Tenant and Landlord in South Africa

The book for residential tenancies and the Rental Housing Act Practical guidelines for tenants, landlords, landladies, estate agents, Rental Housing Tribunals, lawyers and students regarding rights, duties and responsibilities of tenant and landlord of residential dwellings based on the Rental Housing Act as amended

Dr. Sayed Iqbal Mohamed

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Tenant and Landlord in South Africa

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To
All tenants and landlords / landladies working towards a better and just society
ACKNOWLEDGEMENT

My acknowledgement begins with my sincere thanks to God Almighty whose inspiration and guidance has led me to recognise the humanity in all of us. My gratitude to my family for their support and encouragement, particularly my wife Shireen.

This book has its humble beginnings in 1984 when the Organisation of Civic Rights (OCR) came into being (then known as the Durban Central Residents Association). The tenants represented by the OCR informed the author and the organisation of the relationship between tenant and landlord/landlady and provided a kaleidoscope of experiences spanning two and half decades. It is therefore fitting to acknowledge all the honest, exploited tenants as well as sincere, exploited landlords and landladies.

I had the privilege to work with and learn from honourable people whose dedication and integrity moulded my perspective on human rights. Pravin Gordhan and the late Yunus Mahomed through the Durban Housing Action committee played a significant role in the formative stages of the OCR. Gordhan’s incisive mind, selfless commitment and discipline in the struggle for a just society provided incredible inspiration. He has remained an excellent friend and comrade. The late Ebrahim (Papa) Moolla, the late Billy Nair (first deputy chairperson), Theresa James, Sewnath Newaz and the late Ayesha Williams were some of the founding members of the OCR who were dedicated to protecting the rights of tenants.

Moolla and Nair worked with the OCR for 23 and 24 years respectively, instrumental in bringing about changes in tenant-landlord/landlady legislation. Nair later served as one of OCR’s patrons together with the late most reverend Archbishop Denis E. Hurley, Archbishop Emeritus of Durban and Dr. Omaruddin Don Mattera. Moolla’s donation of two books on landlord and tenant by Cooper in 1984 made tenants’ issues the author’s life time career. Until his last moments in December 2007, he was an activist; his heart intertwined with the poor. Nair was another exceptional person who, like Moolla, belonged to the poor.
few weeks before his death, Nair was concerned about tenants’ plight and the need to reform the Rental Housing Tribunals.

The many organisations and persons in the legal profession who in the early years of the OCR (1984-1994) played an important part in ensuring the rights of tenants, include Kishore Harie, Jenny Maharaj, Peter Rutsch and JP Purshotam (Legal Resources Centre), Churton Collins (Lawyers for Human Rights), Jeff Abrahams (Black Lawyers Association), Saloshna Naidoo, Professor Noel Zaal (past OCR executive member); and among the advocates were Vas Soni, Imraan Moosa, Achmat Japie and TN Aboobaker, SC (National Democratic Lawyers’ Association). The late Professor Leonard Gering, and the late justice Hassan Mall were ever so willing to help.

Mall provided legal advice, which he humbly did at no cost. Aboobaker rendered a sterling service with major High court victories; some with positive national implications for the poor. It was for these and many more compelling reasons that the late Dullah Omar, who as the Minister of Justice, on behalf of the OCR, presented awards to Aboobaker, Mall, Soni and Moodley in 1994.

Fatima Dawood, now judge of the High court, is acknowledged for her legal services to tenants represented by the OCR. Another recent asset to the OCR, and, consequently, for the rights of the poor tenants, is Manesh Bahadur who has provided an exceptional service in his capacity as an advocate. Krubashen Moodley continues to render his free legal services to poor and destitute tenants and serves on the OCR executive.

The following trustees need to be singled out for their grassroots involvement and continuous support to the OCR, advocate TN Aboobaker, SC, the late Prof. Leonard Gering and Krubashen M. Moodley (Legal Co-ordinator). Professor Gering always showed his concern about tenants’ matters, sectional titles scheme and the OCR. The following past and present executive members of the OCR have also contributed to the implementation of the OCR’s Tenants’ Rights Project, Gladys Mhlaba, Thembelani Adam Mncanywa, Angel Paulsen, David Jack, Krubashen
Moodley, Beauty Linda, Yunus Naby, Vusumuzi Jerome Mkize, Ismail Mansoor, Yunus Osman, Liana Visagie and retired Bishop Norman Hudson.

Appreciation is extended to William Drayton of Ashoka: Innovators for the Public and its many members, who over the years inspired, encouraged and connected the OCR to individuals and organisations around the world. I am also indebted to Black Sash members especially Ann Colvin and Lynn Hutz (former OCR trustee).

Regarding the perusal of the manuscript and suggestions thereto, I am most grateful to Professor Philip Thomas, Professor of Law, Department of Legal History, Comparative Law and Legal Philosophy from the University of Pretoria. Professor Thomas, in spite of a busy schedule, re-arranged the topics in a logical system for the first edition.

I am profoundly grateful to Mr. Zak Yacoob, the Honourable Judge of the Constitutional Court of South Africa, who responded to writing the foreword to the second edition on short notice while inundated with many pressing commitments. Special thanks to Ms. Justice Leona V Theron, the Honourable Judge of the High Court who, notwithstanding the serious work-load, wrote the foreword to the first edition without hesitation. I am deeply indebted to them both. I am solely responsible for any interpretation that may differ from the general understanding of a legal position and for any shortcoming, omission and error.

The acknowledgement would not be complete if I fail to thank Loshni Naidoo and Gugulethu Pretty-Rose Gumede of the OCR who assisted with typing, proof reading and critical discussions that informed sections of this book. To them, I record my gratefulness. I am also thankful to Uvir Debisingh, Bhavan Ntwani, Taskeen Mohamed and Loshni Naidoo for the many hours spent in securing copies of case law, journal articles and statutes. I sincerely acknowledge with great appreciation the daunting and time-consuming task they applied themselves to.

Comfit Ngidi, past chair of the KwaZulu Natal Rental Housing
Tribunal showed exceptional concern for the poor and great legal skill in providing practical solutions. Professor Isobel Konyn and Ngidi who served two terms with me at the KwaZulu Natal Rental Housing Tribunal and Tony Freeman and Mike Mthembu (advocate) who served one term, inspired me with their enthusiasm and jealousness to serve to the public. Konyn showed extraordinary dedication and commitment, always punctual; and a splendid friend. André Erasmus of the KwaZulu Natal Rental Housing Tribunal shared invaluable insight and debated many legal issues over six years. Together with some of the other support staff, Russel Dumisani Nkabinde, Sibusiso Christopher Dlamini and Nonhlanhla Constance Mdladlamba, they were thrown into the deep end but continue to serve the public without the resources and training required. They are motivated with an intense desire to get things right and dedicated to their work.

I developed a close bond with Salim Patel, chair of the Western Cape Rental Housing Tribunal and Trevor Bailey, chair of the Gauteng Rental Housing Tribunal whose passion for the Rental Housing Tribunals and perseverance are quite significant. I treasure their friendships. Patel’s approach is extraordinarily pro-poor while remarkably and meticulously ensuring a fair and just resolution for both parties. Bailey is creative in his interpretation of the law and dexterously engages in stimulating debates around tenancy issues. I am humbled by their commitment.

I could not have spent the many years labouring at the first edition and the recent four and a half years revising this book without the love, support of and sacrifices made by Shireen, a dedicated partner, friend and mentor and our children Bilal, Taskeen and Basheerah. To them, I am deeply committed out of love and respect.

Sayed Iqbal Mohamed

January 2010
Foreword: Second Edition

The author of this Handbook has been an irrepressible champion of the rights of poor and vulnerable people to housing. Indeed, he has fought for fair conduct on behalf of owners of property who have tenants and has demonstrated a particular sensitivity to the rights of the tenant in particular without ignoring the position of the landlady/landlord altogether.

It is therefore no surprise that this Handbook emerges from his pen. I must say that it is something more than a Handbook but not quite a textbook dealing with the theoretical and practical aspects of landlord and tenant law. The Handbook is intended to be and will serve as a practical guide to landlords/landladies and tenants alike and help in the management of their relationships. I hope that it will fulfill its purpose in empowering landlords/landladies and tenants to manage their relationships because they have an understanding of the law which governs them. That law is primarily the Rental Housing Act. The institution that is dealt with in some detail and aimed at the resolution of problems is the Rental Housing Tribunal.

The Handbook is accessible, logical and clear. It asks pertinent questions and answers them in a way which is both understandable and complete. Its practical significance cannot be underestimated.

The Handbook also places the mechanism and laws now applicable to lessors in their legal and philosophical context.

In my view, this Handbook represents an important contribution to a laudable objective. That objective is to deepen understanding of the legislation applicable to parties who are in the business of letting houses. I trust that the Handbook will achieve its purpose and fulfill its potential by having a positive impact on the lives of landladies/landlords and tenants for, after all, housing is vital to our dignity and humanity.

Z.M Yacoob
Judge of the Constitutional Court of South Africa
April 2009
Foreword: First Edition

The Organisation of Civic Rights has for the past nineteen years been working with tenants and it is indeed fitting that it should publish a handbook on the rights, duties and obligations of tenants and landlords / landladies. This handbook will serve as a “self-help tool” for tenants and landlords / landladies and will certainly have a great impact on its target audience. It will be particularly useful to tenants who, because of a lack of finances, are unable to afford professional legal services.

To this end the language used in the handbook is simple and ought to be easily understood. The author, Sayed-Iqbal Mohamed, must be commended for breaking down this complex area of law in the manner in which he has so as to make the handbook accessible to the large community of South African tenants, many of whom are uneducated.

It is stated in the vision and policy statement of the Organisation of Civic Rights that it is committed to developing a better and just society by, inter alia, making a significant and distinctive contribution to the conditions of tenants and the homeless community. This handbook is a vast step towards the realisation of this commitment of the Organisation of Civic Rights.

Ms. Justice Leona V Theron
Judge of the High Court of South Africa
November 2003
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INTRODUCTION

“There is enough for everyone’s need but not for everyone’s greed!”
Mahatma Gandhi (1869 - 1948)

This handbook is intended as a guide to tenants, landlords/landladies and all those who represent them. The experience through the Organisation of Civic Rights (OCR) with tenants for 25 years provides a deep insight into the hardship of abused tenants at the hands of unscrupulous landlords/landladies. Such abuse include the disconnection of electricity and water supplies, illegal lockouts of tenants and their families, neglecting necessary repairs, high rentals and the non-refund of security deposits.

Rights, off course, do not exist by itself. Tenants need to be educated of their duties, responsibilities and obligations – things they need to do in respect of the corresponding rights of landlords/landladies. This prevents landlords/landladies taking legal action and also reminds tenants that they are obliged to respect and look after the property they occupy. There are tenants who violate and abuse the rights of their landlords/landladies, for example, they cause damage to the property leased, behave abusively or have no intention of keeping to the agreement.

Since 1994 the OCR engaged the national government to introduce a new law that would help protect the rights of tenants and landlords/landladies and for them to fulfil their responsibilities. OCR’s Discussion Documents and proposals (1994; 1996) and meetings with the Minister of national housing led to a national task team on which the OCR served, to develop a new national legislation. There was consensus that changing the existing legislation would improve the living conditions of tenants and protect them from the abuse of unscrupulous landlords/landladies. A law that would also protect landlords/landladies from tenants’ abuse.

All these were made possible by the dedicated and passionate perseverance of the late Billy Nair (1929-2008) who, two months after his release from Robin Island, having served 20 years as a political prisoner, was one of the founders of the OCR in April 1984. He served as its first deputy chairperson and later as one of its patron; having actively served the OCR for 25 years. He ensured that the Minister of national housing engaged in the process of consultation to overhaul the law.

1
In August 2000 the government introduced this new law in all the provinces; called the Rental Housing Act 50 of 1999 (it will be referred to as the “RHA” in this book). A great part of this new law contains OCR’s concerns, suggestions and proposals that includes overcrowding, security deposits, subsidy for tenants who are unable to afford rentals during their tenancy, arbitrary evictions, exorbitant rentals, discrimination and invasion of privacy by unscrupulous landlords / landladies, unacceptable living conditions, illegal lockouts, recognition of tenants’ committees and the right to bring under review proceedings of the Rental Housing Tribunal (RHT) before the High court.

For the first time tenants living in outbuildings, backyard shacks or renting any type of residential dwelling² will be able to challenge unscrupulous actions. Approximately 10 million people living in rented dwellings countrywide have recourse, theoretically at least, to the RHTs to have their disputes resolved. No longer can a landlord / landlady disconnect water or electricity illegally or lockout a tenant without being challenged. Landlord / landlady can also take action against tenants who overcrowd, refuse to vacate the dwelling after the lease has expired or tenants who breach their lease contract (e.g., non-payment or late payment of rentals).

Landlord and tenant conjure up different images for different people: capitalist or oppressor or a bona fide landlord and a recalcitrant (stubborn, unmanageable) tenant. Poverty and landlord appear to be irreconcilable - as is the notion that there are only good tenants. A landlady living on the breadline might appear strange, even unconventional, when looking at tenant and landlord relationship. The circumstances of the parties become complicated when the tenant is unable to pay the rent and has accumulated arrears.

The story of a poor tenant and a poor landlady reflects the hardship in our country we are oblivious of. Their plight reflects the many untold stories of our great democracy with its robust economy. What is urgently needed is the introduction of a subsidy for tenants who are barely surviving and landlords / landladies who have taken the responsibility of providing shelter not motivated by greed for colossal returns. The introduction of subsidy was the main basis of OCR’s agreement with the Minister of national housing to abolish rent control. It appears in the preamble to the RHA but not introduced or even considered approximately eight years since the new legislation.
The next chapter gives an overview of the new legislation in context. In other words, the background of the laws relating to tenancy, both ancient and modern, are briefly discussed and some of the pressing issues that need to be addressed to improve the law and its application by the RHTs and the courts. Chapter 2 focuses on the RHA and the RHT with detailed explanation of the RHA, how the RHT functions and what is required of parties to a dispute. Chapter 3 deals with a wide range of tenancy matters that aims to educate and empower people by providing a concise guide to what the law is, how to access it and the role of the RHTs and the courts. Chapter 4 is about the technical details of the RHA and RHTs, intended for legal practitioners, support staff and members of the RHTs. In Chapter 5, examples of rulings and mediation agreements are given with a brief discussion. The Appendixes contain the RHA, Draft Regulations and useful tools such as specimen contract, letters and contact details of RHTs.

