

KWAZULU-NATAL RENTAL HOUSING TRIBUNAL

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Ref:13/8/3/1426/06
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RULING OF THE RENTAL HOUSING TRIBUNAL IN TERMS OF SECTION 13 OF THE RENTAL HOUSING ACT, 50 OF 1999

CASE NUMBER: 13/8/3/1426/06

IN THE MATTER OF:

STANLEY WILLIAMS

COMPLAINANT

ETHEKWINI MUNICIPALITY

RESPONDENT

Whereas the complainant and respondent, as listed above, were in dispute under the abovementioned case number before the Rental Housing Tribunal as contemplated in section 10(5) of the Rental Housing Act 50 of 1999,

Duly constituted by:-

1. Dr SI Mohamed
2. Mrs P Dabideen
3. Mr XMB Zondo

Williams v Ethekwini Municipality

Dabideen, Mohamed and Zondo
KwaZulu Natal Rental Housing Tribunal

Case No. 1426/06

Lease – cancellation by landlord for breach
breach for non-occupation in terms of lease contract
tenant's request for an extension granted
Complaint lodged by tenant with the Rental Housing Tribunal to have the cancellation declared an
“unfair practice”
Landlord's Dispute Panel – reviewing tenant's objection based on investigation and social workers'
reports
Tribunal deems certain provisions of lease not in compliance with the Rental Housing Act and the
Constitution
Tribunal further deems the process and procedure of the landlord's Dispute Panel deficient
Tribunal rules tenant was in material breach and cancellation did not constitute an unfair practice

First Appearance-for hearing was adjourned on February 2007, both parties seeking an adjournment.

This matter was heard on 14 March 2007. The tenant Stanley Williams (Williams), the complainant in this matter, represented himself. The Ethekwini Municipality (the Municipality), the landlord was represented by a Ms. Nomusa Ntombela, an employee of the Municipality, employed as a renting officer. Mr. Sazi Ngubo was the Municipality's legal representative.

The dispute emanated from the Municipality's termination of the lease. Parties entered into a written lease contract on 14 March 1997. The dwelling occupied by Williams is situated at 424^A John Dory Drive, Newlands East, Durban. The leased dwelling is part of the Municipality's social housing project intended for poor tenants. The crucial materials terms of the lease were:

- (a) the income level of the tenant (clause 3.0 of the lease: **Housing Code**)
- (b) the restrictive nature of the period of occupation (clause 4.0 of the lease: **Use of the Premises**, particularly 4.1 “the **LESSEE** shall at all times personally occupy and reside in **the premises** unless otherwise permitted by the **COUNCIL**”)

The Dispute Panel's policy allows for the reinstatement of a tenant whose objection to cancellation is based on good cause and other factors, provided the tenant's non-occupation of the lease dwelling is less than two years.

The Municipality cancelled the lease for breach, in that, Williams was not personally in occupation of the dwelling for approximately seven years. Williams lodged a complaint with the KwaZulu Natal Rental Housing Tribunal on 12 October 2006 against the Municipality.

The Tribunal had to consider whether the lease contract terminated by the Municipality constituted an unfair practice. The evidence by the parties required the Tribunal to examine the validity of the notice to vacate, the circumstances of the tenant, the Municipality's policy relating to "illegals", the procedure followed by the Municipality's Dispute Panel, social workers' reports and other relevant matters.

The delay in producing a ruling was due to the Municipality's failure to provide documents requested by the Tribunal.

Brief Background

Williams received a notice to vacate (undated - Exhibit 2) from the Municipality, headed "cancellation of tenancy agreement." It made reference to clause 11.0 of the agreement that provided for breach. An investigation revealed that Williams was not in permanent and continuous occupation and that his lease was therefore cancelled with immediate effect. He was however accorded 30 days to give vacant possession of the flat.

Clause 11.0 of the agreement (Exhibit 3) reads:

11.0 **BREACH**

11.1 In the event of **the LESSEE** committing a breach of any of the terms and conditions of **this lease** whether by making default payment of any rental on the date or otherwise, then **the COUNCIL** may summarily cancel this lease without notice and immediately enter upon and take possession of the premises and eject **the LESSEE** or any other person or persons thereupon.

Summary of Complainant's Evidence:

Williams in his evidence confirmed that he did not occupy the dwelling for approximately seven years. He bought a flat in the Bluff area and lived there at the time he and his wife Merle Morrow separated. They eventually divorced and Morrow later moved out of the leased dwelling to live with her mother in 2004.

Williams sold his Bluff flat in 2004 and later re-occupied the leased dwelling at 424^A John Dory Drive with his fiancée Antoinette in mid 2004. Morrow's son Dale (William's step-son) was in occupation of the leased dwelling with his fiancé in 2004 but was "forced" to move to his fiancé's house by Antoinette because Williams had re-occupied the dwelling.

Witness:

Antoinette's evidence confirmed that she moved into the leased dwelling with her two children and that she got Dale to move out.

Respondent's version of events:

Ntombela's evidence was that the Municipality's Dispute Panel, established with a specific mandate to "adjudicate" its housing allocation process and regularisation of "illegal" tenants, considered Williams's objection. The Panel was established by the Municipality, comprising of senior housing officials and councillors, to ensure a fair and just allocation process.

