RHTs "exclusive" jurisdiction over unfair practice

Dr Sayed Iqbal Mohamed
Chairperson, Organisation of Civic Rights (OCR)

Introduction

The Rental Housing Act 50 of 1999 (RHA) came into operation in August 2000 as law of general application[1] to regulate tenant-landlord relationship of residential leases. It empowers parties to a lease contract and protects their rights[2]; and, extends 'protection' to prospective tenants against discrimination.

Leases of all dwellings throughout the republic come under the jurisdictions of the RHA. A dwelling includes any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage or similar structure. A storeroom, outbuilding, garage or demarcated parking space can form part of the leased dwelling if this was agreed between the parties (Definitions, Chapter 1 of the RHA). Log cabins, shipping containers and "cubicular" partitioned spaces used for residential purposes[3] would fall within the RHA's definition of a dwelling.

While the basic requirements of a lease contract still apply, it introduced several changes to the common law rights and duties. A significant change was the notion of "unfair practice" pivotal to establishing the type of complaints and the resolution thereof by the provincial Rental Housing Tribunal (RHTs). The RHA, despite lacking enforcement of its orders[4], is a "generous and powerful mechanisms[5]" presently undergoing a second generation amendments[6] that would make further changes to the contractual and common law tenant-landlord relationship. The amendments are intended to provide more "protection" to vulnerable tenants while ensuring the rights of landlords.

"The Rental Housing Act, a post-Constitution statute, is also clearly intended to protect the vulnerable. Its preamble clearly embraces the fundamental rights entrenched in the Constitution (ss 25 and 26). It seeks, inter alia, to protect parties from unfair practices and exploitation." Somyalo JP (in *Bekker and Another v Jika* 2002 (4) SA 508 (E) at 22).

Unfair Practice

The RHA defines an **"unfair practice"** as: -

> "(a) any act or omission by a landlord or tenant in contravention of this Act; or (b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord".

At the inception of concluding a lease, certain mandatory provisions must form part of the lease without detracting from "the regulations relating to unfair practice" s (6) (g).
Terminating or cancelling a residential lease also demands that the grounds "do not constitute an unfair practice and are specified in the lease" (s 4(5) (c)).

During the lease period parties can approach the RHT[7] to have their dispute resolved through mediation or a hearing. The result of a hearing

[1] Section 36 Limitations (Bill of Rights in the Constitution of the Republic of South Africa, 108 of 1996).
[2] Singh, N. 'What landlords and tenants should know about the Rental Housing Act.' *Without Prejudice*, 7(7): 58-59 (2007)
[3] Mohamed, S. I. (2012) Durban's Carlisle Street Refugee/Migrant Tenants' 'Shelter': Investigation into the type of tenure and the ominous closure of the shelter by the eThekwini municipality. Durban: Organisation of Civic Rights.
[4] Mohamed, S. I. 'Enforcement of Rental Housing Tribunals Orders'. In *LexisNexis Property Law Digest*, 12(2): 3-5, June 2008; Submission on the Rental Housing Amendment Bill [B21-2011] to the portfolio committee on human settlements by the Organisation of Civic Rights (OCR), November 30, 2011.
[5] *Maphango (Now Mgidlana) and Others v Aengus Lifestyle Properties (Pty) Ltd* (CCT 57/11) [2012] ZACC 2 (unreported)
[6] Revised Rental Housing Amendment Bill [B21-2011] March 2012.
[7] Any tenant or landlord or group of tenants or landlords or interest group may in the prescribed manner lodge a complaint with the Tribunal concerning an unfair practice (s13 (1))

is a ruling deemed to be that of a magistrate's court order and enforceable as such[8].

Unfair Practices and the RHTs

Kerr (2004:509) draws our attention to the fact that the RHA does not prevent the courts' jurisdiction regarding unfair practices. 'It must be remembered that although unfair practices fall within the jurisdiction of Rental Housing Tribunals the Act stipulates at the beginning of subsection 5(3) that the invariable obligations it prescribes in that subsection are "enforceable in a competent court"'.

According to Mukheibir (2000:343)[9] the RHT has exclusive jurisdiction regarding unfair practices. Her notion of the RHT having exclusive jurisdiction finds "support" in at least two instances.

(i) A magistrate's court **may** refer an unfair practice at any stage of its proceedings to the RHT. "A magistrate's court may, where proceedings before the court relate to a dispute regarding an unfair practice as contemplated in this Act, at any time refer such matter to the Tribunal" (s13 (11)).

