Blue Moonlight Rising: Evictions, Alternative Accommodation and A Comparative Perspective on Affordable Housing Solutions in Johannesburg

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BLUE MOONLIGHT RISING: EVICTIONS, ALTERNATIVE ACCOMMODATION AND A COMPARATIVE PERSPECTIVE ON AFFORDABLE HOUSING SOLUTIONS IN JOHANNESBURG

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ABSTRACT
The City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd is a welcomed addition to the eviction jurisprudence in South Africa. Courts have jostled for years with the question of whether socio-economic rights should be enforced in the context of adequate housing and evictions. Today, the central questions in comparative constitutional law deal with how courts should enforce such rights. In other words, what are the remedies for violations of socio-economic rights? The usual proposed remedies are coercive orders aimed at guaranteeing occupiers the denied rights directly, planning orders, or procedural benefits. Amidst Blue Moonlight’s increased interest amongst academics, practitioners and jurists, as an example of South Africa’s ‘new normality assumption’ and its realisation of procedural benefits to people facing imminent eviction from private property, is a comparative housing policy yet to be discovered and considered in South Africa. A policy-oriented interpretation of the text of the lower Court’s opinion in Blue Moonlight reveals the policy blueprint of several housing voucher programmes currently operating in the United States that may serve as a new model on how to enforce socio-economic rights for occupiers facing imminent eviction—the Blue Moonlight remedy. Vouchers are a primary mechanism for providing affordable, safe and decent housing to the poor in the US and ought to be considered by academics, policy-makers, jurists and public officials as one of many potentially innovative solutions to Johannesburg’s housing woes.

I INTRODUCTION
The inner-city struggle of property rights between landowners and land occupiers in Johannesburg has left thousands of families living in deteriorated and abandoned buildings and landowners vying to preserve their property.1 Vacant warehouses, factories, apartment complexes and garages are nothing new to the urban landscape in the post-apartheid city. Before 1999, one ware-

∗US Fulbright Scholar, University of the Witwatersrand School of Law, South Africa (2009–2010); I am deeply indebted to many people who have provided insightful comments. This article would not have been possible without the intellectual support over the last four years from Tony Cashman, B. Jeffrey Reno, Thomas Landy, James Bryant, Marie Huchzermeyer, Jackie Dugard, Raylene Keightley, Stuart Wilson, Mary-Anne Munyembate, Russell Pearce and Richard Goldstone.

house in particular, located at 7 Saratoga Avenue in the Johannesburg Central Business District (CBD), was used, primarily, for commercial purposes. The occupiers of the property at that time were employed and given permission to live on the property. But there was a stipulation: if rent was paid, the occupiers could stay.

Long before Blue Moonlight Properties (the current property owner) bought the property at Saratoga Avenue, a company named Kernel Carpets operated from the series of warehouses. Families had lived on the property since 1976 while employed by Kernel Carpets. When the company departed, the occupiers continued to pay rent to unidentified persons claiming affiliation with the property owner. In 2000 a property letting firm started collecting rent. The property deteriorated and living conditions worsened, which led to a complaint by the occupiers to the rental housing tribunal. Yet, nothing came from the complaint.

In 2002, another management company began collecting rent from the occupiers. That company was supplanted by two individuals who collected rent from the occupiers. Another complaint concerning their authority to collect rent was referred to the housing tribunal without any result. The living conditions at Saratoga Avenue worsened yet again. In 2004, Blue Moonlight Properties purchased the building and a stand-off ensued when the company sought to evict the occupiers.

The conflict at Saratoga Avenue has deep roots that are intertwined in the rights of the property owner and the rights of land occupier in the ‘New’ South Africa. Today, a case has climbed the judicial ranks that may loosen the property right’s stranglehold. The City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd (hereafter ‘Blue Moonlight (SCA)’) has the potential to become a landmark judgment that encourages the implementation of a new, if not novel, housing policy in Johannesburg. Underlying Blue Moonlight’s ‘new normality assumption’, its acknowledgment of the power of socio-economic rights, and its realisation of procedural benefits to a person facing imminent eviction from private property, is an international comparative policy yet to be discovered and considered in South Africa.

The main issue reviewed at the Johannesburg High Court in Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue was whether the City of Johannesburg (hereafter ‘the City’) was obliged to provide accommodation (be it temporary or permanent) to unlawful occupiers who are being

2 See generally M Mutua ‘Hope and Despair for a New South Africa: The Limits of Rights Discourse’ (1997) 10 Harvard Human Rights J (1997) 63, 67. The new South Africa is described by scholars as the virtual product of the post-World War II period characterised as the Age of the Rights, where the human rights movement was born.

3 2011 (4) SA 337 (SCA).


evicted from private property. Blue Moonlight Properties sought the eviction of 80 people who occupied the series of warehouses in Berea Township. The property owner had purchased the property knowing full well that 80 people occupied the land, yet still proceeded with the occupiers’ eviction in order to develop the land. The occupiers argued that any eviction would lead to homelessness. Blue Moonlight Properties sought to exercise the right to own property. The occupiers had also exercised their right to remain on the land until alternative shelter was made available to them.

The lower Court found that excluding people under threat of eviction from private land from the City’s emergency shelter programme and other housing programmes violated s 26(2) of the Constitution of the Republic of South Africa, 1996 and found the policy to constitute unfair discrimination in violation of s 9(3). The Court ordered the eviction of all occupiers from the Blue Moonlight property at Saratoga Avenue and required full vacancy by 31 March 2010. The City’s housing policy – temporary and emergency programmes – was declared unconstitutional ‘to the extent that it discriminates from consideration of suitable housing relief’ because the City did not take into consideration the needs of people evicted from private property. Spilg J ordered the City to remedy the defect in its housing policy by altering its long-term programme and pay ratepayer rent to the landowner or alternatively pay direct cash-assistance to the occupiers.

The case was appealed by the City at the Supreme Court of Appeal (SCA). The issue at the SCA was whether the City is able, within its available resources, to meet the needs of the occupiers. The Court found that the City can and must do so under s 26 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). It also found the City to have violated the right to equal protection and benefit of the law in s 9(1) of the Constitution.

At the time of writing, Blue Moonlight awaits judgment at the Constitutional Court after being appealed by the City once again.

South African courts continue to be called upon to adjudicate disputes between unlawful occupiers, property owners and municipalities. Indeed, socio-economic rights are justiciable in South Africa. Jurists, practitioners and legal scholars have sought to define a clear jurisprudence over the past 15 years. Today, courts have surpassed the question of whether to enforce the right to adequate housing and protections from evictions, and instead seek to answer how to enforce such rights. To date, courts have deferred the responsibility to provide alternative accommodation to the City, pointing to the rights established mainly in s 26 and the statutory framework of PIE.

6 Case No 2006/11442 [2010] ZAGPJHC 3 (4 February 2010) para 1 (hereafter ‘Blue Moonlight (HC)’).
7 Ibid para 196(4).
8 Ibid para 144.
9 Ibid para 196(2).
10 Ibid para 196(4)(a).
11 Ibid para 196(6).
This article argues that *Blue Moonlight* is a judicial platform for which policy-makers ought to consider new approaches to provide low-income families facing imminent eviction with affordable alternative accommodation, through housing voucher programmes. A policy-oriented interpretation of the text of the lower Court’s opinion in *Blue Moonlight* reveals the policy blueprint of several housing voucher programmes currently operating in the United States (US).

II THE ROOTS OF THE PROPERTY PROBLEM ARE INTERTWINED IN THE RIGHTS

(a) The uncertainty of land possession

The crux of the debate between landowners and land occupiers stems from ss 25(1) and 26(3) of the Constitution. Section 25 states that ‘[n]o one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property’. Section 26(3) gives protection to occupiers by stating, ‘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’ and legislation must not permit arbitrary evictions. There is tension between the two rights. This stalemate becomes a contentious issue in circumstances where occupiers have lived on land for lengthy periods of time. The landowner has the right to enjoy and utilise his or her land and therefore feels compelled to remove people from the said land. Landowners can exercise this right lawfully by submitting an eviction application to the courts. Indeed, this clash of property interests leaves the parties to an eviction application in a legal vacuum\(^\text{12}\) and gives rise to the question of what the courts can and cannot take into consideration when an eviction application is submitted and what remedies are available when families have been evicted.

The Housing Act 107 of 1997\(^\text{13}\) gives effect to the fundamental right of access to adequate housing under s 26(2) of the Constitution, while PIE gives effect to the protections afforded to land occupiers under s 26(3). PIE sets out a procedural mechanism to follow for people under threat of eviction to all land throughout South Africa and to occupiers who do not have rights of occupation. The Act also clarifies the role that the courts play in granting an order to evict occupiers and the subsequent role the state plays through its housing programmes to handle the eviction process if and when an order to

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\(^{12}\) Wilson (note 4 above) 289.

\(^{13}\) The Act, among other things, provides for the facilitation of a sustainable housing development process; lays down the general principles applicable to housing development in all spheres of government, defines the functions of national, provincial and local governments in respect of housing development; and provides for the establishment of a South African Housing Development Board, the continued existence of provincial boards under the name of provincial housing development boards and the financing of national housing programmes.
evict is approved. Essentially, PIE jurisprudence allows for the constitutional right to housing to narrow the scope of the common law right to ownership of the landowner.

