

Implied warranty of habitability

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It is an established part of our common law that a dwelling to be let must be in a condition fit for the purpose for which it is let when handed over to the tenant¹ and that the landlord must maintain the premises in that condition.

In *Hunter v Cumnor Investments* [1952] 2 All SA 103 (C) at 107, van Winsen J states:

"Before dealing further with the facts of this case it would be as well to refer shortly to the law on the liability of a lessor relative to defects in the leased premises. One of the incidents of a contract of lease in Roman-Dutch Law is that a lessor is obliged to hand over the leased premises at the outset of the lease in a condition reasonably fit for the purpose for which they are let and he remains liable throughout the term of the lease to maintain the premises in that condition".

The landlord is, in consequence, responsible for both internal and external repairs to the dwelling during the lease period. It is trite law, too, that unless otherwise provided, a landlord is obliged to maintain the leased property during the currency of the lease.²

Internal Repairs: the landlord has to maintain the inside of the dwelling and ensure that the electricity, plumbing, ventilation, doors, floors, windows, amongst other things, are in good and safe working condition. If the landlord installs appliances, such as stoves and refrigerators, he has to keep these in good working order too.

External Repairs include: damage to roofs, gates, windows, doors, plumbing and gutters. The landlord also has a legal duty to keep every part of the external dwelling clean and free of rodents, dirt, garbage or other offensive material.

Tenant assuming landlord's duties

However, the landlord can be relieved of his common law duty to maintain the dwelling. In *Poynton v Cran* 1910 AD 205, Dove-Wilson J of the Court of Appeal, in reversing the decision of the magistrate's court, referred to the context in which a tenant takes over the landlord's common law duty:

"If a tenant is to relieve a landlord of his obligations and maintain in good repair the thing let, as well as replace any subjects that might become worn out, the landlord should first place everything in good repair, especially if the previous tenant was obliged to leave them in good condition".

The pre-condition, for a tenant to assume the landlord's duty to maintain the leased dwelling, is to contract outside the common law. Upon the further appeal of the *Poynton* matter to the Appellate Division, Innes J stated:

"And we have to decide whether the terms of the contract relieved the landlady from that obligation. I state the point in that way advisedly; because it seems to me that the obligation which, in the absence of any modification by agreement, the common law would impose upon a landlord ought not to be lost sight of in ascertaining the position of these contracting parties. Now, the Roman-Dutch law (differing in this respect from the law of England) imposes upon every lessor the duty of placing and maintaining the leased premises in a condition reasonably fit for the purpose for which they are let"³.

What is an "implied warranty of habitability"?

Habitability appears in the Housing Act [107 of 1997](#) but lay nondescript in the definition section of the Act. It is part of our common law and has been developed by the courts but is largely ignored.

The *Hunter* case, for example, confirms the Roman-Dutch Law principles of the contract of lease, that the landlord is: under a duty to hand over the premises in a "fit condition"; remains liable to maintain the premises in that condition during the tenant's occupation; and, is obliged to repair any defect. As for defects, the landlord must either have knowledge of the defects or ought to have knowledge of it by reason of his trade or profession.

The phrase "fit for the purpose for which it is let" resonates through the majority of judgments and the *Hunter* case has been "popularised" as a mantra whenever maintenance becomes an issue. "Fit for the purpose for which it is let" is not, however, the same as the dwelling being habitable.

"Habitability" is generally ignored, and yet forms the basis of letting and hiring and is clearly distinguished by cases pre-dating *Viljoen v Cleaver*⁴ and *Hunter*. When a tenant enters into a lease contract, the dwelling must be habitable; this includes having adequate space, protection from the elements, the absence of threats to health, the assurance of physical safety and a structurally sound building.

In *Cape Town Municipality Appellant v Paine Respondent* 1923 AD 207, it was held that:

"a tenant has a just cause of cancelling the lease if the landlord has not made the necessary repairs

to the subject of it to make it habitable".

In fact, 44 years earlier, in *Alexander v Armstrong* (1879) 9 Buch 233, Supreme Court of the Cape of Good Hope, the Court confirmed this common law obligation when it delivered judgment in favour of the plaintiff/tenant:

"that it thereupon became the duty of the defendant to deliver to the plaintiff the said house and premises in a safe and habitable condition, and in a fit and proper state of repair".

