

# Occupancy limit set by rent deal

## Length of tenure depends on lease's duration

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By Sayed Iqbal Mohamed

LAST week we looked at 'temporary ownership' a tenant acquires through a lease.

An owner or landlord enters into a lease agreement by choice, but once a lease is concluded, may be trespassing if he or she enters the dwelling or property without the tenant's consent and without a legally valid reason.

Two examples were given; the *Soffiantini v Mould* 1956 case, and a recent Durban High Court interim interdict granted on June 2, 2011 in the absence of the respondents (landlady and her husband).

The respondents were given the opportunity to challenge or refute any part of the tenants' claims or the entire application.

On the return court date, Wednesday June 14, 2011 the respondents did not oppose the serious allegations made by the tenants. Instead, they consented to the interim order being made final.

The respondents, Paulette Yvonne Clark and her husband Anthony O'Reilly and any persons acting through and on their instructions are prevented from entering the dwelling occupied by the Kotzes; interfering with their peaceful and undisturbed possession of the dwelling and

further interdicted from threatening, harassing or intimidating them<sup>1</sup>.

The Kotzes would vacate the dwelling at the end of July when the lease comes to an end.

Can a tenant, in spite of the interdicts such as the one above, claim more than the right to "temporary ownership" once the lease period has expired or lawfully terminated? Does a tenant not have a right to security of tenure?

In other words, does a tenant have the right to continue to occupy after the lease is cancelled and after the court grants an eviction order? Is a private owner obliged to provide a kind of permanent or semi-permanent accommodation to tenants?

A case in point is where the new owner/landlord terminated the leases of 18 tenants of Lowliebenhof, a ten storey building in Braamfontein, Johannesburg.

Tenants refused to vacate and the landlord brought an application to have the tenants evicted before the South Gauteng High Court, Johannesburg.

Acting judge Van der Riet granted eviction orders against nine tenants; two tenants were not evicted since their leases were not properly terminated.

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<sup>1</sup> In the matter between Nikita Anastasia De Beer Kotze, First Applicant & Sarel Johannes De Beer Kotze, Second Applicant v Paulette Yvonne Clark, First Respondent (a.k.a. Paulette Yvonne O'Reilly) & Anthony O'Reilly, Second Respondent In the Kwazulu-Natal High Court, Durban, 2 June 2011, Case No: 6266/2011

The judge was of the view that evicting the remaining seven tenants would render them homeless.

He suspended their evictions for three months so that the City of Johannesburg could be joined as a party to the proceedings to provide a report as to the steps it would take to provide alternative accommodation.

The tenants appealed against the judgment of Van der Riet. The appeal<sup>2</sup> was heard before five judges of the Supreme Court of Appeal (SCA). The SCA looked at several issues that included whether a tenant had a claim to security of tenure after the termination of a lease.

Can a landlord increase rentals by cancelling the leases after the initial fixed period had lapsed? In other words, can a landlord terminate a periodic (monthly) lease that followed a fixed term and offer a new lease with a rent increase and different contractual terms? Is the landlord not precluded by the tacit terms of the agreement?

After discussing the legal principles, rules and several decided cases, the court found that the landlord could do so.

The second argument was that terminating the lease for the purposes of a rent increase goes against public policy. The tenants' contention in this regard were based on three grounds (paragraph 12(b) of the judgment): -

- (a) that the termination would be unreasonable and unfair;
- (b) that it would constitute an infringement of their constitutional right to have access to adequate housing in terms of s 26(1) of the Constitution;

- (c) that it constituted an 'unfair practice' as contemplated in the Rental Housing Act 50 of 1999, read with the Gauteng Unfair Practice Regulations 2001, promulgated under that Act."

Judge Brand examined the above in terms of the relevant laws and it is the discussion of the security of tenure that is relevant to this article.

He argued that an owner had an indefinite right to security of tenure in terms of his or her right to possess property. A tenant's right to security of tenure was linked to the duration of the lease.

"Beyond the period of the lease, the lessee has no security of tenure." "If the lease is for say 10 years, it goes without saying that the lessee's security of tenure is for 10 years only."

"If after 10 years the lessor insists that the lease has been terminated through effluxion of time, no one will suggest that such insistence amounts to an infringement of the lessee's security of tenure under s 26(1) of the constitution. Perhaps less obvious is the situation where the lease is terminated on notice.

"But the principle remains the same. The parties agreed at the outset that the lessee's tenure can be terminated on notice. What this amounts to, is an agreement that the lessee's security of tenure will never endure beyond the end of the notice period." [paragraph 29]

The tenant's right ceases once the lease comes to an end, and termination of the lease is therefore not an infringement of the tenant's right to security of tenure.

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<sup>2</sup> *Maphango v Aengus Lifestyle Properties* (611/2010) [2011] ZASCA 100 (1 June 2011)