Under the provisions of ss 6(3)(a)(b) and (c) and 4(7) of PIE, eviction orders can be made by the courts that require the state to provide alternative accommodation through its housing policies and programmes. Sections 4(2) and 4(7) give courts the discretion to decide whether occupiers who have unlawfully occupied a building or land for more than six months can be evicted and the role for municipalities in reporting to a court on the availability of accommodation for people facing imminent eviction. Section 8(1) protects unlawful occupiers from eviction from anyone – private or public entities – who do not have a court order to do so. The pending eviction is considered by the court after looking at, among other things, the available accommodation within the specific municipality’s housing policies and programmes. Once an order for eviction is granted subject to the provision of alternative accommodation, the landowner has a right to the land, but may not solely occupy the land if occupiers are not guaranteed the alternative accommodation. Therefore, until alternative accommodation is found, the occupiers may remain on the land. Stuart Wilson explains PIE’s impact on the owner versus occupier dilemma as follows:

While the valid termination of rights was the end of the line in common law eviction proceedings, the PIE Act requires that eviction proceedings against those who lack common law rights be brought in compliance with strict procedural requirements and grants the courts wide-ranging discretion to refuse to enforce an owner’s common law rights if they consider that to do so would not be just and equitable, taking into account all the relevant circumstances.

(b) Constitutional law foundations

The constitutional law foundation for the owner-occupier issue in the context of socio-economic rights originates from the Court’s decision in the Government of the Republic of South Africa v Grootboom. The Court found that the state’s

14 Ibid s 11(3)(a)(b)(c) & (h), which vests legislative or executive authority in municipalities to perform a number of functions, including ‘developing and adopting policies, plans, strategies and programmes including setting targets for delivery’ the implementation of ‘applicable national and provincial legislation and by-laws; the preparation, approval and implementation of budgets; the imposition and recovery of rates, taxes, levies, duties, services fees and surcharges on fees’.
15 Wilson (note 4 above) 289.
16 Section 6(3)(a)(b)(c), s 4(7).
17 Ibid s 4(7).
18 Ibid s 8(1).
19 Ibid s 6(3).
20 Wilson (note 4 above) 271–2. See also 281 fn 49 ‘For example, the property could also be the owner’s home and therefore the owner’s common law right to exclusive possession could be protected by s 26(1) of the Constitution just as easily as s 25(1) of the Constitution. There is no reason to suppose that an eviction would not be just and equitable if the property was instrumental to any other compelling interest protected by the Bill of Rights, but this would have to be considered on a case-by-case basis’.
21 2001 (1) SA 46 (CC).
failure to have in place a housing policy which provided shelter for the homeless who find themselves in desperate need was a violation of s 26(2). The Court acknowledged, though, that there was not a direct obligation on the state to provide specific goods on demand to the poorly housed. Moreover, the Court held that the state must adopt and implement reasonable policies, within its available resources, to ensure access to adequate housing on a progressive basis. The decision resulted in a series of legislative manoeuvres that sought to ensure housing for the homeless. For example, Chapter 12 of the National Housing Code seeks to provide for Housing Assistance in Emergency Circumstances, such as evictions that would lead to homelessness. This new legislation placed on the municipalities the primary obligation to provide for families under threat of eviction. Later decisions advanced Grootboom and clarified the meaning of alternative accommodation.

In President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd the Court held that the only appropriate relief for occupiers facing imminent eviction was to allow them to remain on the land until alternative accommodation was made available by the state. Although the constitutional right to housing realised under PIE narrows the common law right to ownership for landowners, it does not obscure the limitation completely. In the case of Modderklip, the limitation for landowners is temporary, because the state was found to have unreasonably refused to perform its statutory and constitutional obligations to provide temporary housing. Therefore, the limitation was based on the amount of compensation the state will pay for violating the rights of the landowner until alternative accommodation was made available to the occupiers.

In Port Elizabeth Municipality v Various Occupiers, the Court held that lower courts should be reluctant to order the eviction of relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme. The Court’s language unpacks the relationship between private law and public law, while at the same time acknowledging the underlying housing policy implications.

The problem will always be to find something suitable for the unlawful occupiers without prejudicing the claims of lawful occupiers and those in the line for formal housing. In this respect it is important that the actual situation of the persons concerned be taken account of.

22 Ibid para 40.
23 Ibid.
24 The Housing Code was adopted in 2000 and revised in 2009. Chapter 12 of the Code was adopted in 2004. The Emergency Housing Programme was adopted with respect to s 3(4)(g) of the Housing Act, which obligated municipalities to apply for funding from provincial governments to implement emergency housing programmes and specifically targets persons evicted or facing imminent eviction from land or buildings.
25 2004 (6) SA 40 (SCA) para 68.
26 Ibid paras 43–45 & 68.
27 2005 (1) SA217 (CC).
28 Ibid para 28.
29 Wilson (note 4 above) 281.
It is not enough to have a programme that works in theory … it would not be enough for a municipality to show that it has in place a programme that is designed to house the maximum number of homeless people over the shortest period of time in the most effective way. The existence of such a programme would go a long way towards establishing a context that would ensure that a proposed eviction would be just and equitable. It falls short, however, from being determinative of whether and under what conditions an actual order should be made in a particular case.

Sachs J established the core reason why simply having a housing programme is not enough to grant an eviction application. The individual circumstances of the occupants must be taken into consideration under PIE and the proposed alternative accommodation must be suited to the needs of the occupiers.

In Lingwood v Unlawful Occupiers of ERF 9 Highlands, the Court declined an eviction application from the landowner because the owner failed to negotiate other alternative housing options with the occupiers, who were facing eviction. The Court also ordered the parties, including the relevant municipality (the City of Johannesburg) which had been joined to the case, to search various possibilities of alternative housing for the occupiers facing imminent eviction. In terms of s 26(2) of the Constitution, the City had a legal obligation to be joined to the proceedings and to explore alternative housing for the occupiers facing imminent eviction.

The same year, the Court in Sailing Queen Investments v Occupiers of La Coleen Court ordered the joinder of the City to the eviction proceedings between the landowner and the land occupiers, requiring a report on the availability of alternative accommodation in the event that the occupiers were evicted. Indeed, without the constitutional obligations set forth under s 26(2) and (3), any eviction order of land occupiers, without first exploring the possibility of alternative housing, would be denied.

Then, in 2009, Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes, the Court reaffirmed PE Municipality by holding that the government’s obligations under s 26(2) of the Constitution meant that an eviction sought by the state should not be granted without the provision of alternative housing. The Court required that the applicants be allocated the specified proportion (70 per cent) of the new housing units to be built on the site of the Joe Slovo informal settlement.

Indeed, the obligation to provide alternative accommodation in eviction cases that apply under the PIE Act has come a long way from Grootboom to Joe Slovo. Constitutional law, supported by PIE, has found an important defence to eviction applications for occupiers; that is, if there is no alternative accommodation available to the occupier or the government has not taken reasonable measures to put alternative accommodation in place or the occupier

30 PE Municipality (note 27 above) para 29.
31 2008 (3) BCLR 325 (W).
32 2008 (6) BCLR 666 (W).
33 2009 (9) BCLR 847 (CC).
34 Ibid para 170.
under these circumstances is led to homelessness, then the eviction application should be dismissed and the occupier’s right to remain on the land or in the building is upheld.\textsuperscript{36}

Today, the issue turns to the affirmative side. Courts and municipalities continue to grapple with how to enforce socio-economic rights in the context of s 26 and PIE and what remedies are available for violations of such rights. Precedent has leaned towards remedies that were coercive orders aimed at guaranteeing the denied rights directly, planning orders of the sort, used in \textit{Grootboom}, and procedural remedies exemplified by the \textit{City of Johannesburg v Rand Properties (Pty) Ltd}\textsuperscript{37} and the \textit{Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg}.\textsuperscript{38} A new remedy may be on the table and it can be found within the text of the lower Court’s opinion in \textit{Blue Moonlight}.

III \textbf{THE ART OF THE POSSIBLE: THE VOUCHER DESIGN UNVEILED}

\begin{enumerate}
  \item [a] \textbf{Cash assistance and ratepayer remedies}
  
  In \textit{Blue Moonlight}, the Court found that excluding people under threat of eviction from private land from the City’s emergency shelter programme and other housing programmes violated s 26(2) of the Constitution.\textsuperscript{39} The City was required to submit a report twice discussing in detail the availability of alternative housing within its housing programme. The City’s report, ordered by Masipa J in the first hearing, stated that it would only provide alternative accommodation to occupiers evicted from designated buildings under its urban development plan, not from private property. In the second report, the City’s position was that only families evicted from ‘bad buildings’ or derelict facilities determined by the National Building Regulations Act 103 of 1977 would be placed in line for alternative accommodation. The City’s argument was based on the budgetary constraints it would face if it were forced to provide housing for those unlawfully occupying private land.\textsuperscript{40} Wilson alludes to the lower Court’s decision to require a report and its impact on future cases dealing with evictions from private property:

  The decision in \textit{Blue Moonlight} goes some way towards putting into practice the state’s duty to provide alternative accommodation in eviction cases. Indeed much of the \textit{Blue Moonlight}

\end{enumerate}

\begin{footnotes}
\item[36] Wilson (note 4 above) 281.
\item[37] 2007 (6) SA 417 (SCA).
\item[38] 2008 (3) SA 208 (CC).
\item[39] \textit{Blue Moonlight} (SCA) (note 3 above) para 69.
\item[40] Ibid para 51. ‘Because of the scale of the task facing the City, the City cannot for the time being make any of its emergency shelters available for any persons evicted from private property by way of PIE’. See also s 152(1)(b) & (d) of the Constitution requiring a Local Government to ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment. Local Government and municipalities have a primary responsibility to give priority to the basic needs of the community. See s 153 of the Constitution, Developmental Duties of Municipalities, stating ‘a municipality must (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community’; and (b) participate in national and provincial development programmes.
\end{footnotes}
judgment simply takes the state’s obligations in this regard for granted. Importantly, the Blue Moonlight judgment requires the state to say what priority it has assigned the occupiers in a particular eviction application in terms of its overall housing programme and when the occupiers can conceivably benefit from its implementation. This means that, even though the state may not be able to provide alternative shelter straight away, it can be held accountable to do so in future. As is clear from the judgment, it will not normally be acceptable for the state to say that it cannot or will not help at all.41

If the state must provide alternative shelter or housing in the future, then the issue becomes policy-oriented and leaves questions as to what housing programmes can successfully provide occupants facing imminent eviction with alternative remedies to secure affordable housing, either temporarily or permanently.