The law in this handbook is explained in simple language while making allowance for law students, legal practitioners, members of the RHTs and other interested persons for whom some case law references and legal terminology were included. The handbook is a guide, it is not the law; it offers suggestions and provides advice. Legal help is strongly recommended.
CHAPTER 1
HISTORICAL DEVELOPMENT

‘We now live in a constitutional democracy. Customary law should not only be tolerated (as was the position in the past) but it must be recognised, applied and married to the existing Roman-Dutch legal system currently in place in this country.”

Dlodlo J (in Fosi v Road Accident Fund and Another 2008 (3) SA 560 (C) at 570)

1.1 GENERAL INTRODUCTION
This chapter will answer the following questions to enable the reader to understand the Rental Housing Act (RHA): -

• Why is it important to have a background to other laws?
• Are ancient laws still relevant?
• Is the RHA the only law that applies to the contractual relationship between tenant and landlord?
• Does the Rent Control legislation still apply?

1.2 OBJECTIVES / OUTCOMES
After reading this chapter, you will: -

• learn about other laws that affect the contractual relationship between tenant and landlord,
• get an overview of the RHA that has introduced several changes to the common law and the law of contract,
• be introduced to the debate for changes required to improve the law.

1.3 THE DIFFERENT LAWS
A brief comment on the common law, previous rents legislation and the Constitution of the Republic of South Africa will provide an understanding of the need for a comprehensive legislation governing the relationship between landlord / landlady and tenant and the positive impact it envisages to have on the rental housing market.

1.3.1 Common Law
Common law is the law that is based on tradition and usage that governs the relationship of people. Ancient Roman law from around 750 BC to the sixth century AD provided powerful dynamic law, legal principles and legal system that was adopted or adapted by later generations in European countries. Netherlands was one of many countries that were...
influenced by the ancient laws of Rome. Great Dutch scholars in the 17th and 18th centuries debated, interpreted and wrote commentaries that developed into an extraordinary legal system of their time. These brilliant Dutch scholars included Hugo Grotius, Johannes Voet, and van der Linden.

The common law in South Africa is the legal concepts, principles and rules of the Roman-Dutch law that was also influenced by English law. These laws were introduced by Jan van Riebeeck and the Dutch settlers who arrived in 1652 and the British in 1795 respectively. Roman-Dutch law is largely the legal system of the Romans, changed and modified over centuries and is one of the most important ‘civil law systems’ of the South African law together with the English ‘common law systems’. Roman-Dutch law also influenced other countries such as Lesotho, Swaziland, Zimbabwe, Turkey, Japan, Indonesia, Sri Lanka and Scotland but ceased to exist in Netherlands in 1809 by the adoption of the French Civil Code. English law influenced Roman-Dutch law an also forms part of our common law.

Let us look at an example of tenant-landlord relationship under Roman / Roman-Dutch law. A person who was in possession of a property was granted an interdict to prevent a disturbance or interference (prohibitive interdict) or if unlawfully dispossessed, had recourse to a restitutory or mandatory interdict to have possession of the premises restored. This common law still applies in South Africa with the courts adapting it to the changing needs of society. It was recently included in the RHA (May 2008).

Common law is therefore that part of the law not found in “statutory” law.

1.3.2 Case Laws – the decisions of the Courts
How an application is brought before a court, what procedures are to be followed in courts, how evidence is to be given and rules that govern court proceedings, these are largely based on English law. Specific legal principles developed through the courts’ decisions that further shaped the common law. The growth of the common law was the result of our courts’ application and interpretation of the Roman-Dutch law and the English law. The courts’ judgment (precedents) became part of our common law as the need arose to resolve matters in response to the ever-changing needs of society.
1.3.3 Statutory Law

Legislation is another name for statutory law or a law enacted by parliament and includes subordinate laws such as laws made by provincial and local governments. An act of parliament or legislation can change specific aspects of the common law or introduce new rules or laws.

The South African parliament made law called statutes ("statutory" law) for various reasons such as the Rent Control Act to protect tenants and the Group Areas Act to force people to live in categorised "race groups" in specific localities. In the democratic dispensation since 1994, parliament continues to pass laws with emphasis on consultation with various interest groups and all laws must comply with the provisions of the Constitution of the Republic of South Africa. The provincial and local governments can also enact laws or are required to implement national legislation under specific mandates.

The RHA is an example of a legislation enacted by national government that requires each provincial housing Minister to apply it by establishing a provincial RHT. Initially, the provincial housing Ministers were required to promulgate (pass law) provincial regulations but were not allowed to make changes to the RHA. The authority for regulating subordinate laws was changed in May 2008 and it is the Minister of national housing who is also responsible for regulations with no powers given to the provinces to alter or make changes to the RHA and its regulations.

1.3.4 The Constitution

In the past, the apartheid government through parliament was the highest decision making institution. In South Africa’s constitutional democracy established in 1994, the Constitution is the supreme law of the country. It is internationally recognised as one of the most progressive constitutions. Common law, statutory law, indigenous law and any other legislation cannot contradict the provisions of the Constitution of the Republic of South Africa, Act 108 of 1996 that became law on February 4, 1997. Parliament itself is subjected to the provisions of the Constitution as are all government bodies and all individuals, without exception. Indigenous African law is recognised as one of the main sources of our law but is yet to be investigated for its richness and contributory value to contract law, and more particularly, to leases.
The Constitution gives the courts the authority to interpret the common law and indigenous law and to look at the laws of other countries within the context of our society when deciding a case to arrive at a just and equitable solution. Any person or party can legally challenge the decision of a court or any legislation, including the RHA that affects his or her constitutional rights. All courts can hear matters relating to the constitutionality of a case but the Constitutional court deals with the protection or interpretation of the constitution and enforcement thereof and has the final authority on all constitutional issues. Cameron JA summarizes this development in the following statement:

All law now enforced in South Africa and applied by the courts derives its force from the Constitution. All law is therefore subject to constitutional control, and all law inconsistent with the Constitution is invalid. That includes the common law of contract, which is subject to the supreme law of the Constitution. The Bill of Rights applies to all law, and binds the Judiciary no less than the Legislature, the Executive and all organs of the State. In addition, the Constitution requires the courts, when developing the common law of contract, to promote the spirit, purport, and objects of the Bill of Rights.

1.4 THE RENTS LEGISLATION
The rents legislation was passed by Parliament in 1920 with many amendments or changes over eighty years. The rents legislation modelled on English law was in response to the needs of a changing society brought about by the two World Wars and was initially intended as temporary measures. Both “first” and “second” world countries passed laws to protect tenants from exorbitant rent increases and evictions because of the acute housing shortage. War Measure 89 of 1942 was enacted in South Africa to protect business tenants but was abolished in 1980.

Property owners and their representatives saw the rent control law as an “interference” of their common law rights. For instance, at common law a landlord / landlady could terminate a month-to-month lease by giving one month’s notice. Our courts clarified the one-month’s notice period to be a calendar month’s notice to be given not later than the first day of the month to be effective for that month. The Rent Control Act 80 of 1976 placed further restrictions on the landlord / landlady regarding
the notice to vacate: three month’s notice if the dwelling was required for personal occupation; six month’s notice if required for renovation (lease suspended) with the tenant having the first right of re-occupying the dwelling; twelve month’s notice if the landlord / landlady intended to demolish the dwelling. The landlord / landlady also had to satisfy the High court that such demolition or reconstruction was in the public’s interest and that the Minister of Housing granted such permission.

A large number of dwellings were phased out of rent control between 1978 and 1980 because of vigorous campaigns by landlords’ representatives who had considerable support in the apartheid parliament. Consequently, rent control applied to dwellings built and first occupied on or before October 20, 1949. Any tenant, regardless of income, who occupied this category of dwelling was “protected” by the provisions of the Rent Control Act. As for dwellings that were phased out of rent control, a tenant also enjoyed the “protection” of the rent control legislation if he or she was in occupation at the time the dwelling was de-controlled and his or her income was within a specific income category (amended regularly in the government gazette). The income of a tenant however was not considered in determining the rent increase of rent-controlled dwellings. In reality, a pensioner ended up paying rentals similar to that paid by a millionaire in the same building.

Rent control did not apply to any dwelling built after the major phasing out periods (1978-1980). All dwellings in “white” residential areas were eventually phased out of rent control by the early 1990s. Rent control as argued by the powerful property lobbyists, supposed to have stifled private rental development. Surprisingly, this major change, of bringing dwellings out of rent control, did not lead to the building of more rental dwellings or any improvement in the private sector rental market. Similar development emerged in other countries, with intense debates for and against rent control and protection for poor tenants continues in the United States of America.

1.5 THE RENTAL HOUSING ACT

1.5.1 The Rental Housing Act 50 of 1999
The Organisation of Civic Rights (OCR) championed the cause of bona fide tenants and succeeded in a High Court application to have rent boards reintroduced in 1986 when it “mysteriously disappeared” nationally due to an administrative “error”. The OCR also had rent control reintroduced to certain buildings in Warwick Avenue, Durban in 1989.
1989 due to similar mysterious circumstances. It engaged the apartheid government to amend the rent control legislation to have it extended to all dwellings. It lobbied with the Minister of Housing, the late Mr. Joe Slovo, who was the first Minister of Housing in the democratically elected government of national unity.

OCR also engaged the Gauteng Provincial government in 1996 and previously met with anti-apartheid activists from Gauteng and Western Cape to look at Landlord-Tenant legislation. These meetings were directed at exchanging ideas and information the OCR had acquired from several organisations in the United States of America and site visits to Landlord-Tenant courts, tenants and housing rights’ organisations. After extensive consultation nationally and internationally, made possible through ASHOKA (USA) and a funding partnership with Misereor (Germany), the OCR proposed the abolition of rent control and submitted detailed suggestions for a new law to Minister Sankie Mthembu-Mahanyele, successor to late Mr. Slovo.

At this time OCR participated in an international workshop relating to tenants and housing, convinced that a partnership between itself and the national government would introduce new legislation. Indeed, the OCR was the only civic organisation to work closely with the Minister and her team on reforming tenant-landlord law and was later part of the national task team to advise the Housing Minister on a draft Housing Rental Bill 1998.

1.5.2 Repeal of the Rent Control legislation
Is a person of a residential lease still “protected” under the Rent Control legislation? In other words, are rent increases still limited to a 10% increase per annum and evictions restricted? These no longer apply. The Rental Housing Act, 50 of 1999, provided a “cooling off” period of three years for tenants who were living in rent-controlled dwellings.

On July 31 2003, rent control seized to exist (date of commencement for repeal was August 1 2000) and landlords were at liberty to increase rentals without restriction and were no longer required to apply to a statutory body (the defunct Rent Boards) for an increase. This has been a great relief to landlords, but has also created crises in the lives of pensioners and poor tenants. Rent control laws were introduced after World War 1 in most countries and were amended, abolished and reintroduced over the past 80 years because of the critical housing
shortage. It still exists in the United States of America alongside Landlord-Tenants’ court that have the jurisdiction of high courts and with a subsidy scheme for poor tenants.

1.5.3 The Rental Housing Amendment Act 43 of 2007

The first generation of the RHA showed up certain challenges and both the OCR and the RHTs presented recommendations for amendments. After an extensive consultative process with relevant stakeholders, the amendments were seemingly suspended.

 Renewed effort, particularly concerns about enforcements, led to further recommendations and intensive consultative process. Provincial housing portfolio committees held public hearings and presented concerns and suggestions that were presented to the national portfolio committee on housing. The Bill was signed into law and became effective on May 13, 2008. One of the significant amendments of a technical nature gave the Minister of national housing the powers to regulate matters so that regulations would be standardised and introduced simultaneously in all provinces that have established RHTs. The Unfair Practices and Procedural regulations have not become operational at the time this book was due for publication (January 2009) while RHTs continue to conduct hearings and mediations without the necessary regulations.

1.5.4 The impact of the Rental Housing Act

1.5.4.1 Rent hikes

More tenants in the Western Cape than in other provinces registered their dissatisfaction and anxiety at the huge rent hikes. The provincial Rental Housing Tribunals, as a primary source of the impact of the abolition of rent control needed to furnish relevant information to the Minister of national housing for her to evaluate the need for intervention to alleviate hardship. A study of the annual reports of Tribunals, especially the KZN Rental Housing Tribunal, reveals a stats driven approach. It deals with the number game that promotes the staff management’s “achievements” rather than the quality of delivery or the hardships experienced by tenants and landlords / landladies.

 The KZN Rental Housing Tribunal is considered to have granted enormous increases in one leap, highest increases in the country and perhaps in the history of rent increases. This has led to enormous hardship for pensioners, single parents and poor tenants. The RHTs that
were to protect the poor and vulnerable tenants are the very instrument of displacement.

1.5.4.2 Statutory requirements for the composition of the RHTs
It is one of the reasons that there are at least two mandatory requirements in the RHA: (i) the Tribunals must be properly constituted and (ii) with the approval of the provincial housing portfolio committee. Members appointed to the Tribunals must have knowledge and expertise and selected from certain fields such as property management, housing development matters, consumer matters pertaining to rental housing or housing development matters (section 9 of the RHA). Law is not a requirement although the RHA should be amended to have at least one person with legal expertise. Gauteng and Western Cape Tribunals seem to be properly constituted and cautious in their approach to rent increases.

