A *discussion* of the Mkontwana Judgment

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The recent Constitutional court's judgment in *Mkontwana v Nelson Mandela Metropolitan Municipality and another* will most certainly be a controversial one while it provides an interesting development in our law. Central to this judgment and the debate that would ensue is our constitution that has changed and will continue to change our law and society. The Constitutional court has given another judgment that has placed responsibilities on the state as well as private citizens. What is emerging is that our courts and the State are breaking down the "feudalistic" relationship that has existed over the centuries between landlord and tenant.

However, the *Mkontwana* decision *(supra)* places an onerous responsibility on landlords and will also prejudice *bona fide* tenants. While unscrupulous tenants will take advantage of this judgment, landlords are not precluded from approaching the courts for relief regarding non-payment. What landlords cannot do is change existing (written or oral) lease contracts to "protect" themselves where it would appear that new leases may burden tenants. It is clear that municipalities will hold the owner of a property responsible for unpaid service charges to the extent that if a tenant interferes with illegal reconnection and subsequently absconds, the owner must foot the bill of a criminal.

The *Mkontwana* judgment, however, did not generate debates as did the controversial ruling in *Ndlovu v Ngcobo: Bekker and Another v Jika* [2002) 4 All SA 384 (SCA), commonly referred to as the "PIE" judgment. Reaction by landlords and estate agents to the *Ndlovu* judgment (supra) included the hype of increasing the security deposits of tenants and pushing up the rentals. Public opinions, especially those of certain lawyers, decried the Supreme Court of Appeal's judgment for prolonging the process of eviction and providing "protection" to tenants in rental arrears. It would appear that after the uproar, securing an eviction has become a formality once the guidelines are followed and the delay is not significant. As for the rental arrears, the court did not deal with it.

Influential lobbyists, including the banks are still waiting for the government to change the *Ndlovu* ruling by amending the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). In the *Mkontwana* judgment, no amount of lobbying is going to help because it is highly unlikely that the Constitution will be changed. Besides, amending legislations, e.g. "PIE", to countermand the judgment of the courts, while not unusual, would certainly confirm the notion of the power banks wield.

Unlike the *Ndlovu* ruling, the *Mkontwana* ruling will burden landlords and owners of residential and commercial properties. Landlords who enter into a rental agreement that includes water and electricity charges are sometimes faced with the tenant running the bill high. Unless the tenant agrees to pay separately for these charges, the landlord cannot unilaterally alter the original terms and conditions of the oral or written lease agreement.

In the case of a written lease agreement with an escalation clause in respect of a security deposit, the tenant is legally obliged to pay an additional amount, when asked to do so to bring the deposit to the equivalent of the current rental. Unfortunately for the landlord, the tenant cannot be required to pay additional charges to cover the water and electricity consumption charges, unless the lease agreement has a clause for this "contingency".

There are several possible scenarios that owners/ landlords will be confronted with.

- An owner may have to include an appropriate condition in the purchase and sale agreement that would protect him/her from any delay in the transfer of the property arising from unpaid consumption charges and other municipal levies.
- Through a sale of a dwelling the new owner, under the "huur gaat voor koop" rule, acquires a fixed period lease and the rental includes water and electricity charges. The tenant defaults after being placed in *mora*, the lease is cancelled and summons issued for ejectment. The tenant enters an appearance to defend, further delays the legal process and then "disappears".
- The tenant has substantial arrears with the Municipality but has not defaulted on payment of rental.
- Most inner city residential buildings have communal water meters and rentals are inclusive of water charges especially in previously rent controlled dwellings. Tenants who fell into arrears previously and were accommodated by the landlord, may find that the landlord is likely to review the period of grace or indulgence allowed.
- The action of a defaulting commercial tenant could be far more onerous for a landlord. Take for instance the tenant whose average consumption bill is R50 000 per month.
- Then there are "tenants from hell" who know the legal loopholes, are devious and can remain on the property for a long time without paying rentals. They do not pay consumption charges either and know how to have electricity and water supply illegally connected.

The above examples can burden the landlord/owner of the property and will restrict the owner in the case of a sale from effecting the transfer of his or her immovable property if the municipality does not issue a certificate. Section 118(1) of the Local Government Municipal Systems Act 32 of 2000 provides:

> "A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate:
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> (a) issued by the municipality or municipalities in which that property is situated; and
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> (b) which certifies that all amounts that became due [by the owner] in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the

date of application for the certificate have been fully paid."

Landlords will have to protect their rights and their investment and wilt have to find ways to surmount the consequences of the *Mkontwana* judgment. According to Yacoob J, "if the occupier is on the property with the knowledge and consent of the owner, the latter can, amongst other things, choose the occupier carefully and stipulate that proof of payment in relation to consumption charges be submitted monthly on pain of some sanction including ejectment."

O'Regan J recommended that lease agreements could contain provisions that stipulate tenants keep their landlords informed of payments of service charges. Or, the lease agreement could be drafted to contain provisions for the landlords to pay consumption charges and those charges must then be paid to landlords by tenants. He said that landowners can also reduce their risk in relation to the consumption of services by tenants and other occupiers (including usufructuaries, and unlawful tenants) by requesting municipalities to furnish them with regular statements of account.

In practical terms, ejecting "tenants from hell" could take as long as two years. As stated above, existing leases cannot be changed notwithstanding the suggestions put forward by the learned judges. A landlady whose sole income is the monthly rental she receives from her outbuilding may not survive the demand from the municipality to pay her tenant's consumption charges. Assuming the municipality permitted the tenant's account to fall into substantial arrears but holds the landlady liable, she would have to resort to legal action that could be costly.

The *Mkontwana* ruling and many more that would be decided by the Constitutional court is a reminder that changes in our society are inevitable. The Constitution has provided all stakeholders the opportunity to shape and direct our fledgling democracy, to balance and protect individual rights (and private property rights) and also to ensure that social responsibilities are discharged appropriately in the interest of the public. The results are sometimes not the one we seek but necessary to build social justice on the foundation of democratic values and fundamental human rights. Sometime in the future we may appreciate the positive implications of the *Mkontwana* ruling.

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