On 4 February 2010, the Johannesburg High Court ordered the eviction of all occupiers from the Blue Moonlight property at Saratoga Avenue and required full vacancy by 31 March 2010.42 The City’s housing policy – temporary and emergency programmes – was declared unconstitutional ‘to the extent that it discriminates from consideration of suitable housing relief’ because the City did not take into consideration the needs of people evicted from private property.43 Spilg J ordered the City to ‘remedy the defect in its housing policy’ by altering its long-term programme and pay ratepayer rent to the landowner or alternatively pay direct cash-assistance to the occupiers.44

Significantly, a ratepayer remedy entailed the City paying an amount ‘equivalent to the fair and reasonable monthly rental of the said premises from 1 July 2009 until the occupiers vacate on 31 March 2010, which amount is to be determined by agreement between’ the landowner and the City.45 If the parties fail to come to an agreement, Spilg J said a ‘sworn valuator’ appointed by the President of the South African Council for Property Valuers Profession would determine the rate.46 Alternatively, and until housing is provided, Spilg J said the City could ‘pay the amount of R850 per month until the final determination of the relief’ ‘in lieu of accommodation’ directly to the occupiers as a ‘constitutional damage’ remedy.47 Indeed, the decision imposed monetary orders on the City while housing stock was pending availability:

Local Government [is] directly responsible for implementing the constitutional and statutory obligations regarding the provision of adequate housing on a progressive basis and to take active steps to provide accommodation for the most desperate.48

The City has the most direct and immediate control over alternative accommodation and housing policy.49 Spilg J was not persuaded by the City’s argument that it did not have the available resources. He remained ‘skeptical regarding

41 Wilson (note 4 above) 286–7.
42 Blue Moonlight (HC) (note 6 above) para 196(1) and (2).
43 Ibid para 196(4).
44 Ibid para 196(5) (my emphasis).
46 Ibid (my emphasis). See also Property Valuers Profession Act 47 of 2000 s 15(a)(b) & (c).
49 Ibid para 58.
50 Ibid para 68.
its [the City’s] protestations, either in relation to *budgetary constraints* or accessing emergency or temporary accommodation.\(^{51}\) Spilg J reminded the City that it must provide resources within the limitations of its budget:

> The City’s obligation remains to provide access to adequate housing on a progressive basis within the limitations of available resources with due regard to the poorest who otherwise would have no shelter and little prospect of a dignified life.\(^{52}\)

Spilg J continues that the Constitution ‘does not impose an obligation on the private sector to give up its property for this purpose [alternative accommodation]’ and that the ‘private sector’s obligation remains to provide the necessary revenues via taxation and the *other means* … to enable the State to achieve its duties under section 26’.\(^{53}\) The Court even acknowledges that the cash-assistance remedy may not have ‘adequate oversight’ and that the Court lacks the necessary information to make an informed calculation on the amount that each occupant ought to receive until either emergency or temporary accommodation is provided.\(^{54}\) The Court said, ‘[i]t is therefore necessary to provide a *regular review mechanism to monitor and oversee the appropriate subsidy*’.\(^{55}\)

(b) The ‘art of the possible’

The SCA decision confirmed the eviction of the occupiers and the unconstitutionality of the City’s housing programmes and ordered the City to provide the occupiers with temporary emergency accommodation.\(^{56}\) The lower Court had found the policy to constitute unfair discrimination in violation of s 9(3) of the Constitution, while the SCA found it instead to violate the right to equal protection and benefit of the law in s 9(1) of the Constitution. The SCA acknowledged the City’s ‘extensive and impressive housing programme’, but questioned whether its housing programme caters for the occupiers at Saratoga Avenue.\(^{57}\) The Court also significantly altered the lower Court’s order. Most notably, it dropped the lower Court’s order for the City to pay an ‘*equivalent to the fair and reasonable monthly rental*’ per month to Blue Moonlight Properties or alternatively the R850 per month remedy.\(^{58}\) The Court noted the City’s issues with Spilg J’s decision:

> The City was particularly aggrieved at the constitutional damages that the court below appeared to have granted against it. It labelled the order imposing direct financial obligations on it by payment to the landlord, and the provision of a stipend of sorts to the occupiers, as extraordinary and unwarranted.\(^{59}\)

\(^{51}\) Ibid para 186 (my emphasis).

\(^{52}\) Ibid para 173.

\(^{53}\) Ibid para 96 (my emphasis).

\(^{54}\) Ibid para 184 (my emphasis).

\(^{55}\) Ibid (my emphasis).

\(^{56}\) *Blue Moonlight (SCA)* (note 3 above) para 77(3)(4).

\(^{57}\) Ibid para 47.

\(^{58}\) Ibid para 77(2).

\(^{59}\) Ibid para 23.
Indeed, the SCA was perplexed at the extraordinary nature of Spilg J’s opinion and the subsequent remedy, saying the order requiring the City to pay a stipend was ‘to say the least, somewhat unusual’. The Court invoked *Modderklip*, explaining that it was not an authoritative source for the lower Court to rely upon to impose constitutional damages and compensation by way of a ratepayer rent to the landowner or cash-assistance to the occupiers. The Court explained the consequences that could arise if compensation in the form of cash-assistance were ordered on a broader scale:

The granting of the *stipend* to the occupiers, albeit in the alternative, is in itself extraordinary. It has no *basis in law* that we can discern and, if allowed to stand, would have had the potential to serve as a precedent for abuse by unscrupulous landlords who might see the State as a default source of rental income. It, like the compensation order, is relief which is not appropriate.

The consequences alluded to above would certainly test the true nature of the doctrine of separation of powers where judicial reach into the realm of other branches of the government makes for a contentious law versus policy issue.

The SCA decision turned to the question of whether the City is able, within its available resources, to meet the needs of the occupiers and found that the City can and must do so under s 26 and PIE. The Court acknowledged that the City faces immense housing challenges, but the City’s budget surplus and housing reports ‘do not attempt to grapple with, and inform us, as to what is possible’. The Court said:

In dealing with the interrelated issues of the limits of judicial intrusion and the reality of available resources, balanced against the assertion of socio-economic rights, a court’s role can rightly be described as the *art of the possible*.

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60 Ibid para 7.
61 Ibid para 71.
62 Ibid para 72 (my emphasis).
63 Ibid para 73. See also *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC) para 99 (holding ‘the primary duty of the Courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to “respect, protect, promote, and fulfil the rights in the Bill of Rights”. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself’).  
64 Ibid para 49. See also para 52 ‘The City’s recent disavowal of its power and entitlement to engage in accommodation projects on its own, without funding from a national or provincial government, is contradicted by its own accommodation report in which it indicated that of its capital budget of R170- million for housing for the 2007/2008 financial year for R55-million is derived from the City’s own funds. As indicated above, the City has an indispensable role to play in the progressive realization of the right of access to adequate housing’.
65 Ibid (my emphasis).
66 Ibid para 54 (my emphasis).
(c) Uncovering the hidden possibility

What is possible is hidden within the text of Spilg J’s order. Significantly, the language he uses to order the City to compensate the landowner with a ratepayer remedy or alternatively pay cash-assistance to each occupier leads to a peculiar finding. What is unpacked from the text of Spilg J’s opinion is a housing programme akin to that already operating in the United States – namely housing voucher programmes. A close reading of the text suggests that Spilg J’s order rightly practised the art of the possible by unintentionally, yet effectively, outlining the blueprint of what could become a novel and innovative alternative housing remedy for families facing imminent eviction in Johannesburg.

If the City is unable to pay a temporary ‘R850 per month’ stipend or ratepayer compensation to the landowner due to ‘budgetary constraints’ then one must look at Spilg J’s language that proposes ‘other means’ that may make it ‘possible’ to ‘remedy the defect in its housing policy.’ The other means to do so may be through a housing programme in which a subsidy is calculated in the amount ‘equivalent to the fair and reasonable monthly rental of the said premises’ which is to be ‘determined by agreement between’ private landlords/owners, the City and a market-oriented ‘valuator.’ This programme would have a ‘regular review mechanism’ that ‘monitors and oversees’ the ‘appropriate subsidy’ and falls ‘within the limitations of available resources’ and ‘budgetary constraints’ of the City.

This article argues that within the text of the lower Court’s opinion in Blue Moonlight is the policy blueprint of the housing voucher programme currently operating in the US. An endless policy-oriented discussion may be on the horizon after the lower Court’s unusual order, the SCA’s dismissal of the said orders and the Constitutional Court’s opinion. For the SCA to have dismissed the orders was perhaps premature. The ratepayer and cash-assistance remedies are, indeed, inappropriate as separate orders, but the combination components of each of the orders discussed in the lower Court’s opinion sufficiently, albeit with slight modifications, mirror the general design of the housing voucher programme in the US.