Political factors seem to have prevented or delayed by seven years the establishment of the Eastern Cape and Free State Tribunals. Tenants and landlords / landladies are yet to see the benefits of the RHA seven years later. Amendment to the RHA should empower the Minister of national housing to set up Tribunals. The Minister must guarantee the independence of the RHTs, free from interference from the provincial departments of housing, introduce subsidy and other measures to ensure the protection of vulnerable tenants.

1.6 THE CONSTITUTION, RHTS, COURTS AND CONTRACTS

Disputes before the RHTs are determined within the confines of the RHA. It would appear the legislator pre-supposed that members would be aware of other relevant laws that apply to tenant-landlord relationship and would have the requisite knowledge. RHTs perform a judicial function; its ruling is a judgment of a magistrate’s court, although the RHT is not a court. RHT members are not judicial officers and usually do not have the training, experience and expertise of magistrates and judges. The RHTs with the restrictions mentioned above are not in a position to bring about meaningful changes to contract law.

What about the courts? Courts have more than a century of experience and an accumulated “consciousness” based on entrenched legal principles. These were introduced from English law with large part of the law based on early Roman law and its development into the 17th
century Roman-Dutch law. The “Ancient” laws, created by brilliant minds, are very much alive and relevant but changes are inevitable within a changing society. There is therefore a need for the courts’ “consciousness” to be amenable to changes. Few judges have been daringly outspoken, allowing the principle of fairness to prevail over the jealously protected principle of the sanctity of a contract. Bhana (2007) argues that the court ought to reassess its approach to constitutional values in general and the importance of the liberal notion of freedom of contract in particular.

Landlord-tenant relationship is still part of the medieval, feudalistic laws operating within the concept of modern market capitalism. Added to these are the critical housing shortages, homelessness and extremely small rental housing options for tenants (often with exorbitant rentals). Contracting parties do not enter into a lease contract with all things equal. A tenant does not have a choice in the absence of a “surplus” rental housing to negotiate the terms of a lease contract. Tenants are at the mercy of a rental market oriented society made hostile by the absence of choice.

A written lease can be most onerous for a tenant when the landlord hands over his common law duties to the tenant. Parties are free to contract in terms of common law and the lease contract may include a substantial part of the landlord’s duties to be undertaken as part of the tenant’s duties. A tenant cannot discuss the rental value which is a given that it must be market related. Affordability has no place for discussion and the substandard conditions of the dwelling becomes part of the contract. Our law is that a tenant cannot challenge his landlady if he acknowledged and accepted the dwelling with its defects. A tenant in mora – who pays rental late for example, has breached her contract, regardless if she lost her job and made an effort to pay three days after the due date. The courts would generally not interfere with contracts and some of the most liberal judges have upheld the principle of the sanctity of a contract.

In the event of a dispute, judges distance themselves from any interference. At the very least, they show empathy; at most, they must take on a role of a mere bystander. The Courts powers continue to entrench the hegemony of the powerful class, of the lords over peasants; the rights (of power) of landlords in the law of contract. In practice, a tenant cannot negotiate the terms of a contract because of
the unequal bargaining power. Terms are presented as part of a standard form contract on a ‘take-it or leave-it basis’. Once concluded, a contract becomes “sacred” with the courts not willing to “handle” it, no matter how oppressive its terms for the disadvantaged tenant. Parties are free - they must be free, to enter into a contract but in reality, freedom favours the party who lets the property in a society where homelessness and acute housing shortage are growing and cannot meet the rental needs of millions.

Barnard (2006:) states, “The being of the law of contract has always been shot-through with the values associated with altruistic political morality (fairness, reasonableness, etc.) but, more often than not, the law of contract is portrayed in the standard texts and in case law as value-neutral, socially stagnant, rule-bound and an individualistic approach that favours freedom of contract above all other considerations, and is dogmatically endorsed, followed and worshipped as an untouchable foundation and idol of the law of contract.

“This classic portrayal only narrows down, furthers and delineates in contract law the false consciousness regarding the legitimacy of law in general. It provides the means to further the commercial interests of the societal elites, the powerful bargaining agents and the corporate giants to the detriment of the blindfolded labourers, debtors and have-nots who are all told that this way of contract is the best and only way: take it or leave it (you had better believe it! (161).”

1.7 CONCLUDING REMARKS
The response of the provincial Rental Housing Tribunals to complaints of exorbitant rent increases of formerly rent-controlled dwellings, the “struggle” by aggrieved tenants and the responses by stakeholders, will direct the future of tenant-landlord relationships in this regard. RHTs are required to adjudicate a rental that is just and equitable to both parties, but market-related, an arduous and challenging task to balance the interests of competing parties within a burgeoning rental market, undersupply of rental dwellings and growing unemployment and homelessness – underpinned by the principle of the sanctity of a contract.

The Constitution of the Republic of South Africa provides an opportunity to develop the common law to give recognition to the realities of a changing and dynamic society and its values. The constitutional
development of the common law to transform property law is negligible and as van der Walt puts it “precious little has been done about the development of the common law itself” (2008:34). There is an urgent need for a shift to “democratising” particularly the law of contract, to end the feudalistic link that persists in landlord-tenant relationship. Perhaps one definitive solution is to have a statutory requirement for standard terms contracts based on fairness and reasonableness (Lewis, 2003).

Another area that requires urgent consideration is to codify the rental law with a balanced set of rules and principles. This codified rental law will consolidate the common law, rules, principles and decisions scattered in our mixed hybrid legal system and will contain a refined and reformed consolidated code on all tenancy matters. The RHTs should be replaced with Landlord-Tenant courts with jurisdiction (powers) of high courts like those in the United States of America. There, in additions to such courts, rent control that was abolished was reintroduced in some states together with subsidy for disadvantaged tenants, housing codes and other relevant measures.

There should be an earnest commitment with clear time-frames to make this happen.
CHAPTER 2
THE RENTAL HOUSING ACT

“The Rental Housing Act, a post-Constiution 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)

2.1 INTRODUCTION
This chapter discusses the Rental Housing Act (RHA)\(^9\) and the Rental Housing Tribunal (RHT)\(^10\), the powers given to the RHT and the importance of the new law for a tenant and landlord / landlady.

OBJECTIVES / OUTCOME

- You will learn about the RHA and how this directs the relationship between tenant and landlord / landlady,
- have an understanding of how the RHT functions, be guided to start the dispute resolution process that will be mediated or heard at the RHT,
- know how to advise your client if you are an estate or managing agent, an attorney, advocate or acting in a representative capacity.

2.1.1 WHAT IS THE RENTAL HOUSING ACT (RHA)?

- It is a law passed by Parliament for landlords / landladies and tenants of residential dwellings.
- It is the law of general application\(^11\).
- As a law of general application it is aimed to protect and regulate tenant-landlord relationship in all situations of leased dwellings
- It was first published on December 15, 1999 and became law on August 01, 2000 as the Rental Housing Act, 50 of 1999.
- The RHA was amended for the first time and the amended Act came into force on May 13, 2008 (the Rental Housing Amendment Act, 43 of 2007).
- The RHA informs parties to a lease contract about their rights, duties and responsibilities arising from a lease agreement (oral, written or partly written and partly oral).
- It protects the rights of a prospective tenant against discrimination.
It tells parties how to behave and conduct themselves, what they must do, what they cannot do and what would happen if they “violate” each others rights or fail to carry out their duties.

The common law rights and duties continue to exist but the RHA changed some aspects of it.

The basic requirements of a lease contract still apply.

The RHA protects both tenants and landlords / landladies from exploiting each other and against other forms of “unfair practices”.

“Unfair practice” is a very important part of the RHA that allows parties to lodge a complaint with the provincial RHT.

The RHA empowers parties to a lease contract and protects their rights.

2.1.2 Does the RHA apply to Business / Commercial Property?
No.

2.1.3 Does the RHA apply to Residential Dwelling?
It applies to all residential dwellings – dwellings used for rental housing purposes.

2.1.4 What does the RHA say about a dwelling?
A dwelling includes any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage or similar structure a landlord leases to a tenant to live in. A storeroom, outbuilding, garage or demarcated parking space can form part of the leased dwelling if this was agreed between the landlord / landlady and tenant (Definitions, Chapter 1 of the RHA).

2.1.5 Is the RHA restricted to dwellings in urban areas only?
No! It applies to leases of residential dwellings in the entire geographical area of South Africa; rural and urban areas.

2.1.6 Can a Municipality, Provincial or National Government be considered a Landlord?
Yes! 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.

2.1.7 What happens when a Tenant or a Landlord breaks the Law in terms of the RHA or their relationship breaks down?

They can contact the RHT for advice; file a complaint so that any dispute or conflict regarding an unfair practice or matters affecting the relationship between parties in respect of their lease contract can be resolved.

2.1.8 Do the provisions of the Rent Control Act 80 of 1976 still apply now that there is a new law, the Rental Housing Act 50 of 1999?

No!

On 31 July 2003 the protection of tenants living in a dwelling (which included a home, flat or garage) that was subject to rent control, ended. The Rent Control Act was abolished.

2.1.9 In Summary

The Rental Housing Act 50 of 1999 as amended (RHA) is the law that deals with tenant-landlord matters in respect of residential dwellings in the entire geographical area of South Africa. The RHT is the body that has the power to resolve complaints and to instruct and guide parties to do what is required of them under the RHA.

2.2 WHAT ARE REGULATIONS?

The RHA comes from national government. In each province, the Minister of Housing may set up a RHT. In addition to the RHA, the Minister of the Executive Committee (MEC) in the provincial legislature in charge of housing was previously required to tell landlords and tenants about the procedure and more information about unfair practices. This was done by the MEC for housing through regulations.

The changes to the RHA in May 2008 (amendment) placed this responsibility with the Minister of National Housing, making it compulsory for the National Minister to make regulations (Section 15 of the RHA). This is done in consultation with:
There are at least two sets of regulations, one contains procedures (Procedural Regulations) and the other relates to problems or disputes arising from unfair practices (Unfair Practices Regulations). RHTs must follow (standardised) rules, processes and procedures contained in the Procedural Regulations and refer to the Unfair Practices Regulations that list certain categories of unfair practices and provides explanation thereto.

The RHA is like the engine of a bus, the Regulations the body and the RHT its wheels.

2.2.1 What is the Procedural Regulation?
How does one lodge a complaint with the RHT and what happens to it? What is required of the support staff and members of the RHT? What is the procedure to resolve a complaint? How is mediation or a hearing conducted and how are mediators and members expected to behave? What rules must be followed from the time a complaint is lodged to its finalisation? Answers to these and other questions relating to procedure ought to be found in the Procedural Regulation.

2.2.1.1 The Procedural Regulation should include:-
- How the RHT must function.
- How to file a complaint.
- A copy of the complaint form, summons and other forms and certificates to be used are part of the Regulation.
- Duties of the staff and the members of the RHT.
- How many days are needed to summon a party or subpoena a witness?
- What fines or penalties are to be paid, and / or the period of imprisonment when a party ignores a ruling (decision / order / “judgment”) of the RHT?
- How to apply for spoliation, interdict and attachment.
- Mediation and hearing procedures.

2.2.2 What is an Unfair Practice?

2.2.2.1 RHA Definition
Any action, behaviour or conduct by one party that affects the rights of the other party in terms of their contractual relationship. According to the
definition in the RHA, an “unfair practice means any act or omission by a landlord or tenant in contravention of this Act; or a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord.” The RHA together with the Regulations state what the unfair practices are, what the landlord / landlady and tenant must do and what they are not allowed to do.

Any action that goes against the requirements of the RHA and its Unfair Practices Regulation would affect the rights of one party, thereby resulting in an unfair practice. Let us take an example to have a better understanding:

2.2.2.2 Example of an unfair practice action
The landlord illegally disconnects the electricity supply to the tenant’s room. The landlord’s action is unlawful and the tenant can lodge a complaint with the RHT. The RHT can hear matters of this nature and in terms of section 13(12)(c) “issue spoliation and attachment orders and grant interdicts.” This action is also made a criminal offence:

Section 16(1) states “Any person who –
(hA) unlawfully locks out a tenant or shuts off the utilities to the rental housing property; or
(i) contravenes any regulation,
will be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years or to both such fine and such imprisonment.

2.2.2.3 “Non-action” / omission may be an unfair practice
Any “non-action” / omission that goes against the law as stated in the RHA and its Unfair Practices Regulation is also an unfair practice, as for example the tenant’s failure to pay the rental. The landlady can lodge a complaint with the RHT or approach a court to recover the arrears.

Under General Provisions of the RHA, section 4(5) states:
“The landlord’s rights against the tenant include his or her right to -

(a) prompt and regular payment of a rental or any charges that may be payable in terms of a lease;
(b) recover unpaid rental or any other amount that is due and payable after obtaining a ruling by the Tribunal or an order of a court of law;”

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It would be wise for the landlady / landlord and tenant to ask: “Will this action of mine be an unfair practice?” “What does the RHA and the Unfair Practices Regulations say I can do or must do or cannot do?”

2.2.2.4 Unfair Practices Regulations include: -

- the changing of locks;
- deposits;
- damage to property;
- eviction;
- forced entry and obstruction of entry;
- house rules
- intimidation;
- issuing of receipts;
- tenants committees;
- municipal services;
- nuisances;
- overcrowding and health matters;
- tenant activities;
- maintenance;
- reconstruction, refurbishment, conversion and demolition
- effect of unsigned or undelivered lease agreement

2.3 THE RENTAL HOUSING TRIBUNAL (RHT)

2.3.1 What is the RHT?\textsuperscript{16}

- It is an independent body appointed by the Provincial Minister of Housing (MEC) to resolve disputes between landlords and tenants of residential dwellings.
- Its members, between 3 to 5, are appointed to serve a term of up to three years, that could be extended to a further three years on the same appointment. Two alternative members may also be appointed.
- The RHT also has staff that includes inspectors, technical advisors and administrative support staff.
- It is not a court but performs a judicial function; its decision, called a ruling, is deemed an order of a magistrate’s court and is enforced in terms of the Magistrates’ Court Act\textsuperscript{17}.
- The RHT has jurisdiction over all tenant-landlord matters and any person or entity can lodge a complaint.
All tiers of government, which is a party to a lease contract of a residential dwelling are subjected to the same treatment as any other private citizen when a matter comes before the RHT.

