

# The judicial functions of the provincial rental housing tribunals

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## WHAT IS THE RENTAL HOUSING ACT 50 OF 1999 (RHA)?

The Rental Housing Act 50 of 1999 (the RHA) deals with the relationship between tenants and landlords of residential dwellings. The RHA has modified certain aspects of the common law and law of contract to protect the interests and rights of both tenant and landlord. The intrusion into the common law and law of contract dealing with residential lease is minimal and with a substantial measure of balance in comparison to the defunct rental control legislation and rent boards. The definition of a dwelling has extended the ambit of legal protection to both landlords and tenants: "dwelling", includes any house, hostel room, hut, shack, flat, apartment room, outbuilding, garage or similar structure which is leased, as well as any storeroom, outbuilding, garage or demarcated parking space which is leased as part of the lease" (section 1).

## RENTAL HOUSING TRIBUNAL

The RHA is given expression through the provincial Rental Housing Tribunal (the Tribunal) that has exclusive jurisdiction on "unfair practice". The Tribunal is established by the MEC' of Housing of each province (section 7) and stipulates how members (between 3 to 5) are to be appointed by the MEC and the relevant requirements of members who would form a composite body, the Tribunal (section 9).

Even though the MEC appoints the members, the Tribunal is an independent and impartial body that adjudicates disputes between tenant and landlord. The complainant or respondent includes the department of housing of the province or local authority. Confusion has arisen in the provinces because of support or administrative staff being seconded to the Tribunal by the department of housing. In some instances, Tribunals have included the logo of the

department of housing and advertisements and marketing strategies are done under the auspices of the department. The Tribunal's link is to the MEC to whom an annual report is submitted of the activities of the Tribunal that must be tabled in the Provincial Legislature within 30 days after receipt thereof by the MEC if the Provincial Legislature is in ordinary session (section 12).

#### **RULING/JUDGMENT OF THE TRIBUNAL**

According to section 13(13). "A ruling by the Tribunal is deemed to be an order of the Magistrate's Court Act, 1944 (Act 32 of 1944)". A complaint lodged with the Tribunal can be mediated or a hearing is held that is presided over by at least three members. A mediation agreement can be made a ruling of the Tribunal [section 13(12) (b)] in which case the parties are given a ruling that is equivalent to a magistrate's court judgement. The ruling is binding on parties and is final.

#### **EXCLUSIVE JURISDICTION (UNFAIR PRACTICE)**

The Tribunal has exclusive jurisdiction regarding an unfair practice and can rule that a person must comply with the provisions of the regulations relating to unfair practices and can make any other ruling that is just and fair to terminate an unfair practice [section 13(4)(c)].

Section 13(9) states: "As from the date of the establishment of a Tribunal as contemplated in section 7, any dispute in respect of an unfair practice, must be determined by the Tribunal unless proceedings have already been instituted in any other court." As a result of this jurisdiction a magistrate's court may, where proceedings before the court relate to a dispute regarding an unfair practice as contemplated in the RHA, at any time refer such matter to the Tribunal [section 13(11)].

#### **REGULATIONS**

Regulations ought to provide specific details about the procedure and rules to be followed. In addition, it ought to include the details/categories of what comprises an unfair practice. Perhaps like the RHA, regulations need to be promulgated nationally to standardise unfair practise regulations, rules and procedures. Under "Court procedures", section 171 of the Constitution states that all courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

## REVIEW

The RHA specifies the jurisdiction, powers and functions of the Tribunal together with Regulations. The proceedings leading to its decision (ruling/ judgment) is assailable on review by the High court. An aggrieved party (tenant or landlord) can approach the High Court to have the proceedings reviewed: "Without the prejudice to the constitutional right of any person to gain access to a court of law, the proceedings of a Tribunal may be brought under review before the High Court within its area of jurisdiction" (section 17).

## WHAT CONSTITUTES A RULING/JUDGMENT OF THE TRIBUNAL?

Members of the Tribunal are "commissioners" or "adjudicators" for want of a better word and their powers are limited by virtue of a statute. A decision by consensus [section 10(6)] or the decision of a majority [section 10(7)] is the decision of the Tribunal, In the case of a ruling reached by a majority, the dissenting view of a member should be recorded as part of the ruling. A member's dissenting view or a "minority judgment" does not constitute a separate ruling.

## JUDICIAL FUNCTION

The Tribunal performs a judicial function that is evidenced by the constitutional guidelines and several fundamental characteristics of courts. The constitution provides parties (tenant and landlord) access to a judicial body to resolve their dispute: -

- Section 34 of the Constitution [Access to Courts] states that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.
  - Section 165 of the Constitution [Judicial Authority] states:
    - The judicial authority of the Republic is vested in the courts.
    - The courts are independent and are only subject to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
    - No person or organ of state may interfere with the functioning of the courts.
    - Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
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- An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
- Section 166 of the Constitution [Judicial System] reads:
  - the Constitutional Court;
  - the Supreme Court of Appeal;
  - the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
  - the Magistrates' Courts; and
  - any other court established or recognised in terms of Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts

The Tribunal therefore performs a judicial function that is initiated by one party, the complainant (tenant or landlord) who lodges a complaint with the Tribunal. During a hearing: —

- The respondent is given the opportunity of presenting his or her case: the respondent is notified by way of a notice for mediation or issued a summons for a hearing after preliminary investigation
- Parties give evidence under oath or affirmation
- Parties are given the opportunity to cross examine
- Witnesses are allowed to give evidence
- Proceedings are recorded.

To make a decision (ruling/judgment), members of the Tribunal must take into account the following in terms of sections 13(6)(a), (b), (c), (d) and (e): —

- Unfair practice regulations
- Regulations dealing with procedures
- Provisions of the lease
- The common law (if a particular matter is not addressed in the regulations or a lease)
- National housing policy and national housing programmes
- the need to find a solution in a practicable and equitable manner.
- Termination of any unfair practice.

The ruling / judgement is final and capable of enforcement. Members of the Tribunal (at least three) who hear a matter do not have the powers to re-examine or review its ruling: -

- The Tribunal is *functus officio*
- The *res judicata* rule applies to members.

It is necessary for the members who constitute the judicial panel of the Tribunal, when hearing a matter, to ensure that the fundamental principles of law are adhered to. It is costly for the ordinary tenant or landlord to have the proceedings taken on review. The Tribunal was established to provide easy, cost effective access to the public to have their disputes settled. It follows that members must undergo thorough training since there is no requirement for a member to have a legal background.

**The Tribunal has the potential of being "upgraded" to the status of having the jurisdiction of the High court in which case a judge rather than several members would be appointed. The Landlord- Tenant courts in the United States of America perform such a function in resolving disputes in the most cost-effective manner and quite efficiently and speedily. Until this happens, the RHA should be amended to include at least one person with substantial legal knowledge and practical experience in addition to the categories listed under section 9(1).<sup>1</sup>**

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#### FOOTNOTES:

1. "MEC" means the member of the Executive Council of a province responsible for housing matters; "Minister" means the Minister of Housing.
2. The Tribunal consists of not less than three and not more than five members. who are fit and proper persons appointed by the MEC, and must comprise -
  - (a) a chairperson, who is suitably qualified and has the necessary expertise and exposure to rental housing matters:
    - (b) not less than two and not more than four members, of whom -
      - (i) at least one and not more than two shall be persons with expertise in property management or housing development matters; and
      - (ii) at least one and not more than two persons shall be persons with expertise in consumer matters pertaining to rental housing or housing development matters.
    - (c) a deputy chairperson: appointed by the MEC from the members referred to in paragraph (b) of this subsection.

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