Perhaps the City can find new ways to make it possible to uphold its statutory and constitutional obligations to provide alternative accommodation within its available resources by exploring, in detail, the design of the voucher...
programme that has been carved out of the lower Court’s opinion in this article. Perhaps such a policy design would encapsulate components of both the ratepayer order and the cash-assistance alternative into a voucher programme. The City, in response, ought to consider whether a housing voucher programme is a workable alternative to providing housing for occupiers facing imminent eviction as a temporary and permanent solution to affordable housing on a case-by-case basis.

I now turn to a comparative analysis of housing law and policy in the US to fully understand the emergence, purpose and policy design behind the housing voucher programme and how Blue Moonlight’s text implicitly unfolds the programme design into a real alternative option for the City.

IV A COMPARATIVE PERSPECTIVE ON EVICTIONS AND AFFORDABLE HOUSING IN THE US

A new and innovative housing programme in Johannesburg may come from comparative knowledge of the ways in which similar legal and policy issues have been previously handled elsewhere in other countries. A policy analysed through the lens of empirical data and applied from a specific context in the inner-cities of the US may move Johannesburg to a better conclusion on the potential outcome of a housing voucher programme. The approach of copying and borrowing from the US – where the voucher policy has been in operation since the 1970s – may help to design a similar programme in Johannesburg.

A comparative analysis of housing law and policy may strike scholars, policy-makers and jurists as an odd, if not laughable, approach to finding resolutions to statutory and constitutional dilemmas – especially when the comparison is of two countries with such different political, legal and social histories. But such approaches are precisely how the constitutions of new democracies have grown out of oppressive regimes.

Unlike the South African Constitution, the American Constitution does not have affirmative social and economic rights prescribed in the document. Some scholars may interpret particular articles and amendments to assume affirmative rights, but on the whole it is difficult to make a strong argument that the ‘Founding Fathers’ of the Constitution of the United States of America intended to place positive obligations on the federal government or states to provide sources of property, such as housing. Although not a framer of the

81 See F Cross ‘The Error of Positive Rights’ (2001) 48 UCLA LR 857, 879. See generally LH Tribe American Constitutional Law 2 ed (1988); AR Amar ‘Forty Acres and a Mule: A Republican Theory of Minimal Entitlements’ (1990) 13 Harv JL & Pub Policy 40. See also CR Sunstein ‘Why Does the American Constitution Lack Social and Economic Guarantees’ (2005) 56 Syracuse LR 1, 9, where it is stated as follows: ‘On this view, the absence of social and economic rights in our Constitution has an explanation in terms of American politics or even culture. No group that might have been interested in such rights was ever powerful enough to obtain them. In the debate over the Universal Declaration, socialist and communist nations were most enthusiastic about social and economic
Constitution, Thomas Jefferson was an influential writer during that era. He once wrote to James Madison about the importance of cultivated land and the right to property:

Whenever there are in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labor and live on. If for the encouragement of industry we allow it to be appropriated, we must take care that other employment be provided to those excluded from the appropriation. If we do not, the fundamental right to labor the earth returns to the unemployed.82

It is apparent that many classical liberal thinkers endorsed affirmative rights, such as social and economic rights.83 Nevertheless, without explicit text or even implicit interpretations of certain amendments and clauses, the language in the Constitution does not endorse positive rights.

(a) The right to housing in the US

Since this is a piece dedicated to comparative housing law and policy, I turn to how courts and state constitutions have viewed housing as a right. The Supreme Court has stood firm in its reasoning that housing is not a fundamental right in the US.84 But, ‘state courts have sometimes simply ignored Supreme Court rulings, relying on the language of their states’ constitutions85 to carve exceptions to high court dogma’.86 For example, the New York87 and

guarantees, whereas capitalist nations were comparatively skeptical. Perhaps this, in a nutshell, is the best explanation for the American Constitution’s failure to include such guarantees. The Constitution’s content is a political artifact, and American politics is simply distinctive’.

82 Thomas Jefferson to James Madison (1785) ME 19:18 papers 8:682. See also B Montesquieu The Spirit of the Law (1748) 25.

83 See generally Sunstein (note 81 above). Classical liberal thinkers who had an influence on US property law espoused social and economic equalities. Montesquieu claimed that ‘the alms given to a naked man in the street do not fulfill the obligations of the state, which owes to every citizen a certain subsistence, a proper nourishment, convenient clothing, and a kind of life not incompatible with health’.

84 See Lindsey v Normet (1972) 405 US 56 (the Supreme Court held that housing is not a fundamental right).

85 See generally J Payne ‘Reconstructing the Constitutional Theory of Mount Laurel II’ (2000) 3 Washington Univ JL & Policy 555 (a case may be made that shows that a constitutional right to shelter within the logic of the Mt Laurel II opinion exists). See also J Payne ‘Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix’ (2000–2001) 22 W New Eng LR 365, 369–70 (When Mt Laurel II went beyond exclusionary zoning and required that local governments use their power affirmatively to facilitate the provision of affordable housing, something more was required doctrinally. It would have been convenient if that something ‘had been the court’s recognition of a constitutional entitlement requiring the government to be the provider of last resort for at least a minimum of human shelter needs, but the New Jersey Supreme Court conspicuously refused to state that such right exists. Thus we are left to infer what the missing constitutional right that lends support to the judicially-based obligation to act might be’).


87 See art XVIII s 1 of the New York Constitution stating ‘the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing ... accommodations for persons of low income as defined by law’. See Berenson v Town of New Castle (NY 1975) 341 NE 2d 236 (holding zoning ordinances would be annulled if they did not include districts for multiple housing when community needs required housing, but did not mandate affirmative relief).
New Jersey constitutions have provisions that begin to place some affirmative obligations on state governments to provide housing and those provisions have been cited and referenced by courts in many cases dealing with affordable housing. In fact, some US jurisdictions have required similar reports and studies that ‘enable and encourage the satisfaction of the indicated need’ for low-income housing, similar to the lower Court’s demand in *Blue Moonlight*.

The US has also had its fair share of similar landlord and tenant issues.

(b) The private rental market and evictions in the US

The majority of rental units in the US are owned by private sector landlords, and about 5 million individual Americans live in housing subsidised by state public housing authorities (PHA). In the past, self-help remedies were utilised frequently by landlords who sought to recover possession of leased premises. This was called ejectment and was a time-consuming common law approach to unwanted tenants that many landlords did not favour. Today, landlords are typically required to give a few days’ notice to tenants before an eviction action is commenced. Self-help remedies are not confined to landlords, but tenants as well:

A number of jurisdictions are beginning to provide that failure by a landlord to maintain leased premises in a habitable condition justifies certain ‘self-help’ measures by a tenant, including rent withholding. It seems quite logical, then, to permit a tenant to raise the condition of the premises as a defense to a summary eviction action brought for nonpayment of rent – the defense appears to go, after all, to the issue of the right to possession.

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88 See note 89 below.
89 See *Southern Burlington County NAACP v Township of Mount Laurel* (NJ 1983) 456 A 2d 390 (hereafter ‘Mt Laurel II’) (holding every municipality – not just developing ones – must provide a realistic opportunity for decent housing for its poor, provide its fair share, expressed in terms of number of units needed immediately and in the future). Municipalities were to undertake affirmative measures and to assist development in obtaining state and federal aid. In 1985 the New Jersey legislature responded to *Mt Laurel II* by passing the Fair Housing Act. The New Jersey legislature accepted the fact that, indeed, some state constitutional obligation for municipalities to facilitate a degree of affordable housing and created the Council on Affordable Housing (COAH). COAH imposed regulations whereby the obligation to provide affordable housing could be upheld. Essentially, the doctrine established by *Mt Laurel II* and imposed by legislation mandates that municipalities use zoning powers in an affirmative manner to provide a realistic opportunity for the production of affordable housing for low-income families. Indeed, throughout the *Mt Laurel* process, the Court had learned that ‘without a strong judicial hand there would not be more housing but only paper, process, and litigation’.
90 See *South Burlington County NAACP v Township of Mount Laurel* (NJ 1975) 336 A.2d 713, 734 (hereafter ‘Mt Laurel I’) acknowledging the trial Court’s invalidation of the zoning ordinance in toto and ordering the township to make certain studies and investigations and to present to the Court a plan of affirmative public action designed ‘to enable and encourage the satisfaction of the indicated needs’ for township related low and moderate income housing.
91 Moore (note 86 above) 514.
94 Ibid.
95 Ibid (eviction proceedings depend on the jurisdiction from which the landlord seeks the eviction).
96 Ibid 468.
Similar to PIE and s 26(3) of the South African Constitution, many US jurisdictions prohibit evictions motivated by a landlord’s desire to retaliate against a tenant who has not paid rent without a legal justification. Retaliatory evictions can be employed as a defence for tenants. 97 Such defences for tenants have been extended to tenants in privately owned buildings where s 8 voucher recipients live and recipients also enjoy some constitutional protections. 98 Indeed, the US has rules, similar to PIE, that govern pre-termination notice and grievance procedures set forth in federal statutes and regulations. 99

Significantly, while the adjudication of evictions of occupiers has increasingly become common practice in South Africa due to the rise of unscrupulous behaviour from landowners in large cities, such as Johannesburg, adjudication in most large US cities is not favoured by landlords or tenants. 100