(ii) Section 13(9) states: "As from the date of the establishment of a Tribunal as contemplated in section 7, any dispute in respect of an unfair practice, must be determined by the Tribunal unless proceedings have already been instituted in any other court." This section provides strong support for the RHT's exclusive jurisdiction over unfair practices[10].

Knoll J[11] in reference to the unfair practices provision says that the RHA "[a]lso introduces the concept, previously unknown to the common law or contained in rents legislation, of the "unfair practice" (at 65) and that section 13(9) of the RHA is stated in peremptory terms (at 67).

"Sub-sections 13 (9) and (10) of the Rental Housing Act require a dispute in respect of an unfair practice to be determined by the Tribunal and not this court but specifically reserve to this court the jurisdiction to hear proceedings for eviction in the absence of such a dispute" (at 68).

In dismissing the eviction application, Knoll J stated: "There is nothing on the facts of the instant case which convinces me, on the probabilities, that the termination was not retaliatory as is meant by regulation 9(1)(*b*) and accordingly, in my view, the applicant has not succeeded in proving on the probabilities that the termination was not on grounds constituting an unfair practice" (at 71).

Inherent jurisdiction of the courts

Our superior courts, following the English common law principle of inherent jurisdiction, have powers to hear any matter before it unless an Act of parliament (statute) prevents it by granting exclusive jurisdiction to another court or institution. While the concept of unfair practices is unique to the RHA, it can be argued that the superior courts are not precluded from hearing unfair practices. The RHA is silent about proceedings regarding unfair practices before superior courts.

RHTs and the courts

The question still remains: does the RHA prevent courts from determining unfair practices disputes? According to Kerr (2004)[12] the court's powers are generally retained by the deemed provisions or invariable (unchanged) obligations contained in 5(3) and also 13(10) of the RHA. Section 13(10) allows a tenant or landlord/lady to approach a competent court: -

1. for urgent relief
2. in the absence of a dispute regarding an unfair practice
   - 2.1 to recover arrear rentals
   - 2.2 institute eviction proceedings

[8] S 13(13) A ruling by the Tribunal is deemed to be an order of a magistrate's court in terms of the Magistrates' Courts Act. 1944 (Act No.32 of 1944) and is enforced in terms of that Act.

[9] Mukheibir, A. 'The Effects of the Rental Housing Act on the Common Law of Landlord and Tenant'. *Obiter* 335-350 (2000)

[10] Stoop, P. (2008). *The law of lease*. Annual Survey of SA *Law*, 891–901

[11] *Kendall Property Investments v Rutgers* 2005 (4) 61 (C).

[12] Kerr, A. J. (2004). *The Law of Sale and Lease.* 2nd Edition. South Africa: Butterworths

RHTs and "exclusive" jurisdiction

The RHT does appear to have "exclusive" jurisdiction regarding unfair practices. Where a party has lodged a complaint with the RHT, it may be argued that the courts are prevented from adjudicating the complaint because the RHT must settle the unfair practices dispute. "Any other court" would include the magistrates' courts and the superior courts. In the case of the latter, the exception would be when proceedings were instituted there prior to the establishment of the RHT.

An unfair practices dispute must therefore be settled by the RHT unless a party instituted action in any other court prior to the establishment of the RHT. The RHT could be understood to have "extraordinary" powers to deal with unfair practices but being a creature of statute, it does not have inherent jurisdiction.[13] Courts cannot exceed their jurisdiction[14] and must exercise the powers conferred upon them with caution.

The RHT is not a court and must exercise greater care. In resolving disputes regarding unfair practices, either through its mediation process or adjudication through a hearing, the RHT must conduct itself with extreme vigilance. While not a court, the RHTs perform a judicial function and have more powers than an arbitrator or an administrative Tribunal, the latter two functions are like that of a judge.[15]

Good faith basis for terminating a lease has been part of the legal requirement for decades in the United States of America. A landlord cannot end a lease on bad faith or unfair dealing; there must be a just cause reason. South African courts are reluctant to 'interfere' in contractual relationship between parties where one party were to challenge the reasonableness or good faith or fairness of a (lease) contract or even its termination[16].

Let us take the instance of a landlord who cancels the lease and then offers a new lease with a new (higher) rental. The tenant has a choice in terms of the law of contract to accept the cancellation and move out or to continue to occupy even on pain of accepting a higher rental.

Our courts are generally unsympathetic to the fact that the increased rental in the new lease may be excessively exorbitant or exploitative. The landlord/lady need not show a just cause for evicting a tenant; it is not required by law nor asked by the courts.