In *Alexander*, the court differentiated between habitability and "fit and proper state of repair" but somewhere along the Legal Corridors, perhaps in the *Poynton* case, habitability was pushed aside. In recent cases, habitability seems to have recovered ground with great alacrity.

In *Government of the Republic of South Africa and others v Grootboom and others* [2000 \(11\) BCLR 1169 \(CC\)](#), the Court referred to habitability:

"The legislative action pointed out to the Court and the policy documents placed before the Court appeared to be postulated on the need for housing development as defined in the National Housing Act [107 of 1997](#) . . . The needs of such people could be met by relief short of housing which fulfilled the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the Act."

In *City of Johannesburg v Rand Properties (Pty) Ltd and others* [\[2007\] 2 All SA 459 \(SCA\)](#), the Court referred to the international norm that may be argued to include habitability:

"The international ideal has been described by UNESCO in these terms:

'The right to adequate housing should not be understood narrowly as the right to have a roof over one's head. Rather, it should be seen as the right to live somewhere in security, peace and dignity. This right has a number of components, including the following:

- . Legal security of tenure: everyone should enjoy legal protection from forced eviction, harassment and other threats;
- . Habitability: housing must provide inhabitants with adequate space and protection from the elements and other threats to health;
- . Location: housing must be in a safe and healthy location which allows access to opportunities to earn an adequate livelihood, as well as access to schools, health care, transport and other services;
- . Economic accessibility: personal or household costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not compromised;
- . Physical accessibility: housing must be accessible to everyone, especially vulnerable groups such as the elderly, persons with physical disabilities and the mentally ill;
- . Cultural acceptability: housing must be culturally acceptable to the inhabitants, for example reflective of their cultural preferences in relation to design, site organisation and other features;
- . Availability of services, materials, facilities and infrastructure that are essential for health, security, comfort and nutrition, such as safe drinking water, sanitation and washing facilities."

In *Mpange and others v Sithole* [\[2007\] JOL 20479](#) (W) at paragraphs [51]-[53], habitability is inseparably linked to human dignity whilst a much wider meaning is given to habitability.

"In fleshing out the nature of the duties imposed by [section 26\(1\)](#) of the Constitution, it is valuable to consider the comments of the United Nations Committee on Economic, Social and Cultural Rights ('the Committee') on the right to adequate housing (see *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others* [2005 \(2\) SA 140](#) (CC) [also reported as [2005 \(1\) BCLR 78 \(CC\)](#) - Ed] at paragraph [23]). The Committee has dealt with the meaning of 'adequate housing' in General Comment 4. There, the Committee has emphasised the integral link between the right to adequate housing and other fundamental human rights, including human dignity. In relation to habitability, the Committee has noted:

'Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well' (The Right to Adequate Housing (Article 11(1)) UNCESCR General Comment 4 (1991) 13 December 1991 E/1992/23 at paragraph [8]).

Further, the Committee has stressed the need for effective domestic legal remedies to deal with many of the component elements to the right to adequate housing. Such remedies include mechanisms to deal with:

'(c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination and (e) complaints against landlords concerning unhealthy or inadequate housing conditions.'

Section 10: dignity

Human dignity is the central value of the objective normative value system established by the Constitution. As the former Chief Justice wrote:

'As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order.'

Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution' (Chaskalson, "Human Dignity as a Foundational Value of our Constitutional Order", (2000) 16 SAJHR 193, at 196).' "

These recent judgments makes it obligatory for a landlord to provide a tenant a dwelling that is in a safe and habitable condition, and one, which is in a fit and proper state of repair at the beginning of the lease. In addition to these duties, the landlord is liable to maintain the dwelling in a habitable condition and a fit and proper state of repair and is obliged to repair any defect during the leased period.

Footnotes

- 1 *Viljoen v Cleaver* 1945 NPD 332 at 336.
- 2 *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* [1993] 1 All SA 207 (A).
- 3 *Poynton* 1910 AD 205 at 220-222.
- 4 *Viljoen v Cleaver* 1945 NPD 332.