Any government administration, like the department of Public Works or the department of Housing in the province or of a municipality, may also lodge a complaint with the RHT against its tenant.

The RHA, which is the empowering legislation, does not confer delegated powers on the MEC and does not vest him / her to delegate any power to his / her subordinates.

Commissioners of the RHT are independent members even though they are appointed by the MEC for housing.

The MEC for housing can be summoned or subpoenaed by the RHT where the department of housing is a party to a lease.

No one can interfere with the functions and duties of the RHT, including any Minister or government official.

2.3.2 What are the Powers of the RHT?

When we talk of jurisdiction, we are referring to the powers of the court to deal with a certain matter. Magistrates’ courts cannot hear monetary claims that exceed a certain value, a family court does not have jurisdiction over criminal matters and the labour court cannot hear a dispute between landlord and tenant.

There are other aspects to the jurisdictions of courts like the geographical area it can hear a matter or the High court having the power to review a decision of the RHT. The provincial Rental Housing Tribunal: -

- can issue notice for a mediation or summons parties to a hearing
- its ruling is deemed to be an order (judgment) of a Magistrate’s Court
- can impose a fine or have a person imprisoned; or do both
- has jurisdiction over unfair practices

2.3.2.1 Unfair Practices and the RHT

Kerr (2004) 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” (509).

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

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.

Knoll J 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 (absolute, unconditional) terms (at 67).

**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.

**RHT and the courts**

The question still remains: does the RHA prevent courts from determining unfair practices disputes? According to Kerr (2004) 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 / landlady 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

RHT 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.

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 (the RHA is an Act of parliament), it does not have inherent jurisdiction. Courts cannot exceed their jurisdiction 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.

2.3.3 How does a Landlord or Tenant file a Complaint?
The complainant fills in a complaint form. This can be done in one of the following ways:
- in person at the RHT office
- faxed to the RHT office
- by other means allowed by the RHT (e.g., e-mail)

2.3.4 What happens after a Complaint is filed?
- The case manager or the staff in charge opens a file and enters the names of the complainant and the respondent into a register.
- A summary of the nature of the complaint and a file (case) number are entered into the register.
- The complaint needs to be investigated by the staff in charge to do so.
- The investigation must establish, among other things, whether the complaint relates to an unfair practice and what documents are required.
A letter is sent to parties regarding the complaint filed.

Parties are also informed in writing (notice of mediation or by way of summons) of the date, time and place the case is to be mediated or heard. A copy of the complaint sheet is attached or details of the complaint is provided.

The RHT can request / subpoena any information (documents such as financial records of the landlord, income of tenant, lease) or persons (witnesses).

The respondent can also file a complaint against the complainant (“counter-claim”).

The complaint is resolved through mediation or hearing.

The RHT must resolve a complaint within three months from the date it was lodged (section 13(7)).

2.3.5 What are some of the matters the RHT can deal with?

(i) It has the authority to deal with disputes, complaints or problems that include:-
• non-payment of rentals
• refund of security deposit
• invasion of tenant’s privacy (including family members and visitors)
• overcrowding
• determination of fair rentals
• unlawful seizure of tenant’s goods
• discrimination by landlord / landlady against a prospective tenant
• receipts not issued
• tenant conducting a nuisance
• maintenance and repairs
• illegal lockout
• disconnection of services
• conversion, demolition and renovations

(ii) Provide advice and information

(iii) Make a ruling that is just and fair to: -
• end any unfair practice (contained in the RHA and Unfair Practices Regulations)
• compel a landlord / landlady or tenant to obey a provision of the RHA or regulations relating to unfair practice

(iv) Where any law is broken, refer the matter to the appropriate body for investigation
2.3.6 Do Parties have to pay any fee?
No! There is no cost involved for either the complainant or the respondent from the time a complaint is filed to its conclusion through mediation or hearing. To have the RHT’s order enforced or executed, a party will have to pay disbursement costs, e.g., sheriff’s costs.

2.3.7 Can a complainant or respondent have someone to represent him or her?
Anyone, not necessarily a lawyer, can represent a complainant or a respondent at a mediation or hearing but it is necessary for the parties to appear in person especially when intending to give evidence. A representative cannot give direct evidence at a hearing and any fact, even under oath or an affirmation, would be hearsay. In other words, such “evidence” from a representative is unconfirmed information or just a “story”.

2.3.8 Mandate or letter authorising representation

2.3.8.1 A person who represents a tenant or a landlord or a group of tenants or landlords, should present the RHT with a mandate or a letter signed by the persons who are to be represented. The mandate or letter should indicate what decision the representative or spokesperson can make to resolve the complaint and has the authority or permission to sign a mediation agreement. However, if evidence is required, the RHT can and will ask for the complainant and respondent to be present.

2.3.8.2 Agent representing a party
Landlord-tenant disputes can be resolved between parties themselves and should be encouraged. Where an “agent” (e.g., an attorney, community organisation, estate agent or an individual) acts for a party, it is incumbent that the agent places the interest of the client above its own. It must have a specific mandate or instruction within which decisions can be taken to end a dispute.

What happens when an agent that represents a party without proper authorisation enters into negotiations and even concludes an agreement?

Does the agent then have the right to represent a party or to carry out an instruction?
Let us look at a few examples to understand the serious implications of an incorrect mandate or a fraudulent misrepresentation.
Example one: A body corporate terminates a lease agreement and then proceeds to evict the tenant. The landlady, who is the owner of one of the unit (flat), was informed that her tenant has become a nuisance and the other owners and tenants have had enough. However, the landlady does not terminate the lease agreement neither does she instruct the body corporate to act on her behalf.

The landlady could have taken action by placing the tenant on terms, allowing the tenant to rectify the breach. She could cancel the lease because of the tenant’s failure to remedy the breach and thereafter proceed with ejectment. The body corporate cannot act as the landlady, unless specifically mandated to do so. The body corporate can take action against the landlady-owner for not adhering to the provisions of the Sectional Titles Act and specifically the Annexure to the Regulations dealing with conduct rules.

Example two: An organisation represents a group of tenants regarding maintenance and rental disputes. After concluding an agreement, the landlord is unable to enforce the terms because not all the tenants mandated the organisation to act for them. During negotiations the landlord should have requested from the organisation’s spokesperson proof of representation.

What is required?

- A written document with an instruction from tenants, with their details and signature.
- The extent of the mandate is also important, that is to say, parties are informed that the representative can take decisions and even finalise a settlement agreement or the restrictions under which the representative is mandated.
- Attorneys do not require a written mandate and can act under verbal instructions. However, an attorney’s authority to act can be challenged and will be required to produce proof. A municipality, as a party to a mediation or a hearing, cannot be represented by an attorney who is a councillor (Rule 52 of the Magistrates’ Court Act).

2.3.8.3 No proper authority to represent and a ruling of the RHT

Take the above examples as being played out before a court or better still, at the provincial RHT. A party that appeared before the RHT subsequently informs the RHT that during the hearing proceedings
(“trial”), the person who claimed to have represented the other party was not mandated or authorised to act (did not have locus standi). The RHT is asked to hear the matter again or to change its ruling based on “evidence” to be presented by the party itself.

Unfortunately for the aggrieved party, the ruling (judgment) cannot be reviewed or new information examined because once the RHT gives its ruling, it becomes functus officio\(^2\) like the lower and higher courts. In other words, the case is closed and the RHT has no authority to re-examine the case and to give a new judgment. A proper mandate and the RHT itself asking for one at the commencement of the hearing will assist parties in the finalisation of their case.

2.3.8.4 Is a mandate, authorisation and legal capacity required if the owner, landlord or tenant is a company, close corporation, a trust or some other entity?

2.3.8.4.1 Who can contract?
An individual or an entity must have legal capacity to conclude a lease contract. A minor, who is a person younger than 18 years, or a person who is mentally challenged or ill (e.g., an insane person) cannot enter into a contract. A person, who is unable to understand or reason because of the serious state of intoxication or such a state of mind brought about by alcohol or drugs, does not have the capacity to conclude a contract.

2.3.8.4.2 Resolution or minutes of meeting
A company or close corporation is a legal entity or a legal persona and its directors or members, respectively, must give permission (through a resolution or minutes of a meeting) to a person to enter into a lease contract, if it intends to take legal action or lodge a complaint with the RHT or defend any legal action. A trust is not a legal persona but trustees have to follow legal procedures\(^2\). If a trust is the landlord or tenant the trust deed is central to powers of trustees and how decisions are to be made. Steyn CJ affirms that a trust is not a legal entity: “[a] trust, if it is to be clothed with juristic personality, would be a persona or legal entity consisting of an aggregate of assets and liabilities. Neither our authorities nor our Courts have recognised it as such a persona or entity...It is trite law that the assets and liabilities in a trust vest in the trustee.” (in Commissioner for Inland Revenue v Macneillie’s Estate 1961 (3) SA 833 (A) at 840).
A municipality must pass a proper resolution for an individual to represent it at proceedings. Patel AJ states: “It is a trite proposition of our law that artificial persons must duly authorise their employees either to institute or defend proceedings. An authority to act on behalf of an artificial person like a company or a municipality is, according to the best evidence rule, established by a resolution of the entity concerned.”

A municipality cannot become a party to legal proceedings unless a proper resolution is taken empowering a particular individual to act on its behalf.

2.3.8.4.3 What does locus standi mean?
A person or party has the right to bring legal action and the right to proceedings as landlord or owner or relevant interested party to the contract.

A resolution of the directors of a company or members of a close corporation or of trustees of a trust will set out the authority given to a person (an agent) to act on its behalf. A person representing an entity as a party at the RHT, whether as a tenant or landlord, is required to provide proof of its authority and extent of its mandate. In the absence of such authorisation, the person / agent does not have the legal standing (locus standi).

2.3.9 What happens at the RHT on the day of the mediation or hearing?

2.3.9.1 If it is a Mediation: -

- The mediator informs the parties of the procedure to be followed.
- Parties must sign a confidentiality agreement because the discussion is private.
- The mediator does not disclose whatever is discussed to the Tribunal. This is important because if the mediation fails, the dispute is referred to the Tribunal for a hearing.
- The mediator must be impartial; must explain the mediation process, help and guide parties to arrive at a mutually acceptable solution.
- The mediation process is a voluntary one even though parties were issued a notice by the Tribunal to attend.
- The mediator explains his or her role, that would include the following: -
  - that the mediator does not have powers to make a ruling
Mediation is about the common interests of the parties involved and not the interest of the mediator.

A mediator cannot coerce a party in any way.

A mediator must conduct herself / himself professionally.

Parties have the right to be represented.

The solution must be reached through a voluntary settlement with the help of the mediator.

A failed mediation is referred to the Tribunal for a hearing and parties are informed accordingly.

A settlement agreement is signed when the mediation is successful or if there is an agreement on one or more parts of the dispute. The unresolved aspect(s) of the dispute is referred to the tribunal for adjudication.

Parties do not take an oath or make an affirmation because they do not give evidence.

The mediator becomes privy to the discussions through mediation. The mediator, who is a member of the Tribunal, cannot be part of the panel that would hear the evidence of the parties.

Parties have the right to ask for an adjournment to consider proposals.

The complainant has the right to withdraw the complaint during mediation.

At the conclusion of a successful mediation, parties could ask for the agreement to be made a ruling of the Tribunal.

2.3.9.2 The Jackpersad case and RHT mediation

A signed mediation agreement can become a source document of magnitude with serious consequences for a party electing to reject it. In the Jackpersad case the court held that the settlement agreement concluded at the RHT was valid and binding. The defendants (tenants) sought to have the mediation agreement declared unenforceable on the grounds that they were ignorant of their rights in terms of the Rent Control Act that provided certain “protection”.

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The few rights that emanated from this Act were not carried over after the three year period that ended on July 31, 2003. One of the “protection” was the pegging of the rent increase to 10% per annum between August 1, 2001 to July 31, 2003. The mediation settlement included a 15% rent increase concluded between the parties with the mediator on October 28, 2003. Swain J said: “I therefore conclude that the settlement agreement was valid and enforceable and not vitiated by any alleged ignorance on the part of the respondents of their “rights” in terms of the Rent Control Act.”

2.3.9.3 **If it is a Hearing:** -

i) Any member of the public can attend a hearing (“open court”), unless a party is granted permission for a hearing to be held in camera, that is, to exclude the public

ii) The hearing panel constituted by the members (three, four or five) must be present throughout the hearing at all times, be present at any inspection of the dwelling and during deliberations of the evidence to arrive at a decision (ruling).

iii) If a hearing is not concluded in one sitting (part-heard), parties will have to attend another day. The same members have to be present. If a member is unable to continue with the part-heard hearing (where for example the member has resigned), the case will have to start anew; as if it was not heard before (de novo).

iv) Parties together with the Tribunal members sign an attendance register.

v) The Chairperson explains to the parties about the procedure that includes: -

- The recording of the proceedings.
- Taking the oath or an affirmation.
- The parties will be given the opportunity to state their side of the case (give evidence), call witnesses and produce any relevant book, document, or object.
- One party has the right to ask questions after evidence is given by the other (“cross examination” that is used in a formal accusatorial procedure).
- Witnesses are allowed to give evidence.
• Tribunal members may ask questions of the parties and enquire about facts (inquisitorial approach).
• Any inspection report regarding the state of the dwelling will be discussed. The inspector or the person who investigated the dwelling need to give evidence and may be cross-examined by the respondent. The report would otherwise be considered hearsay.
• The Tribunal together with the parties may inspect the dwelling.
• The Tribunal will then adjourn to examine the evidence and thereafter give its ruling.
• The ruling may be given on the day of the hearing.