Pro-landlord litigants complain that judges drag out summary proceedings, while tenant supporters argue that tenants do not have sufficient resources to be represented. 101 The vast majority of tenants in US cities are legally unrepresented. 102 Tenants with representation fair better than tenants without representation. 103 Habitability problems have been presented by many tenants in housing court. But the US housing law reforms, such as warranty of habitability, 104 have made quality of housing a non-issue in many jurisdictions,

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97 Ibid.
98 See generally Jeffries v Georgia Residential Finance Authority (11th Cir 1982) 678 F2d 919, 925 (holding s 8 voucher recipients have constitutionally protected rights under the 14th Amendment). This meant that the participation of Georgia Residential Finance Authority in termination and eviction procedures under s 8 existing HAP programme constituted sufficient state action to implicate due process clause of 14th Amendment. Court’s have provided that even though private landlord’s lease to s 8 voucher recipients, the tenants are still under a state programme funded by the federal treasury and that the tenants indeed have a property interest in the housing under the Due Process Clause. See generally Simmons v Drew (7th Cir 1983) 716 F2d 1160 (holding rent assistance recipients are entitled to a hearing before being terminated from the programme).
99 See 42 USC s 1437d.
101 Ibid.
102 See L Abel, K Krenichyn & N Schaefer-McDaniel Results from Three Surveys of Tenants Facing Eviction in New York City Housing Court, ActKnowledge at the Center for Human Environments at the CUNY Graduate Center and the Brennan Center for Justice at NYU School of Law (2007) 2 (finding that out of 1,767 tenants in New York City Housing Court who submitted information about legal representation, 76 per cent did not have a lawyer). Chicago has similar statistics from the No Time for Justice: A Study of Chicago’s Eviction Court, Lawyers Committee for Better Housing (2003) 4 (where out of 763 cases observed, only four per cent had attorneys and tenants were represented a mere five per cent of the time).
103 See C Seron, M Frankel & GV Ryzin ‘The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment’ (2001) 35 Law & Society Rev 419, 429. Tenants represented by attorneys had a 21.5 per cent probability of having judgment issued against them, whereas there was a 50.6 per cent probability for unrepresented tenants (428).
104 See Hilder v St Peter (1984) 478 A 2d 202 (holding that ‘in the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation. This warranty of habitability is implied in tenancies for a specific period or at will … in determining whether there has been a breach of the implied warranty of habitability, the courts may first look to any relevant local or municipal housing code; they may also make reference to the minimum housing code standards enunciated in 24 VSA ss 5003(c)(1) – 5003(c)(5)’.
but affordability of housing has become the foremost housing problem. Only 3.1 per cent of renters lived in severely substandard dwellings in the US, whereas 22.6 per cent of all households dealt with severe affordability problems. To close the gap on affordability problems, vouchers became a legislative and policy tool to help low-income families’ capture affordable housing.

V THE EMERGENCE, DESIGN AND PURPOSE OF HOUSING VOUCHER PROGRAMMES

(a) The emergence

Vouchers are a primary mechanism for providing affordable, safe and decent housing to the poor in the US. For example, nearly four million Americans received vouchers or lived in subsidised units owned by private landlords in 2004. The dispersion of the voucher to low-income families and its widespread impact on affordable housing can be traced back to Hills v Gautreaux. The Supreme Court held that the Chicago Housing Authority (CHA) and the US Department of Housing and Urban Development (HUD) violated the Fifth Amendment and 601 of the Civil Rights Act of 1964 by knowingly funding the CHA’s racially discriminatory public-housing programme, thereby perpetuating racial segregation. As a remedy, the Court ordered that HUD and the CHA provide s 8 vouchers to low-income black families to desegregate various neighbourhoods.

HUD and the CHA responded by establishing a programme entitled the Gautreaux Programme to create affordable rental units in the suburbs of Chicago and provide s 8 vouchers to families to access those units, with hopes of desegregating historically concentrated black neighbourhoods. Tenant-based voucher programmes like Gautreaux became popular in US federal and state housing policy for low-income families. The history of the s 8 voucher lies in its original use under the s 8 Voucher Programme.

105 Schwartz (note 92 above).
106 Ibid.
107 See USC s 1437f(a) (stating that s 8’s purpose is to aid low-income families in obtaining a decent place to live and promoting economically mixed housing).
108 Schwartz (note 92 above).
110 Civil Rights Act of 1964 601 78 Stat 252 42 USC s 2000d (prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programmes on ground of race, colour, or national origin. No person in the US shall, on the ground of race, colour, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programme or activity receiving Federal financial assistance).
111 HUD and the CHA did not dispute the statutory and constitutional violations, but contended that the remedy – building rental units in predominantly white Chicago suburbs and supplying inner-city black families with vouchers to access the rental units – is beyond the boundaries of Chicago and would inevitably have the effect of ‘consolidating for remedial purposes governmental units not implicated in HUD’s and CHA’s violations’.
In 1974, the Section 8 Voucher Programme was the first to establish a viable option for many low-income families pursuing affordable housing. It is a policy intended to serve low-income families who depend on the subsidy assistance to find affordable rental units in the housing market. The Section 8 programme’s main goal is to provide quick assistance, low-cost housing units, allow for more housing choice, disperse families throughout the community and guard against the growth of projects – low-income, public housing – and concentrated neighbourhoods. The design seeks to provide families with greater neighbourhood choice. The increased portability is what makes the Section 8 programme a flexible option for low-income families who are unable to own a home, pay higher rent costs and/or move to better neighbourhoods. The nuts and bolts of the Section 8 voucher design are complex. A closer look at the economics behind the subsidy is important to understand the potential benefit of the programme for the City of Johannesburg and to show how the programme design is hidden within the text of the Blue Moonlight opinion.

(b) The design

The voucher is a grant given in cash-like assistance based on the annual income percentage of the family and the fair market rent. The federal government (HUD) through the PHA pays the difference, therefore drastically defraying the cost of rent for the tenant (those who qualify for voucher assistance differ slightly). For example, in the Section 8 Voucher Programme, families are eligible for voucher assistance if they are categorised as low-income (80 per cent of the median income level) or extremely low-income (30 per cent of the median income level). Once a family becomes eligible, the programme determines the cost of the rental unit by calculating the difference between the locally determined fair market rent (FMR) and 30 per cent of the household’s yearly income. The local PHA then pays the difference between 30 per cent of the

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113 Ibid.
114 M Shroder ‘Locational Constraint, Housing Counseling, and Successful Lease-Up’ in JM Goering & JD Feins (ed) Choosing a Better Life?: Evaluating the Moving to Opportunity Social Experiment (2003) 60. The voucher is also beneficial because it remains tied to the tenant if he or she decides to leave the unit. Moving can be caused by various factors. For the most part, the family has the ability to leave a rental unit it deems undesirable. At the same time the family still retains the voucher assistance upon relocation. With more mobility and choice in relation to using the voucher, one would expect voucher recipients to have more options to choose from.
116 Ibid (landlords agree to the fair market rent). This design facilitates occupation of affordable rental units, while providing the portability option to choose where to live. The voucher gives tenants more housing choices, ‘especially in high-demand markets where landlords may be reluctant to accept HUDs FMR level’. This is achieved, because voucher recipients can find rental housing that is above the FMR.
118 Ibid.
119 Sard (note 115 above) 110.
120 Ibid.
tenant’s annual income and the PHA-established payment standard of about 80 to 100 per cent of the fair market rent.\textsuperscript{121}

Supply-side economics usually do not factor into the equation of housing stock in considering vouchers. The assumption behind the voucher design is that the poor occupy substandard and unaffordable units, because they lack the sufficient income that enables them to shop or traverse the formal housing market to find the right bargain.\textsuperscript{122} This theory may be applicable in Johannesburg, where thousands occupy dilapidated and illegally-owned buildings because it is the cheapest, if not, only option.\textsuperscript{123}

There is a distinction between an in-kind and cash-transfer subsidy (demand-side subsidies), with the latter making up the basis of the voucher.\textsuperscript{124} In-kind subsidies are allocated to the landlord of the flat that the recipient desires to lease. The in-kind subsidy may defray the cost of the unit, maintain the building or be used to develop or build a new housing unit. The use of the in-kind subsidy is at the discretion of the landlord of the rental unit and not the recipient. McClure sums up the in-kind subsidy programme’s primary features as follows:

In all project-based subsidy programmes, the subsidy is tied to the dwelling unit itself, whether the unit is generated through new construction or through the rehabilitation of an existing unit. The subsidy can be delivered in the form of direct development grants, a master lease of the units at guaranteed rents, the provision of partial or full financing at below-market-rate terms, or some combination of these or other subsidy mechanisms.\textsuperscript{125}

On the other hand, cash-transfer (recognised as a voucher in which cash has been transferred into a certificate-like grant) is a monthly allowance that is attached to the individual and the payment generates subsidy income and portability in the housing market.\textsuperscript{126} It is not freely disposable and restricts its use in other goods and services, such as food. The initial theory of the voucher ‘was the linkage of the cash grant to a programme of new construction to ensure that the supply of low-income housing would increase along with the demand’.\textsuperscript{127} That theory was made practical after the Gautreaux decision with the introduction of the Gautreaux Programme. Vouchers are presumed to be less demanding on state budgets and therefore preferred by public officials and tax payers rather than strictly building public housing projects.

