purchased. Likewise, entrainment budgets can be reviewed and decreased accordingly. If the cost for fuel were to increase, people may be more inclined to car-pool, find smarter ways of cutting back on transportation costs. The amount paid for rent, however, is by and large an inflexible cost. It may not be as easy as to relocate to another leased dwelling.[74] Willis further reflects on a decision held by the Argentine Supreme Court, where the court stated that, if we create a situation where all financial resources are tunnelled into the payment of rent, we risk making shelter (which is a basic necessity) an instrument of oppression.[75]

[71] G Muller and SM Viljoen *Property in Housing* (2021) 339-387 340.
[72] JW Willis "A short history of rent control laws" (1950) 36 *Cornell Law Review* 54-94 57.
[73] JW Willis "A short history of rent control laws" (1950) 36 *Cornell Law Review* 54-94 57.
[74] JW Willis "A short history of rent control laws" (1950) 36 *Cornell Law Review* 54-94 57.
[75] *Ercolano v. Lanteri* 136 S.C.N. 161 (1922). See also JW Willis "A short history of rent control laws" (1950) 36 *Cornell Law Review* 54-94 57.

CHAPTER 5
CONCLUSION

5 1 Introduction

In the words of Mahatma Gandi, "the true measure of any society can be found in how it treats its most vulnerable members."[1] These words ring true against the backdrop of South Africa's complex land history. Security of tenure is a key component of realizing the right to adequate housing[2] that is guaranteed by the Constitution of the Republic of South Africa, 1996[3] (hereinafter referred to as the "Constitution").

The Covid-19 pandemic exacerbated pre-existing challenges in South Africa,[4] more so for persons who form part of low to middle income households whose finances have been greatly impacted by the pandemic and the regulations to the Disaster Management Act 57 of 2002[5] (hereinafter referred to as the "DMA").

The objective of this dissertation was to determine whether existing laws adequately provide for situations where tenants are unable meet rental obligations due to disasters such as the Covid-19 pandemic. More specifically, whether rent control measures particularly those pertaining to the payment of rent, and eviction laws are adequate in ensuring the continuation of the lease relationship and protecting tenants holding over from evictions during disasters and beyond disasters?

In answering the objective as set out above, an overview of the findings of chapters two, three and four follows below. The legal position before, during and post the Covid-19 pandemic were discussed.

5 2 Conclusions

5 2 1 Rent reduction, rent escalation and eviction before Covid-19

[1] TOP 25 QUOTES BY MAHATMA GANDHI (of 3171) | A-Z Quotes (azquotes.com) (accessed 04/02/2023).
[2] OHCHR | Security of tenure, cornerstone of the right to adequate housing (accessed 27/09/2022).
[3] s 26(1) Constitution of the Republic of South Africa, 1996 ("Constitution").
[4] J de Groot and C Lemanski "COVID-19 responses: infrastructure inequality and privileged capacity to transform everyday life in South Africa" *Environment & Urbanization* 33 (2021) 255-272.
[5] Disaster Management Act 57 of 2002 ("DMA"). See also Dancing on the spot: Covid-19 in the low-income economy (dailymaverick.co.za) (accessed 20/08/2022).

The right to adequate housing is protected by maintaining the landlord-tenant relationship. In light of this, chapter 2 aimed to highlight what laws regulate the following:

(a) the lease relationship and termination thereof; and
(b) the eviction of tenants holding over before the Covid-19 pandemic.

The Constitution was found to have significantly changed the contractual relationship between landlord and tenant by altering the landlord's common law right to eviction.[6] Section 26(2) of the Constitution directs the government to take reasonable legislative measures to realize the right to adequate housing.[7] In this regard, the Constitution was found to be the foundation upon which both the Rental Housing Act 50 of 1999[8] (hereinafter referred to as the "RHA") and The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998[9] (hereinafter referred to as the "PIE Act") exist.