The Tribunal could not ascertain the following crucial information from the Municipality's evidence in respect of Williams

- a.) who comprised the Panel
- b.) minutes of the proceedings
- c.) Constitution or rules governing the process and procedure of the Panel.

The following were not in dispute though: -

- (i) the fact that Williams who objected to the termination of his lease was not given the opportunity to state his case in person before the Panel;

- (ii) the Panel's decision was final without recourse to an appeal procedure to have the decision reviewed.

Ntombela explained the process involved in arriving at the cancellation of Williams's tenancy. Exhibit 9 was the summary of the case history. She also summarised the social workers' findings and stated that one social worker who had compiled the report (Ms. Zuma) appeared before the Panel recommending the reinstatement of Williams.

Ntombela's evidence together with Williams and correspondence from the latter's attorney presented makes it common cause that the lease was cancelled in February 2006. The question that arises is whether the cancellation was proper and as a consequence, if it presented an "unfair practice"?

Assessment of the evidence and facts of the case

The Tribunal is under statutory duty to consider the Municipality's policies and the provisions of a lease "to the extent that it does not constitute an unfair practice":

s13 (6) When acting in terms of subsection (4), the Tribunal must have regard to-

- (a) the regulations in respect of unfair practices;
- (b) the common law to the extent that any particular matter is not specifically addressed in the regulations or a lease;
- (c) the provisions of any lease to the extent that it does not constitute an unfair practice;
- (d) national housing policy and national housing programme; and
- (e) the need to resolve matters in a practicable and equitable manner.

The Tribunal is also bound by the provisions of the Constitution of the country to satisfy itself that a fair and equitable decision was made by the Municipality in terms of s33(1) of the Constitution: -

[Just administrative action: (1) "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".]

While it was not the intention of the Tribunal to review the decision of the Municipality and, it most certainly does not have the powers to do so, the hearing proceedings provided an opportunity for

Williams to put forward his case in person, which did not happen during the Municipality's investigation by the Panel.

Regarding the breach and ejection clause, there are several critical issues that conflict with the provisions of the Rental Housing Act and the Constitution: -

11.0 **BREACH**

11.1 In the event of **the LESSEE** committing a breach of any of the terms and conditions of **this lease** whether by making default payment of any rental on the date or otherwise, then **the COUNCIL** may summarily cancel this lease without notice and immediately enter upon and take possession of the premises and eject **the LESSEE** or any other person or persons thereupon.

Read with

15.0 **EJECTION**

15.1 The **COUNCIL** shall have the right summarily to eject the **LESSEE** and his or her belongings, without notice, if he or she

The following points are impossible to enforce due to their unconstitutionality nature, although all other provisions of the lease are enforceable in all other respects: -

1. "and immediately enter upon and take possession of the premises and eject **the LESSEE** or any other person or persons thereupon"
2. summary ejection –

The reference to "summarily cancel this lease without notice..." appears to be harsh but may be considered a forfeiture clause and strictly enforceable (Venter v Venter 1949 1 SA 768).

The powers envisaged by clause 11 and clause 15, provide the Municipality with the absolute right to take possession of the dwelling and eject the tenant without a court order. Section 26 (3) of the

Constitution states that no one may be evicted from their home without an order of court made after considering all the relevant circumstances and that no legislation may permit arbitrary evictions. This is repeated in the Rental Housing Act 50 of 1999 which is the law of general application, governing tenancy contracts.

Williams did not challenge the undated notice but, in fact, requested an extension (making reference to 3rd of February 2006 as the date of receipt of the said notice), which was granted by the Municipality. He also changed his mind about having his own son Duwayne substituted as the legal tenant. He then decided to lodge a complaint with the Tribunal. Williams's non-occupation for 7 years of the Municipality's dwelling, was motivated by a marital dispute, led him to move out. He stated that he purchased a property on the bluff which he then occupied for a considerable period. This in itself is sufficient grounds for cancellation in terms of the Municipality's allocation policy and regularisation process. The maximum period, with good cause, is two years that a tenant is allowed to be in non-occupation of the Municipality's dwelling. Williams occupied his own property at the Bluff for 7 years and thereby breached his contract with the Municipality.

The Municipality, however, failed to cancel for breach at the time Williams was not in occupation of the leased dwelling. It is after his return and re-occupation did the Municipality proceed with cancellation. It also ignored the social worker's recommendation that Williams be reinstated; the recommendation was based on a detailed investigation that included all persons who occupied the leased dwelling with or without his permission.

The Tribunal's observation: -

1. The Municipality's Panel is seriously in need of overhauling to adhere to the principles of Administrative justice.
2. The Tribunal finds that in terms of s13 (6)(c) of the Rental Housing Act, clause 11.0 and 15.0 of the Municipality's lease stated above constitute an unfair practice and violates the provisions of the Constitution. The Tribunal strongly recommends that the Municipality effect the necessary adjustments to the *problematic* provisions of its lease contracts to bring it in line with the statutory requirements imposed by the Rental Housing Act and the Constitution.

Ruling

The Tribunal rules that the notice to vacate constitutes an unfair practice. Williams is therefore the legal tenant of the leased dwelling.

Dr. S I Mohamed,

Mrs P Dabideen

XMB Zondo

16 November 2007