Daily News Tuesday August 17 2010

Time to end this travesty

Unlawful 'policies' hold tenants accountable for others' debts

SINCE the introduction of the Rental Housing Act 50 of 1999 as amended (RHA), this piece of legislation has become the law of general application[1] for all residential tenancies (effective form August 1, 2000).

Types of leases, geographical area and landlords

1. Rural and urban residential leases, across the country are subjected to the RHA.
2. Owners of private dwellings, municipalities, provincial and national governments and any person or entity (e.g., Close Corporation, Company, Trust) who leases a dwelling to a tenant is a landlord. This includes departments or components within the government acting on its behalf such as the department of housing or public works.

All residential leases, written, oral or partly written-partly oral, by all landlords / owners / entities (private and public) are subject to the RHA. While the RHA changed some aspects of the relevant laws, the common law rights and duties, the basic requirements of a lease contract and other contractual matters, continue to exist.

However, unknown to the common law, the RHA introduces the notion of an 'unfair practice', which is integrally linked to the dispute-resolution mechanism created by the RHA, i.e., the provincial Rental Housing Tribunals ("RHTs"). Parties in dispute are required to approach the RHTs. In the absence of an unfair practice, parties are free to seek relief from any court such as specific performance or unpaid rentals. RHTs are precluded from granting evictions.

In summary, the RHA is a national statute, and, being an act of parliament, is the law of general application regulating residential tenancy.

The law of contract, common law and other relevant laws together with the RHA provide a 'comprehensive' set of tenancy laws. Subsidiary laws such as provincial legislations, municipal bylaws and policies cannot be superimposed or override the RHA and relevant tenancy laws.

'Substitution' and 'Regularisation' Policies

The eThekwini Municipality (the Municipality) applies policies to assist tenants who occupy its sub-economic housing. The policy of 'substitution' is used in the case where a member of the family who was in occupation with the deceased (the lease holder) is considered for tenancy.

In the case of a tenant who 'illegally' occupies a dwelling, i.e., without a lease and without authorisation, tenancy is considered provided the occupant declares her illegal status within a prescribed period of grace. The process of recognising an illegal occupant as a tenant with a lease is referred to as 'regularisation'.

The Municipality must be commended for taking a compassionate approach but must be held accountable for its misinterpretation and repressive application of these two policies.

Let us look at the plight of two tenants to understand the huge suffering these policies have

[1] Section 36 Limitations of the Bill of Rights in the Constitution of the Republic of South Africa of 1996

caused. The substitution policy applied by the eThekwini Municipality for the past 33 years relates to a resolution dated 18th April 1977, which was based on a delegated power.

The city treasurer then gave specific directives regarding the transferring of a tenancy to another person, in the event of a death of the tenant in the Municipality's sub-economic accommodation. It is this policy that was supposedly applied to the two cases below and to the many cases of substitution and illegal occupants over the past 33 years.

Poovalingam Maduray Manikum was an occupant with his father Manikum Thimbeeram, who was the tenant of the Municipality from 1986. After his father's death in 2002, he continued to occupy with his mother. The Municipality concluded a lease with him on 4th May 2005.

His father owed the Municipality and the arrears of approximately R17, 000.00 were debited to the son Manikum. This tenancy is considered a substitution by the Municipality.

It would appear that the policy to 'regularise' an 'illegal' occupant is the one that deals with substitution.

Russel Desmond Harding was 'regularised' as a tenant when a lease was concluded on 5 November 2007. Asked for proof that he was responsible for the previous tenant's arrears, the Municipality response was that an amount of R23, 763.81 was transferred from the previous tenant's account because the Harding's declared themselves as illegals.

Pressed for proof, a sworn affidavit was produced. On perusal of this affidavit, it was found that Harding stated that he occupied the dwelling since October 2005 with his wife and two children and indicated their names and ages.

In both cases, the tenants had to endure the restriction to the water and electricity supply or a refusal to allow them to open an account unless the previous tenants' debts were liquidated or an undertaking given to do so.

There is a signed lease between Manikum and the Municipality and between Harding and the Municipality, providing for a legal relationship. There is no mention of 'substitution' or 'regularisation' in the leases or reference to the previous tenants' arrears. If included, these would be void.

There is also no acknowledgment of debt (AOD) and never asked of the tenants, although an AOD for another tenant's debt would tantamount to extortion. In any event, the municipality had a claim for the debt from the deceased estate in Manikum's case and from the previous tenant and not Harding, in that case.

A deluge of correspondence involving some 12 officials, including the head and deputy head of housing, legal and senior staff, the notion that the Municipality has 'exclusive powers' and the right to exact money from an innocent party is upheld.

A thorough inspection of the policy provides no such powers and absolutely no reference to holding a 'substituted' or 'regularised' tenant responsible for the previous tenant's arrears or debt. The Municipality is not vested with 'exclusive powers' or the right to impose what appears to be a repressive, unjustified burden on tenants. The best the officials could do was to procure a resolution dating to the 1970s.

Owners are responsible for its own debt for municipal services and rates in terms of section 118 of the Municipal Systems Act. Logically and as a consequence of the provisions of s118, eThekwini Municipality as the landlord is responsible for unpaid services and rental charges of its tenant.

It has burdened desperate / destitute tenants with its own debt. This is a great injustice.

The eThekwini Municipality has acted outside its powers in 'punishing' tenants for unpaid rentals and service charges of previous tenants. It continues to apply what it believes is its policy and refuses to acknowledge that it is acting unfairly, unlawfully and oppressively.

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.