2.3.10 **Ruling of the Tribunal**
To make a decision (ruling), members of the Tribunal must take into account the following in terms of section 13(6)(a), (b), (c), (d) and (e): -
- Unfair practice regulations
- Provisions of the lease
- The common law (if a particular matter is not addressed in the regulations or a lease)
- National housing policy and national housing programmes
- The need to find a solution in a practicable and equitable manner.

2.3.11 *Some guidelines regarding mediation and hearing*
Parties to a mediation or hearing: -
- Have the right to an interpreter.
- Members of the Tribunal must ensure that parties are given the opportunity to state their case.
- Any point of objection to the hearing or against a member should be brought to the Tribunal’s attention before the hearing starts (*in limine*). Example, a respondent draws the Tribunal’s attention that the dispute relates to a business premises and, as such, the Tribunal does not have powers (jurisdiction) to hear the matter.
- Members of the Tribunal who make up a hearing panel must not hold discussions with any one party or travel with any one party in the absence of the other.
- The Tribunal cannot deny a reasonable request for a postponement (of a mediation or a hearing).
CHAPTER 3
OBLIGATIONS: RIGHTS AND DUTIES OF LANDLORD / TENANT

“It is trite that a lessee is entitled to full use and enjoyment of the property during the full term of the lease. The respondent is therefore under a duty to deliver and maintain the property in a condition reasonably fit for the purpose for which it has been let. The duty includes the obligation that lessees shall not be exposed to any unnecessary risk to life or property and that lessees shall occupy the premises with safety.”

Satchwell J (in Mpange and Others v Sithole 2007 (6) SA 578 (W) at 587)

3 INTRODUCTION
A lease gives rise to a contractual relationship between tenant and landlord. There are certain necessary things that must be agreed upon for a lease to exist.

OBJECTIVES / OUTCOME
- You will learn about the essential elements of a lease
- Understand the rights, capacities, duties and obligations of each party
- Able to take action to get a party to perform or seek help from the RHT or a court
- Have knowledge of certain legal actions and processes
- What to do when a party acts unlawfully

ENTERING INTO THE LEASE
 “[T]he nature of an agreement depends upon its contents rather than the label put thereon.”
Erasmus J (in Jordaan NO v Verwey 2002 (1) SA 643 (E) at 645)

3.1 WHAT IS A LEASE?31

3.1.1 It is a contract between the landlord / landlady or a duly authorised agent and the tenant to allow the tenant temporary use and enjoyment of the dwelling. This agreement can be done: -
- in writing, or
- parties may orally agree to the terms and conditions of the lease contract
- it could also be partly written and partly oral32.
3.1.2 Whether the lease is in writing, concluded orally or partly written and partly oral, parties have to agree: -
   • on the rental to be paid in respect of the dwelling let
   • which dwelling is to be occupied and
   • the period of the lease.

3.1.3 To put it another way, there is no lease: -
   • when there is no agreement regarding the exact amount of money to be paid as rental;33
   • if parties fail to confirm the dwelling the tenant is to occupy for her or his use and enjoyment34 and
   • if the lease period is undecided35.

3.1.4 As mentioned above, a lease can be oral (verbal)36 or in writing or a combination of both. Should the tenant request a written lease, the landlord / landlady must reduce the lease to writing but on the same terms and conditions of the oral lease (section 5(2)). The RHA does not give the same right to the landlord / landlady so that a request to the tenant to reduce to writing the oral lease can be ignored since this would not be an unfair practice.

3.1.5 It is important to note that parties are merely recording the original conditions agreed upon. There may be instances where parties agree that for the lease to be binding, a written lease contract must be signed37.

3.1.6 Condition fit for the purpose for which it is let
It is an established part of our common law that the dwelling to be let must be in the condition fit for the purpose for which it is let when handed over to the tenant38 and the landlord / landlady must maintain the premises in that condition.

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.39
At the end of the lease, the tenant is required to hand over the dwelling in the same condition it was received or to restore it to that condition. Section 5(d)(i) of the RHA requires the tenant to hand over the dwelling “in a good state of repair, save for fair wear and tear”.

3.1.7 Must a written lease be signed?
Legwala (2001) notes with concern that the RHA does not require parties to sign a written contract. In this instance, the requirements of contract would apply, whereby “a written contract comes into existence when it is signed by all parties...” (Christie 2006:108) or a contract is deemed to be signed when one party intentionally or deliberately avoids signing it. Innes CJ appropriately summarises this point as follows:-

“I am of the opinion that by our law a condition is deemed to have been fulfilled as against a person who would subject to its fulfillment be bound by an obligation, and who has designedly prevented its fulfillment, unless the nature of the contract or the circumstances show an absence of dolus on his part.” (Macduff & Co Ltd (in Liquidation) v Johannesburg Consolidated Investment Co Ltd 1924 AD 573 at 591).

3.1.8 Can a term or condition of a lease be changed?
A lease cannot be changed while it is in use, unless the landlord / landlady and tenant agree to any change: The tenant cannot, for example, refuse to pay water charges when the rental agreement was that the tenant will pay a monthly rental of R500.00 plus additional charges of R50.00 for water consumption.

Similarly, the landlord / landlady cannot force the tenant to pay additional charges for water if the rental agreement was that water charges were included in the monthly rental of R500.00. The landlord / landlady cannot in this instance, introduce a separate water meter for the individual account of the tenant without the tenant’s consent.

3.1.9 Can an owner or landlord / landlady install a separate water meter after a tenant has taken occupation?
This will depend on the terms and conditions of the lease contract. The installation may be possible under the following circumstances:

- parties agreed that the rental excludes charges for water consumption;
- the tenant upon receiving a bill, is required to pay the full amount due;
the tenant was aware and agreed that the landlord / landlady would install a separate water meter.

Should the agreement about rental be inclusive of water charges, the tenant could object to the installation if this means a change to the lease contract.

The following may be grounds for objection:-

- the tenant would have to pay charges for water consumption, over and above the rental;
- if the tenant paid a proportionate share, the installation of a separate water meter would seriously alter the amount.

The tenant’s remedy is to place the landlord / landlady on terms to rectify the breach for altering the terms of the lease agreement.

The landlord / landlady cannot change the rental agreement that includes the cost for water consumption by installing a separate meter. The fact that the landlord / landlady cannot make a unilateral change may be financially burdensome when the tenant’s water consumption is very high due to additional occupants or misuse or negligence. Rental in this instance does not even cover the costs of the water consumed.

The landlord’s remedy is to place the tenant on terms to rectify the breach (of exceeding the number of occupants) provided there was an agreement about the number of occupants. Ideally, to safeguard the interests of both parties, a rental agreement that excludes payment for water consumption, should have a separate water meter where such consumption is metered separately and accurately.

**3.1.10 Is the tenant obliged to pay the landlord’s rates?**

The landlord / landlady as the owner is responsible for the payment of rates to the municipality under common law. If agreed by parties, a tenant is obliged to pay rates, taxes and other expenses incurred by the landlord / landlady in relation to the leased dwelling, provided the expenditure are determinable and not left to the imaginative judgment of the landlord or tenant. Certain leases contain a clause that in the event rates and other municipal service charges increase during the year, the tenant will pay a portion, say one twelfth. The tenant is therefore bound by this clause and is under contractual duty to pay his / her share.
3.2 What are the requirements of the RHA regarding leases?
In addition to important information that is a part of a lease contract, the RHA requires tenant and landlord / landlady to include specific information and imposes certain duties. These cannot be negotiated or left out. Below, a few examples of what is deemed to be part of the lease contract even if parties failed to include these in the contract:

3.2.1 Written and Oral (Verbal) Lease

3.2.1.1 Joint Inspection
Joint inspection by both parties before the tenant takes occupation and within three days before the tenant moves out.

3.2.1.1.1 Difference between viewing and inspection
It is common practice that tenants view the premises and thereafter decide to enter into a lease contract. Viewing the premises is not the same as inspecting it for the purpose set out in the RHA, that is, to inspect for any defect. Under common law, it was not a requirement to inspect the premises. The RHA has made this a requirement and is obligatory: Section 5(4) states: The standard provisions referred to in subsection (3) may not be waived by the tenant or the landlord. Joint inspection is therefore necessary at the commencement of the lease and towards the end of the lease period.

It is the landlord / landlady who is required to make sure that the property is handed over to the new tenant without any defect and a joint inspection is to confirm this or to agree on any defect that needs repaired.

There is obviously a problem with an inspection within three days of vacating because an unscrupulous tenant may damage the property on the last day if the inspection was carried out on say the penultimate day. In fact, it would appear that parties need to meet at about midnight and keys handed over to the owner at that time. This is impractical.

3.2.1.2 Receipts:
The landlord / landlady must give the tenant written receipts for all payments he or she receives from the tenant, including the payment of deposit. Section 5(3)(b) of the RHA is an amendment and the latter part reads: “Provided that a Tribunal may in exceptional cases, and on application by a landlord, exempt the landlord from providing the
information contemplated in this paragraph.” The landlord / landlady will have to get a ruling from the RHT granting an exemption.

3.2.1.3 Deposit:
The tenant has to pay a deposit if this was agreed between the tenant and landlord. The deposit must be paid before the tenant takes occupation and the landlord / landlady has to invest the deposit in an interest bearing account.

3.2.1.4 Breach:
In respect of the tenant moving out of the dwelling before the lease period is over, the lease is deemed to have ended when the landlord / landlady realises that the tenant is no longer in occupation. The landlord / landlady can also take legal action against the tenant for breaking the lease, i.e. moving out before the lease period ended or without a proper notice (a calendar month’s notice in the case of a month-to-month periodic lease).

3.2.1.5 Tacit Renewal or Relocation of lease
When a lease for a fixed period expires, the tenant is required to move out. However, a new lease comes into being when the tenant continues to occupy the dwelling, either with the landlord’s clear and direct (express) consent or where the landlord / landlady does not object to accepting the rentals while the tenant remains in occupation (tacit acceptance). Both parties, in this instance, have entered into a periodic lease on the same terms and conditions of the expired lease.

3.3 TYPES OF LEASES

3.3.1 What is a ‘periodic lease’?
The RHA (section 5(5)) defines a ‘periodic lease’ as “a lease for an undetermined period, subject to notice of termination by either party. A periodic lease, contrary to this definition, is a lease that is for a definite period whereby the parties decide, either expressly or implicitly through their conduct that the period would be daily, weekly, monthly or a yearly lease. There is no lease if the lease period is undecided, undetermined or indefinite. In other words, a lease does not exist if the period is without limit or restriction of time. refer to Chapter 4 below for a detailed discussion.
3.3.2 What is a long lease?
A lease for a period of 10 years and beyond is considered a long lease in our law. A tenant’s real right of occupation in terms of a lease is registered against the title deed of the property, thereby limiting the right of ownership. A long lease must be in writing and registered against the title deed of the leased property (e.g., a dwelling) in terms of section 1(2) of the Formalities in Respect of Land Act 18 of 1969 (FRLA). This provides the tenant security of tenure; in other words, it protects the tenant from eviction by a third party and against the creditor or new owner who has no knowledge of the long lease. There are other provisions for unregistered long leases which affect the right of a tenant in the FRLA and the Deeds Registries Act 47 of 1937.

For a detailed discussion and legal implications refer to Cooper (1994) and Kerr (2004).

3.3.3 Additional requirements for a written lease

3.3.3.1 In addition to the requirements above, a written lease must include the following information:
- the names of the tenant and the landlord
- the dwelling to be occupied by the tenant must be described (e.g., a house, room, outbuilding, garage).
- the rental to be paid
- any reasonable increase
- the amount of deposit if any
- any charges (e.g., water, electricity)
- the lease period (e.g., monthly, 6 months or 3 years)
- the duties of the tenant and the landlord / landlady
- the rental period (e.g., monthly, weekly, daily, yearly)
- the notice period for terminating the lease if the lease period is not stated

3.4 LEASE COSTS
Previously, the tenant had to pay the costs of the drafting of a lease. The cost was exorbitant, especially for a computer generated or photocopied lease. The landlord / landlady is now required to provide proof of the expenses incurred when claiming lease costs from a tenant.

Section 5(3)(p): “any costs in relation to contract fees shall only be payable by the tenant upon proof of factual expenditure by the landlord.”
3.5 STAMP DUTY
The amendments to the Taxation Laws have changed the amount of stamp duty for all lease agreements concluded on or after June 1, 2007:

<table>
<thead>
<tr>
<th>Lease Type</th>
<th>Description</th>
<th>Stamp Duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Short term fixed lease period.</td>
<td>a lease for five years or less</td>
<td>no duty</td>
</tr>
<tr>
<td>Short term periodic leases</td>
<td>a lease for five years or less (month to month, weekly, daily or yearly leases)</td>
<td>no duty</td>
</tr>
<tr>
<td>Long term leases</td>
<td>leases more than five years</td>
<td>flat rate of 0.5% stamp duty applies</td>
</tr>
</tbody>
</table>

There are other considerations when calculating refunds for leases that terminate prematurely. There is a proposal to abolish stamp duties for leases from 1 April 2009 (repeal of the Stamp Duties Act).

Please consult an attorney or the South African Revenue Services because no revenue stamps will be required for leases from 1 April 2009.

3.6 NEGOTIATING AND CONCLUDING A LEASE BEFORE TENANT TAKES OCCUPATION
It is wise and legally preferable for parties negotiating a lease contract, to conclude the terms and conditions before the tenant is given the keys to the dwelling. The landlord / landlady or his / her agent would interview the tenant; identify and discuss the dwelling, rental, security deposit and the period of the lease. Parties must inspect the dwelling together and the tenant given an opportunity to decide. Once deposit is paid or part payment is made towards the leasing of the dwelling, a lease contract (oral or written) is concluded. Should the tenant change his or her mind or does not take possession of the keys, this will not render the contract non-existent. In fact, the tenant is liable for the full lease period.