The RHA was found to regulate the contractual relationship between landlords and tenants in so far as the lease of a residential dwelling is concerned.[10] It does this by defining the rights and responsibilities of both contracting parties and outlining the conditions under which each party may terminate the lease relationship.[11] The concepts of rent escalation, rent de-escalation and rent reduction were discussed as rent control measures aimed at ensuring the continuation of the lease agreement.[12] The Rental Housing Tribunal(s) (hereinafter referred to as the "tribunals") are established in terms of section 7 of the RHA and have exclusive jurisdiction to resolve disputes involving "unfair practices".[13] The importance of the tribunals was affirmed in the case of *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*[14] wherein it was held that the tribunals have jurisdiction to rule on all questions or disputes of unfair practice.[15]

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[6] See chapter 2, section 2.3.1 above.
[7] s 26(2) Constitution.
[8] Rental Housing Act 50 of 1999 ("RHA").
[9] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE Act").
[10] RHA. See also SM Viljoen *The Law of Landlord and Tenant* (2016) 67. See also SI Mohamed *Tenant and Landlord in South Africa* (2nd ed 2010) 15.
[11] ss 4, 5 RHA. See also chapter 2, section 2.2 above.
[12] See chapter 2, section 2.2.2 above.
[13] Chapter 4 RHA. See also Chapter 2, section 2.3.2.1 above.
[14] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC).
[15] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 554-555.

Lastly, PIE specifically applies to the eviction of unlawful occupiers.[16] In the case of *Ndlovu v Ngcobo; Bekker and Another v Jika,*[17] the Supreme Court of Appeal (hereinafter referred to as the "SCA") confirmed that tenants holding over are considered as unlawful occupiers per PIE. [18]

5 2 2 Rent reduction, rent escalation and eviction during Covid-19

Chapter 3 aimed to establish which measures, if any were available to protect tenants against the termination of the lease relationship due to non-payment of rental; and to protect tenants against evictions during the Covid-19 disaster.

A national state of disaster was declared and implemented in terms of the DMA which was the national regulatory framework used in South Africa during the Covid-19 pandemic.[19] The DMA regulations enhanced the protection already provided to landlords and tenants by the RHA and PIE Act.[20]

To contrast the continuation of a lease relationship as provided by the DMA regulations as opposed to under common law principles during a disaster, the principles of *pacta sunt servanda*, *force majeure* and impossibility of performance were discussed.[21] It was found that the common law principles highlighted above, similarly to the DMA regulations aid tenants to continue a lease relationship in the face of unforeseen occurrences such as a disaster that may affect their ability to pay rent.

In an effort to ensure the continuation of the lease agreement between landlords and tenants during the Covid-19 pandemic, the Social Housing Regulatory Authority (hereinafter referred to as "SHRA")[22] established the Residential Rent Relief Scheme (hereinafter referred to as the "RRS").[23] Landlords and tenants who found themselves

[16] s 1 PIE Act. See also chapter 2, section 2.3.2.2 above.
[17] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA).
[18] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 125.
[19] See chapter 1, section 1.4.1 above.
[20] See chapter 3, section 3.2.2 above.
[21] See chapter 3, section 3.3.1 above.
[22] The Social Housing Regulatory Authority was established in terms of the Social Housing Act 16 of 2008.
[23] Polity - SHRA is ready for residential rent relief roll-out (accessed 10/06/2022) "The Department of Human Settlements has allocated R600 million to the residential relief scheme, of which, R300 million has been allocated for rental relief to support social housing institutions. The Residential Rent Relief Programme will be made available retrospectively from 1 April 2020. It will run for a period of approximately six months or until funding is exhausted, whichever comes first. Only South African citizens are eligible to apply for relief". See also chapter 3, section 3.3.2.3 above.

in financial difficulties due to the pandemic were provided temporary relief by the RRS.[24] Although the RRS was unsuccessful (as discussed in chapter 3),[25] the establishment thereof is indicative of the fact that rental assistance is a necessity in a country where low to middle income households are one bad incident away from defaulting on rental obligations during disasters. Furthermore, the DMA regulations encouraged parties to negotiate amongst themselves in reaching an amicable solution pertaining to the payment of rent.[26] Parties may have resolved in their negotiations to reduce rent, thus creating a sense of security of tenure, despite the fact that the concept of rent reduction was not expressly included in the DMA regulations. Therefore, the DMA's encouragement to landlords and tenants to negotiate and reach an amicable solution about rental payments could be seen as a regulation that provided for rent reduction.