\textsuperscript{121} Ibid.
\textsuperscript{122} Ibid 140.
\textsuperscript{124} Hayes (note 117 above) 140.
\textsuperscript{125} K McClure ‘Housing Vouchers versus Housing Production: Assessing Long-Term Costs’ (1998) 9 \textit{Housing Policy Debate} 356.
\textsuperscript{126} Note the difference between cash-transfer and cash-assistance. A cash-transfer is a stipend or cash that is transferred into a voucher to ensure the subsidy is used for the purpose of defraying the cost of rent. A ‘cash-assistance’ remedy is cash or a stipend handed directly to the recipient and its use is not subject to rent restrictions, but it is presumed that the stipend will go towards the rent.
\textsuperscript{127} Ibid.
Vouchers also provide portability because the recipients can freely move between sub-markets. This payment method is structured to allow families to ‘choose among approximately 40 per cent of the units available in a housing market area without paying more than 30 per cent of its income’. Moreover, vouchers put less constraints or interference in the production of housing on the private market, because the state’s role is limited to allowing low-income families to enter the market with a voucher. Therefore, it is assumed that the US’s biggest affordable housing dilemma could be rectified by implementing a demand-side policy design in the form of a voucher.

(c) The purpose

Vouchers have gained more support and interest from policy-makers as an affordable remedy for the poor around the world. Economists are not sympathetic to supply-side subsidies, while supporters of vouchers believe that the choice of whether to accept state subsidies and how to use the subsidy should be left to the individual. Furthermore, beyond the locational choice and defrayed cost of housing, vouchers allow ‘continued assistance to tenants of projects where project-based subsidies are no longer tenable’. This means that where public housing has ceased in some cities, low-income families can apply for and utilise the voucher to ensure an affordable living option.

One of the primary features of the voucher is cost-effectiveness. Data shows that the rate of construction of housing units compared to the average rent of $8 vouchers was significantly less. The cost-effectiveness is due in large part because the voucher is tied to the household and a formula is calculated to determine the amount of the subsidy for each household based on the tenant’s income and the FMR. The intent and purpose of the design is to ‘affect supply … by stimulating demand’ and remove or prevent downfalls where the market fails. It is well documented that today, many housing policy experts recommend ‘using all or the greatest percentage of’ government budgets for housing on voucher assistance.

The cost-benefit of the voucher is one of the primary reasons why public officials and policy-makers have taken kindly to the subsidy in the US. After the Gautreaux victory and the Gautreaux Programme’s relative success, Alexander Polikoff – the lead counsel for the Gautreaux litigation – pled with public officials at HUD to expand the voucher scheme nationwide.

128 Sard (note 115 above).
129 Ibid.
130 Ibid.
132 Shroder (note 114 above) 59.
133 McClure (note 125 above) 358. Project-based construction cost the state US$362 per month, while under a voucher system it cost only US$240.
134 Ibid.
135 Priemus et al (note 131 above) 580.
136 McClure (note 125 above) 357.
argued that ‘apart from the Section 8 [vouchers] … administration of the [Gautreaux] Program involved a one-time per family cost of $1,500 … and compared to the societal costs of the alternatives for these families, this may be one of the biggest bargains around’.¹³⁸ Indeed, Polikoff persuaded policymakers and the programme was designed into a nation-wide scheme called the Moving to Opportunity Programme (MTO) in 1993.¹³⁹

MTO was created as a federal effort to increase affordable rental units for poor families in the inner-cities via vouchers.¹⁴⁰ MTO aims at ‘devising a method for managing and then examining the behavioral impacts of dispersal of public housing families in multiple metropolitan housing markets’ and testing whether special counselling can improve the outcomes of families who seek affordable rental units.¹⁴¹ The encouraging results from Gautreaux persuaded Congress to support the MTO Programme (as a programme aimed at public housing residents living in distressed inner-city areas to be given an opportunity to find affordable rental units located in better neighbourhoods).

(d) The voucher design unveiled

Indeed, digging into the *Blue Moonlight* opinion with a policy-oriented interpretive tool uncovers the design of a housing voucher programme buried within the text. Spilg J’s order wins the day. The *other means* to provide alternative accommodation is essentially the private-public cooperative design of the voucher programme, which is novel for many policy-makers in South Africa. The *equivalent to the fair and reasonable monthly rental of the said premises* and *sworn valuator* is the vouchers built-in rent formula in which the PHA (state) pays the difference between the FMR and the tenant’s income to the landlord. The *monitoring and oversight* design is the vouchers restrictive use for defraying only the cost of rent and to ensure that the state subsidy is not abused by unscrupulous landlords and tenants.¹⁴² The *regular review mechanism* is the PHA’s relationship with the landlord to ensure the voucher transaction is completed on a month-by-month basis and that the rental unit is leased with the *appropriate subsidy*. The cost-effective design of the voucher programme seeks to allow the state to provide affordable housing within its limitations of available resources and *budgetary constraints*. Lastly, the protections afforded to occupiers regardless of refuge on ‘state-owned’ or private property under s 26 is akin to the voucher recipients constitutionally

¹³⁸ Ibid.
¹³⁹ See Goering & Feins (note 114 above).
¹⁴⁰ Ibid.
¹⁴¹ Ibid 134.
¹⁴² There are instances when tenants misrepresent their income levels or engage in fraudulent activities with regard to their s 8 subsidy. See generally *Alarape v New York City Department of Housing Pres & Dev* (1st Department 2008) 55 AD3d 316 317 (terminating petitioner’s s 8 housing subsidy on the ground he misrepresented his resident adult son’s employment status and the household income). See also *Langton v Rutksko* (2nd Department 1998) 252 AD2d 504 (sustaining termination of s 8 subsidy for misrepresentation of income).
protected rights under the Due Process Clause and therefore may make the voucher programme a *basis in law* under a provision of the South African Constitution.

The voucher remedy is not expressly so stated in the lower Court’s opinion, but the language is implicitly, if not reasonably, close to the surface of the voucher design in the US. It is clear that courts in South Africa can influence (by way of ‘the art of the possible’) unintentionally, but effectively novel, housing recommendations within its text. I now turn to the usefulness and limitations of the voucher programme in Johannesburg.

VI TRANSFERABILITY: USEFULNESS AND LIMITATIONS OF VOUCHERS IN JOHANNESBURG

*Blue Moonlight* serves as a judicial platform to consider a housing voucher programme in Johannesburg. The SCA was of the opinion that the purpose of the provision of alternative accommodation was to place ‘the occupiers on the lowest rung of their climb towards ultimate permanent accommodation’. The lower Court was of the opinion that the route to permanent accommodation entailed first, a ratepayer remedy and alternatively a cash-assistance remedy until accommodation was made available by the City. The lower Court’s decision, without proper structure, is a serious deferential issue that is unlikely to solve the problem of temporary or permanent alternative accommodation. Ordering the property owner to pay the rent of the occupiers does not solve the problem of where they ought to move when an eviction is ordered. The decision to drop those orders completely by the SCA, at best, ignores the reality of the intersection of law and policy in eviction cases.

Indeed, the SCA’s opposition to each remedy was justified if looked at as two separate orders. Neither remedy is a well conceived temporary or permanent solution. The lower Court could have done better to justify such a vaguely tailored cash-assistance and ratepayer remedy. The poor facing imminent eviction do not have time to wait for City housing to become available. There is likely to be monetary constraints on the state budget by forcing ratepayer or cash-assistance remedies. Moreover, the cash-assistance remedy is unlikely to be of any use in Johannesburg’s inner-city rental market.

(a) Lack of affordable rental accommodation

One of the main issues with affordable housing is that Johannesburg’s inner-city housing market remains constrained and inaccessible to the poorest of the

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143 Retaliatory evictions can be employed as a defence for tenants in the US. Such defences have been extended to tenants in privately-owned buildings where s 8 voucher recipients live.

144 Court’s have provided that even though private landlord’s lease to s 8 voucher recipients, the tenants are still under a state programme funded by the federal treasury and that the tenants indeed have a property interest in the housing under the Due Process Clause and have constitutionally protected rights under the 14th Amendment.

145 *Blue Moonlight* (SCA) (note 3 above) para 54.

146 Ibid para 68.
poor, especially those at Saratoga Avenue. The average monthly income is a mere R940;\(^{147}\) 18 of the occupiers over the age of 22 do not have an occupation and 20 occupiers over the age of 22 earned less than R1,000 per month.\(^{148}\) Research on the price of available private rental units in the inner-city of Johannesburg in March 2010 found that the cheapest available rental unit in the city was R825 per month.\(^{149}\) The City’s claim that there is an ‘almost limitless demand for units in the price range of R1,800 per month’ may still not be an affordable rate for the occupiers at Saratoga Avenue and thousands of other residents squatting and illegally occupying dilapidated and unkempt buildings in the inner-city.\(^{150}\)

Voucher schemes, on the contrary, combine the ratepayer and cash-assistance components of the lower Court’s decision into a structured affordable housing policy. These schemes may offer an additional policy mechanism for the City to comply with its statutory and constitutional obligations. Voucher schemes may also be a reasonable legislative measure to uphold an occupier’s constitutional right to adequate housing and alternative housing in eviction cases that apply under the PIE Act. More research on the usefulness and limitation of a housing voucher programme in Johannesburg is essential. Much more has to be done to cure the symptoms of the broader housing policy problems and the owner-occupier battles that exist in South Africa. Alan Morris provides a realistic comparative fact that exists between accessing affordable housing in the US and accessing affordable housing in South Africa:

> Unlike North American cities, the cheapest accommodation in Johannesburg is not found in the inner city. Much cheaper housing, albeit of an inferior standard, can be found in the informal settlement and site-and-service schemes on the periphery of the city.\(^{151}\)

The supply of suitable and affordable inner-city rental units – which may be geographically in proximity to accessing transportation and jobs – is one of the major economic limitations the voucher programme would face in Johannesburg. There is ‘effectively no private rental housing available within the [Central Business District] for the households earning an income of R3 200,00 per month or less’.\(^{152}\)

The City owns a mere one per cent of the rental stock in the inner-city.\(^{153}\) It is working to refurbish buildings and convert them into prime rental accommodations through project-based subsidies that fund private developers to build.\(^{154}\) For example, the City refurbished the BG Alexandria Building by working in coordination with a private property developer – Johannesburg

\(^{147}\) Blue Moonlight (HC) (note 6 above) para 18. In April 2008, the Wits University Law Clinic undertook a research project that revealed the income status of the occupiers at Saratoga Avenue.