A landlord / landlady who allows a prospective tenant to view the dwelling and then informed by the tenant that he has decided to take occupation or has taken occupation, may prejudice his / her rights. If
the tenant has taken occupation and the deposit that was agreed was not paid, the landlord / landlady would have compromised himself / herself. Section (3)(c) of the Rental Housing Act 50 of 1999 states “the landlord may require a tenant, before moving into the dwelling, to pay a deposit which, at the time, may not exceed an amount equivalent to an amount specified in the agreement or otherwise agreed to between the parties.”

Take the case of the landlady who left the keys with a neighbour to the dwelling she advertised for hire. The tenant viewed the dwelling and, without prior discussions with the landlady, took occupation. The tenant refused to pay the security deposit but offered to pay the rental in advance. The landlady reluctantly agreed and provided the banking details to her account for the rental to be paid. She then demanded the deposit be also paid into her account and the water and electricity account be transferred into the tenant’s name. She presented the tenant with a written lease contract for his signature. Personal details were also required together with a certified copy of the tenant’s ID. The tenant did not disclose personal information, was not willing to pay the deposit and refused to sign the lease.

An investigation revealed that the tenant abandoned the previous dwelling, without settling his rental arrears and failing to pay the municipal service charges. The previous landlord did not do a credit check and did not request rental receipts as proof of the tenant’s payment history.

Simple, obvious facts must not be overlooked and any undertaking should be in writing like the amount of security deposit, rental and period of lease. While parties may agree orally, nothing prevents a party to confirm the terms in writing to avoid disputes. Entrusting a stranger with one’s valuable asset should not be done without taking into account the consequences. The onus rests with the landlord / landlady to establish the *bona fides* (good faith, integrity) of the prospective tenant. After all, the tenant would be given possession of the dwelling; to use and enjoy, and, to have *temporary ownership*. In reality, the owner or landlord-landlady grants the tenant the following:

- guarantees physical control over the property (detentio) with all its accessories
- unhindered possession of the property (vacua possessio)
- undisturbed use and enjoyment of the property (commodus usus)
3.7 BREACH

When a party (tenant or landlord / landlady) fails to perform on its contractual obligation or performs late, the innocent or aggrieved party can cancel for a major breach. If the tenant cancels, say for the landlord / landlady’s failure to maintain the dwelling that placed the onus on the landlord / landlady to carry out repairs and maintenance, the lease is cancelled. The landlord / landlady’s refusal to acknowledge or accept the cancellation (for breach) does not have an effect on the lease that is terminated. Similarly, if the landlord / landlady cancels the lease for late payment of rental, the tenant’s acceptance or rejection of the cancellation is not required for the termination to come into existence. The lease is cancelled and the relationship between the parties is terminated.

Late payment results in mora: “when the contract fixes the time for performance mora is said to arise from the contract itself (mora ex re) and no demand (interpellatio) is necessary to place the debtor in mora because, figuratively, the fixed time makes the demand that would otherwise have to be made by the creditor (dies interpellat pro homine)” Christie (2006:498). The situation is now different with residential dwellings because the RHA imposes a statutory obligation that the grounds for cancellation must be stipulated in the lease and may not constitute an unfair practice, (section 4(5)(c))\textsuperscript{51}.

Should the tenant fail to pay after a notice is given to remedy the breach, the landlord / landlady can cancel the lease agreement. A clause stating that the landlord / landlady has the right to cancel should the tenant fail to pay his or her municipal charges for the water and electricity consumption on time, affords the landlord / landlady the right to cancel.

A tenant may have at least three options when a landlord / landlady cancels for breach: the tenant can ignore the cancellation and continue to occupy the dwelling, at enormous risk if a breach has been indeed committed, accept that he or she has breached the lease contract and vacate the dwelling, or accept the cancellation (as a repudiation of the contract) and institute an action for damages\textsuperscript{52}. If the tenant is in breach but refuses or fails to vacate, and the landlord / landlady follows ejectment proceedings, the tenant would be liable for legal costs and ultimately removed by the sheriff on a writ of execution issued by a court at the landlord / landlady’s instruction.

Should the tenant intend to challenge the landlord’s cancellation and can prove that the breach did not occur; the tenant must hold the

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landlord / landlady to the lease. In other words, the tenant must continue to occupy the dwelling and discharge his or her obligations. The tenant should notify the landlord / landlady that there is no breach.

Take for example the case where the landlady alleges that the tenant failed to pay rental on time, on the first day of the month, as agreed. The tenant indeed failed to honour the agreed payment date. The landlady cancels the lease because cancellation for late payment is not an unfair practice and the lease contract contains a clause that states that the landlady can cancel for late payment.

The landlord / landlady or tenant does not have to cancel for breach and can decide to continue with the lease or may choose to invoke the breach at a later stage, depending on the nature of the breach. The courts would examine an alleged breach within the context of the lease and the construction of a clause breached would depend “upon a consideration of the nature, effect and scope of the lease and the intention of the parties as gathered from the lease”53. In the Protea Assurance case the court held that the tenant did not breach the lease by erecting partitioning. These were non-permanent structures and did not amount to alterations and additions that required the landlord’s prior written consent.

The courts could limit the meaning of clause as in the Chang case54. Cancellation for breach was an extraordinary remedy and the tenant installing a geyser without the landlord’s permission did not breach the lease. Plasket J concluded his judgment by stating that he was “at a loss to understand how this one act may be said to entitle the applicant to cancel both leases. On this ground, I am of the view that the applicant has failed to prove its entitlement to cancel either of the leases.”

It is advisable to seek legal advice when there is no clarity about cancellation for breach, because once the lease is properly cancelled, the contract is terminated. Should either party decide to continue with the lease after cancellation, there is a new lease because a party cannot withdraw a notice that cancels or terminates a lease.

3.8 GOODWILL OR “KEY” MONEY
It is “illegal” for a landlord, supervisor or managing agent to require a prospective tenant to pay a “bonus” commonly called “key-money”. This amount is paid, in addition to the rental and security deposit. This form of exploitation has become quite common in South Africa and
like the United States of America; it is the result of the acute housing shortage.

Through this exploitative practice the landlord, supervisor or managing agent gives preference to a prospective tenant who is able to pay the “bonus” or “premium”. A receipt is not issued and the amount usually is not refunded.

“Goodwill” however should not be confused with security deposit. It is also not key deposit, that is, minimal amount paid for keys which is refundable when the dwelling is vacated and the keys returned to the landlord / landlady.

3.9 INSPECTION AND INVENTORY
Before taking occupation of the dwelling, the tenant and the landlord / landlady must inspect the dwelling (section 5(3)(e)). This inspection allows the parties, as they walk through the dwelling, to list any defect or damage that the landlord / landlady has to repair. The list of defects or damage must be attached to a written lease (section 5(7)). Where an oral lease is entered into, it would be advisable for both parties to sign the list and to have the signed copies in their possession.

3.9.1 The inspection or inventory list is very important because: -
The rights and duties of the tenant and the landlord / landlady are protected when joint inspections are carried out at the beginning and at the end of the lease period.

- It is proof of the landlord’s duty to carry out the repairs needed or put right any damage.
- When vacating, the tenant’s deposit is not withheld for defects or damage that the landlord / landlady was required to repair.
- The landlord / landlady can hold the tenant responsible for any defect or damage caused by the tenant, the tenant’s visitor or household member (section 4(5)(e)). At common law, the tenant was liable for damage caused due to his or her negligence but the RHA extends the protection to the landlord / landlady by including the tenant’s visitor or household member.
- The landlord / landlady cannot hold the tenant liable for any damage if he or she fails to inspect the dwelling with the tenant (section 5(3)(j)) before the tenant occupies the dwelling and jointly inspects it three days before the lease expires.
• The tenant can be held liable for damages to the dwelling if he or she refuses or fails to carry out an inspection jointly with the landlord / landlady (section 5(3)(k) and (l)).
• In the event of damage caused by the tenant, the landlord / landlady can use the deposit and the accrued interest for the cost of repairs (section 5(g)). It is therefore in the tenant’s interest to carry out any repair he or she is responsible for.

3.10 DEPOSIT

The landlord / landlady is allowed deposit from the tenant. The deposit must be paid before the tenant takes occupation (section 5(3)(c)).

3.10.1 What amount is to be paid?
The amount to be paid depends on the agreement between the landlord / landlady and tenant. It could be an amount equal to one month’s rental or any amount agreed upon (section 5(3)(c)).

3.10.2 What must the landlord / landlady do when he or she receives a deposit?

(i) Give the tenant a receipt in which the following must be written:
- Date
- For deposit and the amount
- Tenant’s name, address of the dwelling for which deposit is paid, the type of dwelling (e.g., flat, room, garage, cottage)
- Landlord’s Signature

(ii) Invest the deposit with a bank in an interest bearing account. It could be any type of account (e.g., current account, savings,) but the interest rate must not be less than the rate offered by the savings account of the same bank or same financial institution.

(iii) Provide the tenant with written proof of accrued interest when the tenant makes request.

3.10.3 Deposit with accrued interest to be refunded: Exception to Estate Agents removed

Previously, in terms of section 5(3)(d), if the tenant’s deposit was kept with the landlord who was a registered estate agent, the accrued interest
was handed over to the Estate Agency board and not the tenant. The landlord / landlady had to be a registered estate agent though.

Before the amendment, section 5(3)(d) read:-
the deposit contemplated in paragraph (c) must be invested by the landlord in an interest-bearing account with a financial institution and the landlord must subject to paragraph (g) pay the tenant interest at the rate applicable to such account which may not be less than the rate applicable to a savings account with a financial institution, and the tenant may during the period of the lease request the landlord to provide him or her with written proof in respect of interest accrued on such deposit, and the landlord must provide such proof on request. Provided that where the landlord is a registered estate agent as provided for in the Estate Agency Affairs Act, 1976 (Act No. 112 of 1976), the deposit and any interest thereon shall be dealt with in accordance with the provisions of that Act

The amended section 5(3)(d) reads:
the deposit contemplated in paragraph (c) must be invested by the landlord in an interest-bearing account with a financial institution and the landlord must subject to paragraph (g) pay the tenant such interest at the rate applicable to such account which may not be less than the rate applicable to a savings account with that financial institution, and the tenant may during the period of the lease request the landlord to provide him or her with written proof in respect of interest accrued on such deposit, and the landlord must provide such proof on request

The amendment in May 2008 confirms the common law position of holding the landlord / landlady responsible for the refund of the deposit to tenant. It would appear that irrespective of who holds the deposit, the landlord / landlady must refund it with accrued interest at the end of the lease period when the tenant has vacated the dwelling. Section 5(3) (g), (i), (j), (l) and (m) deals with the refund of the deposit with accrued interest under different circumstances of the lease coming to an end.

3.10.4 When is Deposit Refunded?
At the end of the lease period. However, the following conditions would apply: -
(i) *Within seven [7] days* (section 5(3)(i)) - when no amount is owed to the landlord / landlady. If there is no arrears, no damage to the dwelling or repairs required by the tenant, the deposit must be refunded with accrued interest within 7 days after the tenant has moved out.

(ii) *Within fourteen [14] days* (section 5(3)(g)) - when amount is owed to the landlord / landlady. The landlord / landlady must refund within 14 days after the tenant has moved out of the dwelling an amount after deducting cost of repairs or any amount for which the tenant was responsible for.

(iii) *Within twenty [21] days* (section 5(3)(o)) - when tenant refuses joint inspection. The landlord / landlady has to inspect the dwelling after the tenant has moved out and having refused to inspect it with the landlord / landlady within three days before the lease period ended.

The landlord / landlady has a total of 21 days from the time the tenant has moved out or became aware that the dwelling was abandoned by the tenant, to inspect the dwelling, carry out repairs and deduct the cost of repairs, arrear rental and cost of lost keys and to refund any money available.

### 3.10.5 What must the landlord / landlady do if deposit is used for repairs and replacing lost keys?

The landlord / landlady must have in his or her possession all receipts as proof. The tenant has the right to inspect all vouchers regarding the landlord / landlady’s expenses deducted from the deposit or set off (section 5(3)(n)).

### 3.10.6 What can the landlord / landlady do if the costs of repairs or arrears exceed the deposit with accrued interest?

The landlord / landlady can take legal action to claim the balance owed to him or her and any legal cost.
3.10.7 **What about the tenant who moves out without a notice to end the lease?**

- The tenant is in breach and the landlord / landlady can take legal action against him or her for breaking the contract (section 5(3) (o)).
- The tenant is also responsible for the rental for the remaining lease period, or, up to the time of a replacement tenant.

**Example 1**
If the lease was for 12 months, from January to December and the tenant moved out end of September, he or she will owe the landlord / landlady rentals for October, November and December. If the landlord / landlady finds a “replacement” tenant for the remaining period at least at the same rental, there is no claim for rental for breach.

**Example 2**
If the lease is a monthly one, it is terminable on a month’s notice. The tenant is required to give the landlord / landlady a calendar month’s notice of his or her intention to move out. If the tenant moves out, say on the 3rd day of the month, the tenant is liable for the month’s rental.

3.10.8 **Can deposit be used as rental?**
Deposit is the landlord / landlady’s security against damages or arrears. The landlord / landlady can allow the tenant to use the deposit as rental for a particular period (e.g., the last week in the case of a weekly tenancy, last month in a month to month tenancy or for rental arrears for any period).

3.10.9 **What happens to the deposit if the landlord / landlady sells the dwelling?**
The new owner or landlord / landlady is responsible for the refund of the deposit, even if he or she did not receive the deposit from the previous owner. The tenant’s claim is based on the receipt for deposit paid.