The plight of unlawful occupiers was duly anticipated and recognized by the South African government who took heed of international guidelines by placing a prohibition on evictions for the duration of the state of disaster.[27] The prohibition on evictions which first appeared in Regulation 11CA of the DMA stipulated that, "no person may be evicted from their place of residence, regardless of whether it is a formal or informal residence or a farm dwelling, for the duration of the lockdown". Essentially, it placed a moratorium on the eviction of unlawful occupiers. Under lockdown level 3, Regulation 37(1) permitted a competent court to grant an eviction or demolition order. Regulation 37(2), however, states that in the event that such an order is granted, execution thereof must be stayed or suspended until the national state of disaster has lapsed, unless deemed just and equitable for it to be carried out. This provision recognised that even if there is a valid ground to evict someone, we must bear in mind that we are in the midst of a pandemic. This requires that for everyone's sake, people stay home to avoid spreading. It may be in the public interest to override an individual's interests in this regard.

[24] Covid-19 in SA: R600m rental relief funds untouched (iol.co.za) (accessed 10/06/2022). See also Chapter 3, section 3.3.2.3 above.
[25] See chapter 3, section 3.3.2.3 above.
[26] Regulation 54 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020. See also Regulation 71 of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 999 in GG 43725 on 18 September 2020. See also Chapter 3, section 3.3.2.2 above.
[27] See chapter 3, section 3.2.1 above.

Despite the laws in place, evictions and demolitions took place during the national state of disaster. As the court found in the case of *South African Human Rights Commission v City of Cape Town*,[28] the defence of counter-spoilation does not replace substantive or procedural requirements set out in PIE and the DMA regulations in relation to demolitions and evictions.

5 2 3 Rent reduction, rent escalation and eviction post Covid-19

Chapter 4 offered a forward-looking perspective.[29] The chapter inquired whether the law regarding the termination of lease relationships and the eviction of tenants holding over should be amended to ensure adequate protection for tenants during disasters and beyond? If so, how can it be amended to ensure the required protection?

With reference to how the DMA regulations may be carried forward and applied during disasters and beyond (i.e., post the Covid-19 pandemic), it was suggested that it may be advantageous to include the DMA regulations in the Rental Housing Amendment Act 35 of 2014[30] (hereinafter referred to as the "RHAA") and PIE. Two particular regulations are referred to below that should be included in the two Acts mentioned above.

As stated in Regulation 53(2) of the DMA, if a competent court has granted an order for eviction or demolition, such an order may be suspended or stayed until the national state of disaster has ended,[31] except if the court believes that suspending or staying the order, based on the considerations set out in Regulation 53(2)(a)-(i), would not be just and equitable.[32] In contrast to the aforementioned provision of the DMA, sections 4(6) and 4(7) of PIE stipulate that a court may grant an order for eviction after considering all relevant circumstances, “including the rights and needs of the elderly, children, disabled persons and households headed by women”.[33] It is recommended that the listed considerations in regulation 53(2)(a)-(i) of the DMA should be added to the considerations which appear in sections 4(6) and 4(7) of PIE so as to provide

[28] *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC)
[29] See chapter 4, section 4.1 above.
[30] Rental Housing Amendment Act 35 of 2014 (hereinafter referred to as “RHAA”).
[31] Regulation 53(2) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020.
[32] Regulation 53(2)(a) -(i) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020.
[33] Ss 4(6) and 4(7) PIE Act.

increased protection to unlawful occupiers facing the possibility of eviction. In light of this, it is suggested that the words providing that an order may be suspended or stayed "until after the lapse or termination of the national the state of disaster"[34] be removed, since it is recommended that a combined list of considerations should apply both during disasters and beyond.

Further, it is recommended that regulation 54(2)(a)-(d) of the DMA which provides an elaborate list of conduct which is deemed unfair practice (including the termination of lease due to non-payment of rent without having engaged in negotiations for alternative payment arrangements) should be included in the RHAA under conduct deemed unfair practice as to afford increased protection to tenants. It is difficult to predict when circumstances might arise that lead to non-payment of rent. It is therefore incumbent on the contracting parties to engage in negotiations for alternative payment arrangements before terminating the lease relationship. It is recommended that extended list of conduct deemed as unfair practice apply both during disasters and beyond.