\(^{148}\) Ibid para 184.

\(^{149}\) Research study conducted by the Litigation Unit at the Centre for Applied Legal Studies (CALS) March 2010.


\(^{151}\) Morris (note 1 above) 332.

\(^{152}\) Blue Moonlight (HC) (note 6 above) para 15.

\(^{153}\) City of Johannesburg (note 150 above) 12.

\(^{154}\) Ibid.
Social Housing Company (JOSHCO). BG Alexandria serves as temporary accommodation for those who otherwise would be rendered homeless in an eviction proceeding. The City estimated that between 3,000 and 4,000 temporary accommodation beds will be provided over the next few years, but these will be for people already living in ‘bad buildings’.

The City’s action plan stated it would do so by housing ‘people in its temporary accommodation until suitable alternative accommodation can be found’. The City’s action plan acknowledges that ‘it is neither desirable, nor financially or technically feasible, for the City to become permanently responsible for housing people, at little or no cost, who were previously unlawfully occupying buildings’.

Some organisations have proposed cooperative rental schemes ‘to increase the availability of affordable low-cost rental opportunities’ in the inner-city for recipients under the Expanded Social Package (ESP). The Registered Social Landlord Scheme (RSL) is one of the most recent proposals. It seeks to access housing by ‘increasing the affordability of low-cost rental provision in the City’ by utilising private sector providers, such as landlords.

The cooperative nature of the proposal, like the voucher programme, brings landowners into agreement with the City. The relationship seeks to then defray the cost of the rental unit, similar to the voucher design. The RSL programme design is akin to the in-kind, demand-side subsidy where most of the transactions occur between the landlord and the City. The voucher programme, on the contrary, prefers the cash-transfer that places the tenant

155 Ibid.
156 Ibid 9.
157 Ibid 10.
158 Ibid 10.
160 Ibid. The proposed scheme’s report states that the ‘City will enable the private and non-profit sectors to present a formal alternative to slumlord-run buildings as part of a wider bad buildings strategy, in direct alignment with – amongst other programmes – the affordable social rental component of the inner-city property scheme. It would also allow for private sector assistance in decanting highly impoverished residents from buildings requiring clearance due to health and safety concerns, since the City could utilise priority to subsidised rental (specifically tier 2 of the proposed RSL programme) in place of the resource and capacity intensive approach of providing and managing alternative accommodation in City-owned buildings’.
161 Ibid 23. The Second Tier scheme involves a call for proposals from suitable RSL to enter into a partnership with the City. The intentions of the partnership is that the City will provide access to buildings and land on a leasehold basis for the partners to develop and manage viable and sustainable social rental housing options for households on incomes of R800 to R7,500. The partnerships will last initially for five years. Within each partnership, there would be a guarantee of buildings/land to cover the supply of a set number of permanent and transitional rental opportunities. The City would support the partner in their application for government capital housing subsidy for the development of the units.
162 Ibid 35. The income levels of those who are to benefit from the RSL are lower than the maximum threshold set by the poverty index, which is R3.36 per day. Once the landlord and building has been designated as an RSL programme building, the rates, municipal charges and utility charges would be set at a rate affordable for single-room apartments and shared abutions. Moreover, the landlord who seeks to participate in the programme would have to verify that its building meets certain norms and standards. This includes rental charges that are set at a maximum of 33 per cent of the Band 1 gross threshold on the prevailing City of Johannesburg Poverty Index for Band 1 tenants. Furthermore, at least 70 per cent of all units in the building would have to be rented to individuals registered on the ESP.
in control to have the ability to shop the market. At the same time, while the voucher design is assumed to meet the demand without increasing the supply, the design has experienced some backlash. Some US PHAs today have issues regarding waitlists. Many families who qualify for the voucher do not receive the subsidy soon enough and in some cases wait many years to receive the subsidy while the supply of housing lags behind.\(^\text{163}\)

(b) Voucher discrimination

Sociological studies in the US have found discrimination to have evolved from the wide-spread distribution of vouchers, specifically from landlords. In particular, racial discrimination and class bias has remained an obstacle for recipients of vouchers, especially in the s 8 programme, because some landlords give preference based on race.\(^\text{164}\) Voucher recipients have also been subject to discrimination by private landlords, especially in largely white middle-class communities.\(^\text{165}\) Stereotyping of voucher recipients has also evolved over the years. Studies have shown that landlords presume that since voucher recipients are federally subsidised, they are poor and therefore, cannot maintain (upkeep) the facilities or that poverty correlates with drug involvement.\(^\text{166}\) Recent developments in the US, especially in California, show a persistent problem when voucher recipients move from larger inner-city neighbourhoods to suburban communities.\(^\text{167}\) The prospect of discriminatory landlords participating in the programme may pose a problem in Johannesburg, where an unscrupulous culture of landownership pervades in the inner-city.

(c) Design failure

Some studies have found the portability component of the voucher design, in accordance with the restrictive monitoring mechanism, to fail. The research has shown that low-income voucher recipients either use the subsidy assistance to pay the rent of their current unit, thereby ignoring the portability component of the voucher, or move within the same neighbourhood where they had originally leased a unit.\(^\text{168}\) The use of the voucher this way, although permitted, may be a counter-productive cycle that fails to place, in some instances, families into better neighbourhoods and into affordable and habitable units. Moreover,

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\(^\text{164}\) P Beck ‘Fighting Section 8 Discrimination: The Fair Housing Act’s New Frontier’ (1996) 31 \textit{Harvard Civil Rights-Civil Liberties LR} 155. ‘Indeed, many housing advocates believe that the acceptability and legality of Section 8 discrimination enables landlords to use it as a proxy for other legally prohibited kinds of discrimination, such as that based on race, ethnicity, national origin, gender, family status or disability’.

\(^\text{165}\) Ibid 159.

\(^\text{166}\) Ibid 162.

\(^\text{167}\) See generally J Medina ‘Subsidies and Suspicion’ \textit{The New York Times} (10 August 2011).

\(^\text{168}\) Ibid 158.
some participating landlords also refuse to accept voucher recipients because they do not want to deal with the attendant government requirements.\footnote{169}{T Wilson ‘Woes Mar Rent-Subsidy Plan’ \textit{Chicago Tribune} (March 1995).}

\textbf{(d) Unscrupulous landlord culture and inner-city decay}

Slumlords and building hijackers have an immense impact on the market value of units in Johannesburg.\footnote{170}{See generally Morris (note 1 above).} Many of the property owners under-invest in the maintenance of their buildings, neglect to pay municipal accounts, fail to pay rates and taxes and run overcrowded buildings.\footnote{171}{Ibid.} Yeoville, Hillbrow and Berea Township, located in the inner-city of Johannesburg, are prime examples of areas where properties have declined physically and in value.\footnote{172}{U Jurgens, M Gnad & J Bahr ‘New Forms of Class and Racial Segregation: Ghettos or Ethnic Enclaves?’ in Tomlinson et al (note 122 above) 61.} The decreased flow of capital to Yeoville and the ‘progressive loss of value of the real estate’, has caused finance companies and property owners to move elsewhere after apartheid, thereby leaving dilapidated buildings.\footnote{173}{Ibid 64.} As apartheid unravelled, so did the inner-city as ‘owners of office real estate in the central business district (CBD) of Johannesburg began investing in decentralised locations’, such as Sandton and Rosebank.\footnote{174}{S Goga ‘Property Investors and Decentralization: A Case of False Competition’ in Tomlinson et al (note 123 above).} The root of the decline still lingers from the aftermath of apartheid as seen in the statement below:

Because of falling real estate prices, many white property-owners would like to sell their property … [and] property can only be sold at a great loss, if at all. In this situation, many owners divide their houses or flats into several units, and hope to amortize the property in a short period of time through usurious rents. This strategy means that the owners no longer invest in maintenance and tacitly accept that the buildings will decay.\footnote{175}{Ibid 65.}

The property decline and lack of suitable rental accommodation in Hillbrow has to do with a wide range of factors (both past and present), including landlord/tenant relations, the policies of the City, property administration, redlining of neighbourhoods by financial institutions\footnote{176}{A Morris ‘Tenant-Landlord Relations, the Anti-apartheid Struggle and Physical Decline In Hillbrow, an Inner-city Neighbourhood in Johannesburg’ (1999) 36 \textit{Urban Studies}.} and overcrowded rental units which increase maintenance costs and force property owners to neglect the upkeep of the buildings.\footnote{177}{O Crankshaw & C White ‘Racial Desegregation and the Origin of Slums in Johannesburg’s Inner City’ (1994) 19 \textit{Int J of Urban and Regional Research} 622, 625. The structure of rental property in Johannesburg during the apartheid era was three-tiered. First, there were small landlords who owned an entire apartment block. These were private individuals who owned entire buildings in partnership or solely. In these circumstances, buildings owned by landlords with limited managerial experience and capital flow became dilapidated and unkempt. Second, sectional title landlords sub-divided their apartment units by selling each one off individually. By the 1980s areas such as Hillbrow had 60 to 70 per cent of apartment blocks under a sectional title scheme. This meant that each apartment unit was overseen by a different landlord, which created an unequal market environment where the price for rent varied among the landlords.}
Therefore, dilapidated buildings occupied by families, such as a series of warehouses in *Blue Moonlight*, may simply be a lingering outcome of the past that has drastic statutory and constitutional implications for the occupiers, the City, landowners and the courts today. Perhaps, the current owner-occupier dilemma in the inner-city of Johannesburg may be due in large part by the influx of poor immigrants and blacks into the inner-city and the subsequent decline in property values and physical deterioration of buildings when apartheid began to unravel.\(^{178}\) Regardless of the historical reasons for the demise of the inner-cities, the City of Johannesburg does acknowledge the task at hand:

