Implications of a controversial ruling

Sayed Iqbal Mohamed
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Last week's Constitutional Court judgment in the case Mkontwana versus Mandela Metropolitan Municipality and others will generate debates - as did the controversial ruling in Ndlovu v Ngobo, Bekker and Another v Jika 2003(1) 113 (SCA), commonly referred to as the PIE outcome. Reaction by landlords and estate agents to the Ndlovu judgment included the increase of the security deposits of tenants and rent hikes. Public opinions, especially those of certain lawyers, decried the Supreme Court of Appeal's judgment for prolonging the process of eviction and according "protection" to tenants in rental arrears. In fact, the court did not deal with the issue of rental arrears.

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 last week's Constitutional court ruling 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 override the judgment of the courts will set a dangerous precedent. What is important is the independence of the judiciary and the independent individual interpretation by judges evident in several cases since the Ndlovu judgment: MJ Mosomane and Others v Semang Housing Corporation (Pty) Ltd and Maggie Jaftha and Christina van Rooyen Cases.

The Mkontwana case 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". The action of a defaulting commercial tenant could be far more onerous for a landlord.

Landlords will have to protect their rights and their investment and will have to find ways to surmount the consequences of the Mkontwana judgment. According to Judge Yacoob, "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."

Judge O'Regan recommended that lease agreements could contain provisions that stipulate tenants keep their landlords informed of payments of service charges. Or, the lease agreement could 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."

Changes in our society are inevitable and the constitution has provided all stakeholders the opportunity to shape and direct our fledgling democracy. The results are sometimes not what we seek, but necessary to build social justice on the foundation of democratic values and fundamental human rights.