A case in point was the tenants of Lowliebenhof building in Smith Street Johannesburg. In September 2008 the new landlord Aengus Lifestyle Properties (Pty) Ltd terminated the leases of 18 tenants and offered a new lease on identical terms of the previous leases but at new rentals, between 100 and 150 percent more.

The tenants lodged a complaint with the Gauteng Rental Housing Tribunal but the landlord brought a high court application to have them evicted. The tenants lost the case and took it on appeal to the Supreme Court of Appeal (SCA) but to no avail. Both courts unanimously found that the landlord's rights were not affected by the provisions of the RHA.

The tenants' contention that the terminations of their leases were unreasonable, unfair and in bad faith, were rejected as being fundamentally flawed. "Reasonableness and fairness" according to Brand J, "are not freestanding requirements for the exercise of a contractual right." ... '.....[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of

[13] *Omnia Fertilizer Ltd v Competition Commission; Competition Commission of South Africa v Sasol Chemical Industries (Pty) Ltd and Others* 2008 JOL 22197 (CT).

[14] Supreme Court of Canada, *College Housing Co-operative Ltd. v Baxter Student Housing Ltd,* 1976 (2) S.C.R. 475.

[15] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A).

[16] *Aengus Lifestyle Properties (Pty) Ltd v Maphango and Others* Case No 22346/09, 7 May 2010, (unreported); *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA), per Brand JA (Lewis, Cachalia, Shongwe JJA and Plasket AJA concurring).

fairness and equity will give rise to legal and commercial uncertainty.'" (para 23).

As for unfair practice in terms of the Rental Housing Act of 1999 (RHA), the SCA held that the termination of the leases did not qualify as a practice from a dictionary meaning of an "incessant and systemic conduct by the landlord which is oppressive or unfair".

The tenants again noted an appeal, this time to the Constitutional Court, which delivered the judgment on March 13, 2012[17] in favour of the tenants. It was also the first time that our courts recognised the statutory value of RHTs and its jurisdiction on unfair practices.

The high court and the SCA did not consider the implications of the RHA that overrides certain provisions of the common law and law of contract.

The most significant aspect was the "exclusive" jurisdiction given to the RHTs relating to unfair practice complaints and can rule that a person must comply with the provisions of the regulations relating to unfair practices and can make any other ruling that is just and fair to terminate an unfair practice [section 13(4)(c)].

Section 13(9) states: "As from the date of the establishment of a Tribunal as contemplated in section 7, any dispute in respect of an unfair practice, must be determined by the Tribunal unless proceedings have already been instituted in any other court."

In the Constitutional Court, Cameron J supported by the majority in discussing unfair practice rejected the SCA's cramped interpretion of the word "practice. It held that the RHA "superimposes its unfair practice regime on the contractual arrangement the individual parties negotiate. That the statute considers its unfair practice regime to be super-ordinate emerges not only from the requirement that a lease-based termination must not constitute an unfair practice, but also from what the Act enjoins the Tribunal to take into consideration when issuing its rulings: these include "the provisions of any lease", but only "to the extent that it does not constitute an unfair practice".[18] The effect of these provisions is that contractually negotiated lease provisions are subordinate to the Tribunal's power to deal with them as unfair practices." (para 51).

Froneman J (Yacoob J concurring) in a concurring judgement found that RHA applies directly (para 158) to unfair practice being primarily the jurisdiction of the Tribunal (para 153). There was a constitutionally-mandated enquiry required by courts to determine "whether it was appropriate, in the circumstances of the case, for the Tribunal to determine whether the cancellation amounted to an unfair practice," (para 156).

The Constitutional court made the following order: -

1. The application for leave to appeal is granted.
2. The appeal is postponed.
3. Any of the parties may, if so advised, lodge a complaint in terms of section 13 of the Rental Housing Act 50 of 1999 with the Gauteng Rental Housing Tribunal on or before Wednesday 2 May 2012.
4. If a complaint is lodged on or before that date, the parties are granted leave to apply to the Court within fifteen court days of the ruling by the Gauteng Rental Housing Tribunal, or other disposition of the matter, for further directions.
5. If no complaint is lodged on or before that date, the appeal is dismissed with costs.

One may conclude that the RHT does not have inherent jurisdiction but is a specialist tribunal with specific powers to resolve disputes over unfair practices.

[17] *Maphango (Now Mgidlana) and Others v Aengus Lifestyle Properties (Pty) Ltd* (CCT 57/11) [2012] ZACC 2 (unreported)

[18] Section 13(5)(c).