3.10.10 **What is the situation if deposit was paid to the landlord / landlady’s agent**
The landlord / landlady instructs an agent (e.g., estate agent; attorney) to collect the deposit. At the end of the lease period, the landlord / landlady is responsible for the refund to the tenant even if the agent did not hand over the amount to the landlord / landlady.

Let us examine the situation where a dispute between the agent and the landlord / landlady resulted in the cancellation of the mandate to the agent to act on behalf of the landlord / landlady. The agent decides
not to transfer the deposit to the landlord / landlady and may have legal grounds to do this. This conflict does not affect the tenant's claim to a refund of the deposit since the landlord / landlady is directly responsible.

3.11 RENTAL

3.11.1 Payment of rental
The tenant is under duty to pay rental regularly, on time and in full (section 4(5)(a)).

(i) The payment of rental on time is an important part of the rental agreement. It must be paid at the time and place agreed to, and in the manner requested (cash, cheque, money order, etc).

(ii) Failure to pay, continuous late payment of rent or the tenant withholding payment, is a violation of the rental agreement. Such actions give the landlord / landlady the right to cancel the lease.

(iii) If the dwelling is let without an agreement to rental, then no contract of lease exists.

(iv) The landlord / landlady can lodge a complaint with the RHT of unfair practice when rental is not paid.

3.11.2 When is Rental Paid?
Rent is either paid in Arrears or in Advance. In a written lease, the rental is payable on the date stated in the lease. In an oral lease, it is payable on the date agreed by the landlord / landlady and tenant.

3.11.2.1 Arrears:
If it is paid at the end of the period of occupation, it is paid in arrears, e.g., in the case of a weekly tenancy, rental is paid on or before the end of the week; in the case of a monthly tenancy, rental is paid on or before the end of the month.

3.11.2.2 Advance:
If it is paid at the beginning of the period of occupation then it is paid in advance. Most tenancies are based on advance payment of rental.

Some tenants confuse the rental paid in advance when the lease contract comes to an end. It is believed that rental is not payable for the last month (or week) of the lease period because of the “advance rental”. This misunderstanding or confusion can lead to legal action against the tenant for arrear rental.
3.11.3 **What Rules apply when there is no agreement about the date rentals are payable?**

(a) If the rental is payable in advance, e.g., in the case of a monthly lease, the rental is paid on or before the 7th day of the month in terms of common law.

(b) If the rental is payable in arrears, then it must be paid on or before the date agreed or on or before the last day of the month or week or day or year. If such a first day of the month falls on a Sunday, to pay the rental after Sunday would be a breach of the lease.

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**It must be understood that there is no period of grace unless such a period is agreed upon by the landlord / landlady and the tenant, either explicitly or by implication.**

3.11.4 **Late Payment of Rental and Landlord / landlady’s Remedy**

If a written lease does not have a clause dealing with the late payment of rental, or in the case of an oral lease, the position on the late payment of rental is that the tenant is in breach of the terms of the lease, the landlord may choose to declare the lease cancelled or to enforce the payment of the rental, or do both.

The landlord / landlady’s remedy would be to issue summons to recover the arrear rental or cancel the lease or start eviction proceedings. The landlord / landlady can recover outstanding rental through the RHT or through the courts. The landlord / landlady can also use the hypothec (refer to “3.22 Seizing tenant’s property” below for a detailed discussion).

3.11.4.1 **Summons**

If the landlord / landlady chooses to enforce payment of the rental then he or she simply causes summons to be issued in which the claim is for the arrears. The tenant may be required to pay the cost of the summons and any other legal costs incurred by the landlord / landlady.

3.11.4.2 **Cancellation of the lease**

If the landlord / landlady chooses to cancel the lease, he or she must give the tenant notice of this intention, that is, that the tenant must move out of the dwelling. However, the tenant still has to pay the arrears even after vacating the dwelling.
The landlord / landlady can cancel the lease contract for arrears under the following circumstances:

**Cancellation Clause** – in a written lease contract there must be a clause that allows the landlord / landlady to cancel. The RHA in terms of section 4 (5) (c) allows the landlord / landlady to cancel a lease contract when no unfair practice exists. In addition to this, the landlord / landlady’s reasons to cancel must also be specified in the lease, in other words, there must be a cancellation clause.

**Unintended Consequences:** The problem arises with an oral lease because a cancellation clause cannot possibly be included into it.

In respect of an oral lease, the landlord / landlady should give the defaulting tenant an option in writing to pay the arrears within a reasonable period e.g., 14 days. Should the tenant fail to pay after such a notice is given, the landlord / landlady can cancel the lease.

### 3.12 EVICTION

The landlord / landlady can ask for an order of eviction from the court if the tenant refuses to vacate. The landlord / landlady can lodge a complaint of unfair practice with the RHT. The tenant is under duty to pay his or her rental as agreed and the landlord / landlady is entitled to recover arrears after a ruling is obtained from the RHT (section 4(5) (b)).

#### 3.12.1 Tenant’s Remedy should the owners / agents refuse to accept rental
- Post a cheque or postal order by registered mail, or
- Instruct an attorney to pay the rent; or
- Approach a community based, legal or paralegal body to pay the rental on his or her behalf.

The tenant must ensure that the attorney or any organisation acting for him or her issues a receipt. However, should a third party (own attorney or organisation) to whom rental is paid ceases to exist or misuses the rental, the tenant is ultimately responsible for the payment of rental to the landlord / landlady.

#### 3.12.2 When is rental paid to a third party, that is, someone other than the landlord/landlady?

If a tenant fails to pay the rental to the landlord / landlady or his / her duly appointed agent, the tenant is in breach that could lead to the
cancellation of the lease, recovery of the rental not paid and eventually the tenant can be evicted. There are certain instances when the law allows a third party, someone who is not a party to a lease, the legal right to collect rentals from a tenant. The following are a few examples when the law gives the legal right or authority over the rental to another party, that is, not the landlord / landlady or his / her duly appointed agent:

- **The municipality.** An owner of a sectional title unit who failed to pay rates may lose the right to his or her rental when the municipality decides to recover the rates through the tenant’s rental. The Local Government Municipal Property Rates Act 6 of 2004 gives a municipality the legal right to collect the rentals from a tenant whose landlord / landlady as the owner of the dwelling, owes the municipality rates. The municipality must show the tenant proof that it has the legal right to the rental.

- **The Bank.** The bank with whom the dwelling is mortgaged can collect rentals from the tenant whose landlord / landlady as the owner, defaulted on bond repayments. The bank must first obtain a court order against the owner and authorisation from the court to do this.

- **A new owner.** Tenant is obliged to pay rentals to the new owner who takes over the dwelling (acquires ownership rights) from the previous owner-landlord.

- **A new owner who has acquired the right to collect rentals owed to the previous owner** (through cession, that is, given the right by another; when right is transferred to another).

- **Cession of rentals involving tenant, subtenant and a creditor whereby the subtenant is required to pay rental to the creditor and later required to pay to a third party chosen by the creditor.**

The tenant has the right to a copy of a written document from a third party who claims the right to rental. It is important to consult an attorney when a third party demands rental and to present the attorney with the third party’s document.
3.13 RENT INCREASE AND ESCALATION MUST BE INCLUDED IN THE LEASE

3.13.1 STATUTORY REQUIREMENT

Statutory requirement means what is required by statute or law and since the RHA is an act of parliament or a statute, it lays down what needs to be in the lease agreement.

a) A landlord / landlady may give a written notice of a rental increase, which becomes effective when the rental agreement is renewed by mutual agreement.

b) The law requires a minimum advance notification for such a change.

c) The law does not limit the amount by which a landlord / landlady may increase the rent. However, according to the RHA in terms of section 5 (6) (c) the rental increase must be reasonable and such escalation must be included in the lease.

The common law position that the landlord cannot increase the rental unless there is an escalation clause in the lease remains unchanged.

According to Delport (2001) “In the absence of an escalation clause a landlord is not entitled to increase the rental merely because of inflation” (249). Some RHTs appeared to be influenced by the new owner’s bond or purchase price and support the notion that the tenant must pay a substantial increase for the bonded property.

3.13.2 Written Leases and Rent Increase

a) Escalation Clause:
Written leases must contain a rent clause, which allows a rent increase before the renewal date, provided the tenant abides by all the conditions in the lease.

b) Automatic Renewal Clause
If the landlord / landlady proposes to make any change in the renewed lease regarding rental increase, he / she must notify the tenant, in writing, on or before the tenant’s deadline for notice of termination of the rental agreement. Otherwise, the lease is renewed on the old rental for a further fixed period.
3.13.3 UNINTENDED CONSEQUENCES
It is one of several peculiarities of the RHA that in making a provision mandatory (compulsory) such as a rent “escalation must be included in the lease” parties to an oral lease appear to be ignored.

3.14 REDUCTION OF RENTAL / WITHHOLDING RENTAL

3.14.1 Non-payment of rental is a breach
A tenant who withholds rental believing that she / he is doing so for good reason, may end up being evicted. Non-payment of rental is a breach and even though the tenant is deprived of full use and enjoyment of the dwelling or its usage had diminished, rental must be paid. The courts have allowed non-payment of rental in certain instance but the courts decide on the facts of the dispute, common law and the terms of the lease contract. The tenant may be absolved from any payment if the tenant is unable to take occupation due to the landlord / landlady’s failure to deliver the dwelling as agreed.

3.14.2 Remission of rental – when allowed
In the instance where the use and enjoyment is disturbed by the landlord / landlady’s failure to maintain the property, the defects being necessary and the landlord / landlady having tampered with the electricity, the tenant was entitled to withhold rental for one month to force the landlord to perform

The tenant can have the rental reduced (remission of rental) in proportion to the reduced use and enjoyment, depending on the circumstances of the case. What is the remission amount, how is it calculated and once established, how is the amount recovered by the tenant? The courts and the RHTs are able to provide answers to these questions.

The RHT can reduce the rental that is exploitative in terms of section 13(4)(c) and Unfair Practices Regulations.

3.14.3 Remission of rental not allowed
In a case of a tenant who claimed the right to withhold rentals because only partial occupation was possible, the facts of the case based on the lease contract provided options the tenant did not exercise and allowed for the cancellation of the lease when the tenant failed to remedy the breach of non-payment. In the case of Municipality case, the tenant was not allowed rental remission. The tenant failed to rectify the breach
within 90 days to pay the arrear rental that accumulated over three years. The tenant claimed that the landlord was in breach for the failure on the landlord’s part to point out the boundary pegs as required by the provision of the lease and approximately 3000 m2 to 4000 m2 of the property was used by another occupant.

In the judgment delivered in May 2007 in the Supreme Court of Appeal, B J van Heerden JA, said: “It follows that, upon taking occupation of the property in late 1994, the plaintiff became obliged to pay rent to the defendant, as stipulated in clause 1 of the lease. Of course, because the plaintiff was, until early June 1997, deprived of the use of that portion of the property, which was being used by the person making pre-cast fencing, the plaintiff would be entitled to a remission of rent over the period in question, proportional to its reduced use and enjoyment of the property. If the amount to be remitted was capable of prompt ascertainment, the plaintiff could have set this amount off against the defendant’s claim for rent; if not, the plaintiff was obliged to pay the full rent agreed upon in the lease and could thereafter reclaim from the defendant the amount remitted.”

The tenant did receive some benefit by occupying the dwelling and was therefore liable for rental proportionate to the deprivation. Tenant cannot cancel the lease for not having “total occupation” when the landlord had already cancelled for the tenant’s breach (of non-payment of rental). The tenant also had the option of taking possession of the dwelling after the occupant had vacated with the full rental being due from the time of “total” occupation.

3.14.4 Remission of rental decided by courts or RHTs
It is the court or the RHT that will decide what amount is to be a reasonable rental for the reduced rental value of the leased dwelling. The court could change the decision of the RHT as it did with the decision of the Western Cape Tribunal. In the Perryvale case, Davis J allowed for part remission and set aside rental remission for the period the landlord provided the tenant alternate accommodation, which he rejected.

3.15 RECEIPTS
“The primary function of a receipt is to prove payment of a pre-existing debt or the delivery of property.”
When the tenant makes a payment, the landlord / landlady must issue a receipt for the amount received (section 5(3)(a)). Even if the tenant pays into the landlord / landlady’s bank account, the landlord / landlady must write out a receipt and hand it over to the tenant.

3.15.1 A receipt must include the following information: -
   a) the tenant’s name
   b) the date money is received
   c) the address of the dwelling
   d) the type of dwelling (e.g., flat, room, shack, garage)
   e) what the payment is for (e.g., rental, arrears, deposit, repairs, service charges like water, electricity)
   f) the period for which payment is made
   g) the correct amount.

Under common law, the tenant can demand receipt when making payment and should the landlord / landlady refuse or fail to issue a receipt, the tenant can refuse to make payment. Maritz, J stated: “A debtor tendering payment is entitled to a receipt, and if this is refused him he is justified in declining to make payment.”

Receipt is proof of payment like a cash sales slip that is proof of purchase. It would be wise to place the landlord / landlady on terms in writing that should he or she fail to issue receipts, rental will not be tendered. This common law remedy is still available.

3.15.2 What can the tenant do if a receipt is not issued?
Lodge a complaint with the RHT regarding an unfair practice.

3.16 SPECIFIC PERFORMANCE AND RENTAL REDUCTION

3.16.1 Reluctance of courts to grant specific performance orders
Our courts are quite reluctant to grant specific performance orders, whereby a party to a contract is ordered to do certain things as required of him / her in terms of the contract. When a tenant’s use and enjoyment of the dwelling has diminished, the court has discretionary powers to compel the landlord / landlady to place the dwelling in a condition fit for the purpose it was let. The court can order certain repairs and renovations to make the dwelling habitable.
The High courts have discretionary powers and each case is examined separately even with a clause that places the onus on the tenant to carry out repairs. The courts, however, have generally refused to award specific performance orders because it believes that it would be difficult to enforce such an order. Judge Satchwell in Mpange v Sithole rejected this view. 