Butler writes that "an effectively functioning property system needs resilience to adapt, to self-correct, to make the adjustments needed to handle changing socioeconomic, cultural, political, and biophysical conditions."[35] Resilience can be used as a measure to both regulate and evaluate the property system. Building resilience into the private rental market would be beneficial to both the government and private parties (landlords and tenants), as it would help rebuild a society that is more humane, inclusive, founded on equal opportunity for all, and which protects the most vulnerable.[36]

Accordingly, the RHAA aims to enhance tenants' rights while increasing landlords' obligations.[37] Notably, the RHAA includes sections that appear to promote the notion of rent control. A few sections were identified in chapter 4 that may be made more resilient. These include section 15(Fb) of the RHAA which states that the calculation method for escalation of rental amounts may be set according to a geographical

[34] Regulation 53(2) of the Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 in No R 891 in GG 43620 on 17 August 2020.
[35] LL Butler "The resilience of property" (2013) 55 *Arizona Law Review* 847-908 891.
[36] See chapter 4, section 4.3.4 above. See also CYRIL RAMAPHOSA: State capture report, end of COVID restrictions will change SA (ewn.co.za) (accessed 04/07/2022).
[37] Getting To Grips With The Rental Housing Amendment Act | Eviction Law (evictionlawyerssouthafrica.co.za) (accessed 19/11/2022).

area.[38] It is recommended that in an effort to make the aforementioned section more resilient, a subsection should be added which stipulates a maximum escalation percentage. Upon assessment, the government will implement this. However, it is further recommended that contracting parties should be empowered to (as provided for in the DMA regulations) negotiate a lower escalation percentage than the stipulated maximum.

It was further recommended that a section that speaks to a rental freeze should be included in the RHAA. The said inclusion, however, should take into account the pros and cons of a rental freeze or rent restrictions. This would be reminiscent of the rental freeze which appeared in both the Tenants Protection (Temporary) Act 7 of 1920 and the Rents Act 13 of 1920 as a rent control measure.[39] We recommend that the government be able to call for a rental freeze during economic hardship. Contracting parties should also be empowered to negotiate this between themselves. This measure should be applicable beyond disaster situations.

Lastly, it was recommended that de-escalation[40] as a method of rent reduction be introduced in the RHAA. Essentially, it would be a rent control measure aiming to ensure tenants also benefit from a booming economy which has resulted in property taxes and levies decreasing for property owners and landlords.

5 3 Final remarks

Although there has not been a dedicated regulatory framework to rent control since the Rents Control Act 80 of 1976[41] (hereinafter referred to as the "RCA") was repealed in 2002, provisions in the both the RHA and the RHAA provide for rent control measures.

Once the national state of disaster came to an end, tenants (who were afforded beneficial occupation during the pandemic) who fail to meet rental obligations were in breach of contract. Landlords can now cancel the contract on account of the breach and institute eviction proceedings. Although it is likely a court will take the pandemic

[38] See chapter 4, section above 4.4 above.
[39] See chapter 2, section 2.2.2.3 above.
[40] See chapter 2, section 2.2.2.2 above.
[41] Rents Control Act 80 of 1976 ("RCA")

into account, landlords may not be willing and will not be obligated to negotiate with tenants.

Due to the fact that sections 4(6) and 4(7) of PIE are formulated in general terms and do not provide for circumstances that may require extraordinary considerations, PIE alone has proven insufficient and has fallen short of achieving adequate tenure-protection during disasters.[42] Muller and Vadachalam recommend that as an interim solution and in an effort to provide a wider scope of protection, PIE should be read together with the regulations of the DMA or that regulations similar to those of the DMA be proclaimed in terms of PIE.[43]

In conclusion, it is fair to state that the pandemic can be used as a vehicle for transformation because in hindsight it has exposed limitations and loopholes in our systems and laws. Policy-makers can use resilience-thinking to develop effective policies for the future.[44]

[42]See chapter 4, sections 4.2.1 and 4.2.2 above. See also G Muller, A Vadachalam "Guarding against the illegal eviction of unlawful occupiers during a pandemic" 118-141 in ZT Boggenpoel, E van der Sijde, MT Tlale, S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021).
[43] G Muller and A Vadachalam "Guarding against the illegal eviction of unlawful occupiers during a pandemic" 118-141 in ZT Boggenpoel, E van der Sijde, MT Tlale, S Mahomedy *Property and Pandemics: Property Law Responses to Covid-19* (2021).
[44] E Peresa, C du Plessis and K Landman "Unpacking a sustainable and resilient future for Tshwane" (2017) 198 *Procedia Engineering* 690 – 698 690.

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