

Lease a feudal throwback

Lack of choice limits tenants' rights in a hostile rental market

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IN NAMIBIA, the common law plays a significant role in residential tenancies and, it would appear, parties are free to negotiate the terms of the lease contract.

This includes the rental amount and increases during the lease period, security deposit, maintenance and insurance.

The Rents Ordinance regulated business and residential leases, but ceased to apply to residential leases from 1991 when rent boards were abolished.

In South Africa, too, it would appear that parties can freely decide the terms of the lease, but the reality is that landlord-tenant relationship is still part of the medieval, feudalistic laws operating within the concept of modern market capitalism.

Added to these, are the critical housing shortages, homelessness and extremely small rental housing options for tenants (often with exorbitant rentals).

Contracting parties do not enter into a lease contract with all things equal. A tenant does not have a choice in the absence of a "surplus" rental housing to negotiate the terms of a lease contract.

Tenants are at the mercy of a rental market oriented society made hostile by the absence of choice.

A written lease can be most onerous for a tenant when the landlord hands over his common law duties to the tenant.

Parties are free to contract in terms of common law, and the lease contract may include a substantial part of the landlord's duties to be undertaken as part of the tenant's duties.

A tenant cannot discuss the rental amount, which is a given that it must be market related.

Affordability has no place for discussion, and the substandard conditions of the dwelling become part of the contract.

The courts do not generally interfere with contracts and some of the most liberal judges have upheld the principle of the sanctity of a contract.

In the event of a dispute, judges distance themselves from any interference. At the very least, they show empathy; at most, they must take on a role of a mere bystander.

The courts' powers continue to entrench the hegemony of the powerful class, of the lords

over peasants; the rights of landlords (to wield absolute power) in the law of contract.

In practice, a tenant cannot negotiate the terms of a contract because of the unequal bargaining power. Terms are presented as part of a standard form contract on a 'take-it' or 'leave-it basis'.

'Sacred'

Once concluded, a contract becomes "sacred" with the courts not willing to "handle" it, no matter how oppressive its terms for the disadvantaged tenant. Parties are free- they must be free - to enter into a contract.

In reality, freedom favours the party who lets the property in a society where homelessness, poverty and acute housing shortage are increasing mercilessly, unable to meet the rental needs of millions.

Barnard (2006: 161) states, "The being of the law of contract has always been shot-through with the values associated with altruistic political morality (fairness, reasonableness, etc.) but, more often than not, the law of contract is portrayed in the standard texts and in case law as value-neutral, socially stagnant, rule-bound and an individualistic approach that favours freedom of contract above all other considerations, and is dogmatically endorsed, followed and worshipped as an untouchable foundation and idol of the law of contract.

"This classic portrayal only narrows down, furthers and delineates in contract law the false consciousness regarding the legitimacy of law in general. It provides the means to further the commercial interests of the

societal elites, the powerful bargaining agents and the corporate giants to the detriment of the blindfolded labourers, debtors and have-nots who are all told that this way of contract is the best and only way: take it or leave it (you had better believe it!)"

This reality confronted a tenant of 11 years when an attorney for the landlord recently presented a lease with harsh, iniquitous terms that included an exorbitant monthly rental and the transferring of the landlord's responsibilities and obligations to the tenant. The attorney also inserted a guarantee for his client that the tenant will have to repair the dwelling that needed maintenance for almost a decade, even though there are rotten gutters, water seepage and borer infestation.

The tenant is also required to return the dwelling at the expiration of the lease "in the same good order and condition as they were in when the tenant first took occupation of the leased premises."

The courts will not interfere with these contractual terms once the tenant signs the lease, accepting the dwelling with all the defects and agreeing to carry out all the repairs and renovations.

What made this lease even more offensive was the fact that the attorney who drew up the lease prides himself as a tenants' rights activist, being closely associated with the OCR for more than 20 years.

The response to the tenant's rejection of the lease means a possible legal battle, among other issues, to challenge the autocratic power masquerading as the freedom to contract.