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Rental bill out for comment

Two provinces have no housing tribunals

THE Rental Housing Bill 2010 was recently published for public comments. The Minister of Human Settlements proposed certain amendments that included:-

- The substitution of definitions
- Mandatory requirement for each province to have a Rental Housing Tribunal and compulsory for municipalities to establish Rental Housing Information offices, and
- Granting Rental Housing Tribunals powers to rescind its rulings

Two provinces, Free State and Eastern Cape do not have Rental Housing Tribunals (RHTs) ten years after the enactment of the Rental Housing Act 50 of 1999 (RHA).

Free State refused to appoint members this year whose qualifications and expertise did not meet the requirements of the RHA.

Unlike some provinces which have appointed and 'populated' their RHT with members who fail to meet the minimum requirements laid out in the RHA, Eastern Cape seemed beset by politicking, and like the Free State have disadvantaged tenants and landlords for ten years.

In terms of the proposed amendment of section 7 of the RHA, every MEC must by notice in the Gazette establish a tribunal in the Province to be known as the Rental Housing Tribunal.

However, it must be the minister, in consultation with every MEC, establish RHTs for the following reasons: -

1. The Rental Housing Act (RHA) is a national legislation.
2. The minister's direct authority to establish RHTs leave MECs with no choice.
3. The minister's direct involvement will prevent incompetency, nepotism, and appointments of members who are unsuitable.
4. MECs will take the RHTs seriously and be more accountable.
5. The rationale for MECs to establish RHTs was due to Gauteng's tenant-landlord tribunal at the time the Rental Housing Bill was being developed in 1998. On hindsight, the minister should have had the

authority to establish RHTs at the outset.

6. Failure to establish an RHT requires a political will / intervention.

The other major amendment relates to RHTs to be given powers to change or cancel their rulings. A ruling of the RHT is deemed to be a magistrate's court judgment.

Amendment of section 13 of Act 50 of 1999, Section 13 of the principal act is hereby amended by the insertion after subsection (12) of the following subsection:

"(12A) The Tribunal may, acting on its own accord or on application by any affected person, rescind any of its rulings if such rulings-

(a) Were erroneously sought or granted in the absence of the person affected by it;

(b) Contain an ambiguity or patent error or omission, but only to the extent of clarifying that ambiguity or correcting that error or omission; or

(c) Were granted as a result of a mistake common to all parties to the proceedings,"

The RHT should not be given the powers to rescind its ruling. In fact, it cannot do so if its judgment is deemed to be a magistrate's court judgment.

The seriousness of the RHT's ruling / judgment and the importance of its role will be undermined.

More importantly, there is adequate safeguard in the RHA and the Procedural Regulations.

- Section 13 (b) of the RHA requires a preliminary investigation to establish if a complaint does relate to an unfair practice. Such investigations will invariably determine whether: -
  - The complaint is legitimate or frivolous;
  - The respondent was informed of the nature of the complaints and given the opportunity to respond in terms of the provisions of the draft procedural regulations.
- Mediation is a prelude to or perhaps the finalization of the matter.
- The following section of the draft Procedural regulations provides adequate pre-emptive remedy regarding the concerns raised in the proposed amendments: -

- Procedure on determination that dispute exists
  (1) If the Tribunal has determined that a complaint does relate to a dispute in respect of a matter which may constitute an unfair practice, the tribunal must –
    (a) Further determine, whether in its view, the dispute may be resolved by mediation or a hearing;
    (b) Call for further determination as contemplated by paragraph (a) to be recorded in the relevant file;
    (c) If it has determined that the dispute may be resolved by mediation, appoint a mediator in terms of section 13 (2) (c) of the act with a view to resolving the dispute, and in writing inform the parties to the dispute of the particulars of mediation (Annexure B);
    (d) If it has determined that the dispute is of such a nature that it cannot be resolved by mediation, arrange for a formal hearing of the complaint, and, in writing, inform the parties of the particulars of the hearing; and
    (e) If it has determined that a complaint does relate to a dispute in respect of a matter which may constitute an unfair practice, it will notify the respondent in writing, providing him or her the opportunity to examine the file and, if necessary, to provide the tribunal with a written response thereto and / or lodge a counter claim within 21 days of receipt of the tribunal's notification.

- Once a ruling (judgment) is made and communicated to the parties, the RHT cannot review it or consider new information to re-examine the evidence or re-evaluate the case.

- Once the RHT gives its ruling, it becomes functus officio like the lower and higher courts. See S v Mpopo 1978 (2) SA 424 (A) at 428-429; S v Tengana 2007 (1) SACR 138 (C); Ndlovu v Director of Public Prosecutions, Kwazulu Natal, and Another 2003 (1) SACR 216 (N); Sefatsa and Others v Attorney-General, Transvaal, and Another 1988 (4) SA 297 (T); S v Smith 1985 (2) SA 152 (T).

- In terms of the res judicata rule, parties are prevented from having the same matter adjudicated that was already finalised. See Pothier (Vol 1:2000). Janse van Rensburg and Others NNO v Myburgh and Two Other Cases 2007 (6) SA 287 (T).

- Granting such powers may lead to abuse by any of the relevant stakeholders.

- Simple grammatical or arithmetical corrections can be made. The authority to effect such corrections can be achieved through the Procedural Regulations.

- The unambiguous and concise view of Ngcobo J (in Zondi v Mec, Traditional and Local Government Affairs, and Others 2006 (3) SA 1 (CC) at 11-13.) sums up the reason for not allowing self-amendments / review or rescission: -

"Under common law the general rule is that a Judge has no authority to amend his or her own final order. The rationale for this principle is twofold. In the first place a Judge who has given a final order is functus officio. Once a Judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases.

The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of Court has been made, it is final and they can arrange their affairs in accordance with that order.

However our pre-constitutional case law recognised certain exceptions to this general rule. These exceptions are referred to in the Firestone case. These are supplementing accessory or consequential matters such as costs orders or interest on judgment debts; clarification of a judgment or order so as to give effect to the court's true intention; correcting clerical, arithmetical or other errors in its judgment or order; and altering an order for costs where it was made without hearing the parties. This list of exceptions was not considered exhaustive. It may be extended to meet the exigencies of modern times.

Simple interlocutory orders stand on a different footing. These are open to reconsideration, variation or rescission on good cause shown.

Courts have exercised the power to vary simple interlocutory orders when the facts on which the orders were based have changed or where the orders were based on an incorrect interpretation of a statute which only became apparent later.

The rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action.

Dr Sayed Iqbal Mohamed is the chairperson, Organisation of Civic Rights. For tenants' rights advice, contact Pretty Gumede or Loshni Naidoo at 031 304 6451