The affordability constraint is massively compounded by a constrained supply of new units, which systematically pushes up the price of rental and owned accommodation. The supply constraint is primarily due to a reluctance to invest in a degraded area, despite the price signals suggesting a large market opportunity for developers … The high risk-pricing of finance for inner city residential developments makes many buildings unviable, further limiting supply, or it is passed through to tenants as relatively higher rentals.\(^{179}\)

Today, many landowners do not want to get caught in between the owner-occupier dilemma, knowing fully well that they may be stuck with poor families on their property who have protections from eviction and who have the right to remain on the land until accommodation is provided. As a result, Johannesburg’s inner-city continues to deteriorate as property is left vacant and landowners avoid buying up relatively valueless property, while the City is left to expend public money to refurbish the urban landscape. It is a vicious cycle that pervades in Johannesburg.

(e) **The ‘haves’ and ‘have nots’**

Perhaps the most striking problem at hand if vouchers were injected into Johannesburg’s inner-city is that vouchers have been delivered, for the most part, to the ‘haves’ in the US while the target population at issue in *Blue Moonlight* in Johannesburg is the ‘have nots’. In other words, the purpose of the vouchers has been to provide an affordable means to secure housing for those who may already be leased in public housing or live in a privately-owned unit in the inner-cities of the US – the haves. During tough economic times, PHAs find it difficult to supply the vouchers that are on demand from low-income families who may already pay nearly half their income towards rent.\(^{180}\) Here, the problem is dispersing vouchers to the have nots – an extreme underclass population\(^{181}\) of Johannesburg who occupy ‘bad buildings’, who pay rent to unknown people, who face imminent eviction leading to homelessness or who

178 Morris (note 1 above) 38. See also Morris (note 176 above).
179 City of Johannesburg (note 150 above) 2.
181 See generally W Wilson *The Truly Disadvantaged: The Inner City, the Underclass and Public Policy* (1987). Wilson argues that the dense concentration of the very poor (underclass) of the inner cities produces negative effects on their income levels, educational achievement, employment rates, access to affordable housing and that this social isolation, rather than cultural failures, is the main reason the underclass exists.
are already homeless. Moreover, the poor ‘underclass’ in Johannesburg do not have social capital or a primary source of income or shelter.

There is some evidence from the US that shows the vouchers’ potential to provide housing to the homeless, such as homeless assistance programmes that rely on accepting vouchers in exchange for giving emergency accommodation or distributing vouchers to obtain emergency accommodation.182 But permanent housing programmes for the homeless in the US, such as the s 8 programme, ‘do not include a specific set-aside for homeless persons or for which homelessness is not a basic eligibility requirement’.183 Yet, some conclusions are simply inescapable about vouchers: Every available study indicates that giving homeless people in the US housing by means of a voucher or other mechanisms help ensure they have shelter.184 The task of housing the homeless and finding, if not creating, affordable rental units in a dilapidated inner-city may be simply too daunting even for a voucher programme.

VII Conclusion

What seems to be a common theme throughout this discussion is the clash between landowners and land occupiers, statutory obligations, a constitutional right to housing and the impact these issues have on the government’s housing budget. These same themes are likely to be at play in Blue Moonlight at the Constitutional Court level. The Constitutional Court heard oral arguments in the Blue Moonlight case on 11 August 2011, in which the legacy of Grootboom reappeared before the highest court in South Africa, but with more complex issues.

Indeed, positive and negative rights – the right to adequate housing and protection from arbitrary eviction in South Africa or the right to be protected from the deprivation of life, liberty and property by the government in the US – place great burdens on government budgets. It would be remiss to ignore the monetary constraints that socio-economic rights place on the state. Cass Sunstein explains the corollary between rights and the subsequent monetary constraint on state budgets:

To the obvious truth that rights depend on government must be added a logical corollary, one rich with implications: rights cost money. Rights cannot be protected or enforced without public funding and support. This is just as true of old rights as of new rights, of the rights of Americans before as well as after Franklin Delano Roosevelt’s New Deal. Both the right to welfare and the right to private property have public costs... the right to freedom of speech no less than the right to decent housing. All rights make claims upon the public treasury.185

182 M Burt Helping America’s Homeless: Emergency Shelter or Affordable Housing? (2001) 17. For example, the s 8 Moderate Rehabilitation Programme for Single-Room Occupancy (SRO) Dwellings include specific set-asides of assisted housing units or vouchers for a homeless person by public housing agencies or others as a matter of policy or in connection with a specific programme. Programmes that accept vouchers for temporary accommodation provide homeless persons with accommodation who are currently living in a hotel, motel or other for-profit facility, in exchange for a voucher.

183 Ibid 349.

184 Ibid 323.

Social and economic rights are not unique, but they may be unusually costly. To ensure that everyone has a right to adequate housing, it is necessary to spend more than must be spent to ensure that everyone is free from, say, unreasonable searches and seizures. Concerns over the state’s housing budgets have already been voiced as major impediments to state intervention in the housing crisis in South Africa – especially from powerful policy-makers and public officials. The Minister of Human Settlements, Tokyo Sexwale, implicitly attacked the lower Court’s decision in *Blue Moonlight*, calling it ‘the legalisation of illegality’.

While being dutifully circumspect about the constitutional independence of the Judiciary, the Ministry of Human Settlements is concerned about rulings that could virtually collapse government budgets and plans where unlawful behaviour – in this case illegal land and buildings’ occupation – is legitimised by a series of court rulings. Hence the reference to the legalisation of illegality.

Sexwale’s concerns may be warranted. Perhaps the voucher programme is designed precisely to deal with Sexwale’s concerns. The economic and fiscal impact of judgments like *Blue Moonlight* – especially when statutory and constitutional violations of PIE and s 26 are at the centre of the debate – naturally invokes a contentious political issue. Indeed, the economic and policy content of new housing programmes in Johannesburg may fundamentally define, shape or contest the politics behind its idea. As with any public policy, there is the question of how the policy can be achieved and maintained within the best interests of policy-makers and public figures. Elsewhere in the world, vouchers have satisfied the preferences of politicians and taxpayers who were originally reluctant to give low-income individuals such freedom. A housing voucher programme, like any other policy proposal in South Africa, ‘should be based on reason and the rationality thereof (whether it can work or not) should be determined in light of its own reason for choosing policy’.

Courts have jostled for years with the question of whether they should enforce socio-economic rights in the context of adequate housing and evictions. This article suggests that it is time to move beyond the question of whether courts ought to enforce socio-economic rights and explore how courts and municipalities should enforce such rights. It is well established that ‘courts do not build housing nor do municipalities’. Court-mandated housing remedies, such as the one ordered in the lower Court’s decision, may

186 Sunstein (note 81 above) 7.
187 Ibid. ‘But any such comparisons are empirical and contingent; they cannot be made on an a priori basis. We could imagine a society in which it costs a great deal to protect private property, but not so much to ensure basic subsistence’.
189 Ibid.
190 Ibid.
191 Ibid.
193 Mt Laurel (note 90 above) 734.
lack the political legitimacy that legislation can claim. Indeed, courts may not have such legitimacy, and without it, a court order that directly affects thousands of people in Johannesburg and directly affects other housing policies and state budgets is unlikely to be self-sustaining. While courts and municipalities do not build housing, courts (by way of the ‘art of the possible’) and municipalities (by way of resources within the limitations of its budget) do have the capacity to explore new housing possibilities. Blue Moonlight is about unlocking a comparative housing policy and transforming what is possible into what is a practical affordable housing solution in Johannesburg. The voucher scheme may be its realisation – the Blue Moonlight remedy.

POST-SCRIPT

The Constitutional Court’s groundbreaking decision in the City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another 2011 SA33 (CC) in December unanimously affirmed the SCA decision and held the City of Johannesburg’s Emergency Housing Programme unconstitutional in that it excludes people evicted from private property as opposed to those relocated by the City. The Court ordered the City to provide alternative accommodation to the occupiers, who are to vacate the premise by April 2012. The Court said, ‘A remedy must be formulated’ for the occupiers at Saratoga Avenue.

Indeed, it is back to the drawing board for the City after the Court’s ground-breaking decision. A new housing policy is already on the table after the lower Court in Blue Moonlight ordered a cash-assistance or ratepayer remedy, which was unveiled in this article as mirroring the general design of the voucher scheme in the US. The City has an immense task ahead of itself and it now must think innovatively on how to handle the prospect of housing thousands of occupiers who may face imminent eviction from private property down the road. The voucher scheme, or perhaps better named today—the Blue Moonlight remedy—may be one of many possibilities to uphold the City’s obligations.

194 See generally Payne (note 85 above) 370.
195 Ibid.