3.16.2 Courts have the powers to grant specific performance orders

Satchwell J discusses the courts powers to grant such a decree and the criticisms by the Appellate Division (now called the Supreme Court of Appeal) of the courts’ reluctance to order specific performance. Mpange, Zithulele and 20 other tenants approached the High court in the Witwatersrand local division in 2007. Tenants paid R420.00 rentals per month and contributed between R450.00 to R900.00 to replace the board partitions with brick walls. The 113 tenants occupied small “rooms” in a three story warehouse or factory “converted” for residential use. There were two toilets, illegal and unsafe electrical connections, no privacy between rooms, insufficient and unhygienic sanitation facilities, broken walls and windows and accumulation of refuse.

3.16.2.1 Tenants’ constitutional rights and the right to adequate housing breached

Satchwell J believed that the tenants’ constitutional rights were breached. These infringements were the right to access to adequate housing, the right to privacy (thin “walls”) and the right to dignity (living under squalid conditions and being deprived of access to services). The Constitutional Court stressed the need for High courts and the Supreme Court of Appeal to look at the values contained in the Constitution and international law when developing the common law. Satchwell J quoted relevant provisions of the United Nations Committee on Economic, Social and Cultural Rights (the Committee) on the right to adequate housing:

The Committee has dealt with the meaning of ‘adequate housing’ in General Comment 4. There, the Committee has emphasized 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 (Art 11(1)) UNCESCR General Comment 4 (1991) 13 December 1991 E/1992/23 at para 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.’

While Satchwell J argued in favour of the courts’ powers to grant specific performance decrees, he was unable to make such an award in this instance for the following reasons:-

1. The landlord was not the owner. An order of this nature had serious implications for the owner who may not be able to institute a claim against the landlord.
2. Delaying the proceedings so that the owner could be joined with the respondent-landlord would further prejudice the constitutional rights of the tenants.
3. The court was not in possession of the proposal detailing repairs and regeneration of the building to be undertaken, cost implications, time frame, disruption for tenants and alternate accommodation during the period of regeneration.

3.16.2.2 Rental reduction
According to the judge, the desperate tenants of Leyland House were at the mercy of an unscrupulous slum landlord. They faced the legal dilemma of being evicted and becoming homeless and on the other hand, and, as paying tenants, living under unsafe conditions.

Since it was not possible to grant a specific performance order, Satchwell J looked at reducing the rentals and referred to the judgment of Nienaber JA for the guidelines to calculate a reduction in rental. The rental were reduced from R420.00 to R170.00 per lease or housing unit because the landlord did not spend any money or very little to improve
the conditions of the building. The landlord was given the opportunity of returning to court to have the rentals changed once he rendered the building fit for human habitation through renovations and repairs.

3.16.3 Governing clause
A governing clause in a written lease contract may prevent a tenant from approaching the court for a specific performance order. The following are a few examples of such a clause:

a) The tenant agrees that the dwelling is in good state of repair and will maintain the dwelling during the lease period.
b) The tenant may agree that the dwelling is not in a good condition and accepts it with its defects at a lower rental.

The courts have the final say, in spite of such restrictive clauses.

3.17 UNDISTURBED USE AND ENJOYMENT
A tenant rents a property for his or her quiet and undisturbed use and enjoyment. It is therefore the landlord / landlady’s duty to fulfil this right during the lease period.

3.17.1 The landlord / landlady disturbs or interferes by:
(i) preventing a tenant access to his or her dwelling by barring entry,
(ii) preventing him or her from occupying the dwelling or part of it,
(iii) cutting off water or electricity supply or putting up barriers that interfere with the tenant’s ease of entry or exit to his or her dwelling,
(iv) refusing to attend to specific problems e.g., leaking roof, faulty electrical wiring, and plumbing,
(v) carrying out repairs which are not necessary or which can be done after the lease expires
(vi) entering the dwelling without the tenant’s consent which amounts to a trespass.

3.17.2 What are the tenant’s remedies?
a. tenant may demand that the landlord / landlady put the dwelling into the condition required by contract
b. seek a proportionate reduction of rent while remaining in occupation

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c. cancel the contract and sue for breach
d. take the matter to court to prevent the landlord / landlady from continuing the interference (interdict)
e. restrain the landlord / landlady by an interdict if he or she enters without permission
f. file a complaint with the RHT in terms of section 4(2) and section 4(3)

3.17.3 Criminal Trespass
The landlord / landlady cannot enter the tenant’s dwelling unless arrangement is made with the tenant (mutually agreed between the parties). A landlord / landlady who enters the tenant’s dwelling without permission may be guilty of a criminal trespass. The landlord / landlady would be like a stranger should he or she enter the dwelling without permission or prior arrangement.

3.17.4 What can a tenant do?
• The tenant may report the incident to the police. The police have the power to remove the lock from the door if the landlord / landlady fails to do so immediately.
• If the police are not helpful the tenant should seek legal assistance: an attorney can obtain an urgent court order putting the tenant back into the dwelling.
• The tenant can file a complaint with the RHT for violating his or her rights; seek urgent relief through spoliation application in terms of section 13(12)(c).

3.17.5 The landlord / landlady’s rights
A landlord / landlady must maintain the premises, therefore the law grants him or her reasonable rights to enter the dwelling to inspect it. Such inspection must be carried out at a time that suits the tenant (section 4(2) and provisions of the draft Unfair Practices Regulations). However the tenant must not be “difficult” or unreasonable in agreeing to a time that suits both parties. The following are grounds upon which a landlord / landlady may request permission to enter the dwelling
• to inspect the dwelling for necessary reasons, such as damages;
• to make repairs to the dwelling;
• to show the dwelling to a prospective tenant, purchaser, mortgagee or its agents;
• to inspect the dwelling for damages as contemplated in
Section 5(2) or upon notification by the landlord / landlady or the tenant of the intention to terminate the lease.

Section 4(2) reads:
A tenant has the right, during the lease period, to privacy, and the landlord may only exercise his or her right or inspection in a reasonable manner after reasonable notice to the tenant.

Section 9 of the draft Unfair Practices Regulations (UPR):
(1) A landlord may only enter a dwelling on reasonable notice to the tenant:-
(a) to inspect the dwelling,
(b) to make repairs to the dwelling;
(c) to show the dwelling to a prospective tenant, purchaser, mortgagee or its agents;
(d) to inspect the dwelling for damages as referred to in Section 5(3)(e)(f) of the Act or upon notification by the landlord or the tenant of the intention to terminate the lease;
(e) if the dwelling appears to be abandoned by the tenant; or
(f) pursuant to a court order.
(2) A tenant must allow a landlord to enter a dwelling for the purposes set out under sub regulation (1), but such entry must be carried out at reasonable time.

The party who is aggrieved can lodge a complaint with the RHT on good grounds, that is, there exist an unfair practice in terms of section 4(2) of the RHA and section 9(1) and (2) of the Unfair Practices Regulations.

3.17.6 The tenant’s duty
It is therefore necessary for a tenant to conduct himself or herself in a manner that will not bring him or her into conflict with the law or the landlord / landlady. The landlord / landlady can also lodge a complaint of unfair practice with the RHT in terms of sections 4(5)(e), 13(4)(c), 15 of the RHA and UPR that includes:-
• overcrowding
• damage to property
• nuisance: tenant creates a disturbance by making a noise; playing music loudly; abusive towards the supervisor or other tenants; bring in things, which would cause damage to the premises e.g., explosives, smelly goods
3.17.7 **What can the landlord / landlady do?**

If the tenant causes such a problem, the landlord / landlady too can lodge a complaint with the RHT or approach a court to obtain a court order to stop the problem; cancel the lease by considering the nuisance a breach and sue for damages.

3.18 **REPAIRS / MAINTENANCE**

3.18.1 **What are landlord / landlady’s duties?**

- To hand over the dwelling for occupation to the tenant in a reasonable condition (“a good state of repair”; “fit for the purpose for which it is let”) that would allow the tenant undisturbed use and enjoyment.
- To maintain the property both internally and externally at all times.

Parties can however agree that the tenant will take over certain common law duties of the landlord / landlady.

3.18.2 **Internal Repairs**

The landlord / landlady has to maintain the premises let and ensure that the following is in good and safe working order (e.g., electricity, plumbing, ventilation, doors, windows).

If the landlord / landlady installs appliances such as stoves and refrigerators, he or she has to keep these in good working order too.

“It is trite law that, unless otherwise provided, a landlord is obliged to maintain the lease property during the currency of the lease.”

3.18.3 **External Repairs**

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

A tenant, however, can undertake to maintain the premises and thereby relieve the landlord / landlady of his or her common-law duty. The tenant must look for a “maintenance clause” before signing a lease.

3.18.4 **Repair-and-Deduct**

- The landlord / landlady must know of the defects or ought to have knowledge of it by reason of trade or profession.
- The tenant must notify the landlord before carrying out the repairs himself / herself.
• Should the landlord / landlady having knowledge of the defects, fails to carry out the necessary repairs or fails to maintain the premises in a proper condition a FORTEEN (14) days notice (a letter detailing the complaints) can be sent to him or her. It is considered a reasonable time period for the landlord / landlady to attend to the necessary repairs.

van Winsen AJ discusses the above in Lester Investments (Pty) Ltd v Narshi 1951 (2) SA 464 (C) at 468: -

“It is necessary at the outset to consider the right of a tenant to effect repairs to the leased premises and then to claim to deduct the amount so expended from the rent due by him to the landlord. On the strength of de Groot, 3.19.12 and Pothier Louage sec. 108 our Courts appear to have recognised the right of the tenant under certain circumscribed conditions to deduct the amount so expended from the rent. These conditions are that the work done must be in the nature of repairs properly so-called, that there must have been prior demand and notice to the landlord, and the latter must have failed or refused to effect the repairs himself. See Poynton v Cran, 1910 AD 205 at p. 227.”

3.18.4.1 Restrictive Clause

It is extremely important to look for a clause that may prevent any deduction or set off against rentals. It is important to approach the Courts and the RHTs to examine such a clause. The courts have jurisdiction to decide on the merits of each case in the context of the lease contract, the circumstances surrounding the need for repairs and the evidence of the parties.

In the Poynton v Cran (1910 AD 205), the tenant signed a lease that stated that he will not be able to deduct from the rent whatsoever and that he will be responsible for the internal and external repairs and maintenance of the premises (a hotel). In spite of these conditions in the lease, the landlady was under duty to ensure the property was repaired at the outset of the lease and handed over in a tenantable condition. The tenant did not accept the premises with the defects, if he did, then he would have had no claim because this would have been a waiver. In other words, having knowledge of the defects and accepting them without demand for repairs or protest results in the tenant not having the right to claim repairs or damages.

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In the Poynton case, the tenant retained his right to demand that repairs be carried out and the right to claim costs for repairs he was eventually compelled to do when the landlady failed to respond.

The landlady’s failure at the outset to attend to the repairs prevented her from relying on the condition that the tenant cannot charge the cost against the rental. Both parties were in default, the landlady for not repairing and the tenant for deducting the costs from the rental.

Lord De Villiers, CJ said:-
“...the question is complicated by the fact that the payment of rent is stipulated for “without any deduction whatsoever,” but I do not consider that this stipulation was intended to deprive the lessee of any right which he might have to claim any sum of money from the lessor by way of damages or otherwise.” (at 216)

Innes, J at 227-8: -
“It remains to consider whether the evidence discloses any circumstance which would deprive the tenant of the legal right which he exercised. I do not think that the clause in the lease providing for the payment of rent on a certain day “without any deduction whatever” has that result. That provision cannot relieve the landlady of her obligation to place the leased property in repair, or deprive the tenant of the remedy which the law gives him in respect of her initial default. That default afforded pro tanto a defence to the claim for rent. And I entirely agree with the learned Judge when he says that “it is only the rent due which can be stipulated to be paid without deduction.”

3.18.5 Tenant’s Remedy
The tenant may attend to these repairs himself or herself and
(i) deduct the cost of such repairs from the rental79, or
(ii) set it off against the rentals when the cost exceeds a month’s rental, or
(iii) claim a rental reduction.

• Receipts and cash sale slips are important as proof of money spent.

(iv) The tenant could cancel the lease contract because the landlord / landlady refused or failed to carry out
the necessary repairs or maintenance. Such repairs or maintenance should not be merely an inconvenience but one that makes impossible the use and enjoyment of the dwelling.

The tenant can sue the landlord / landlady for breaking the lease contract (breach).

(v) The tenant may decide not to carry out repairs himself or herself and not cancel the lease contract. The tenant can file a complaint with the RHT or apply to the High court for a specific performance order.

3.18.6 Limitations of the use of Repair-and-Deduct

- Tenant must give reasonable notice in writing to the landlord / landlady regarding repairs to be carried out. The landlord / landlady must be given the opportunity to attend to the repairs.
- Tenant can only attend to defects that interfere with the proper use and enjoyment of the dwelling.
- Tenant may not have the money for the cost of repairs.
- Tenant agreed (in a written lease) to maintain and repair the inside (and outside) of the dwelling that was given in a condition fit for the purpose for which it was let.
- Tenant agreed and accepted the dwellings with defects.

3.18.7 What can the Tenant do in an Emergency?

For example, if there is a burst water pipe, the tenant can have it repaired if the landlord / landlady fails to respond or cannot be contacted. Should the landlord / landlady refuse to pay the repair cost; the tenant can deduct the cost from a month’s rental or have it set off against the rentals when the cost exceeds a month’s rental.

3.19 LIFTS

The owner or landlord / landlady is required to examine and maintain a lift in his or her building at regular intervals.

3.19.1 What information must be displayed in the lift?

The manufacturer’s name, the year the lift was installed, the rated speed, load in kilograms and the official number for the permission to install and use a lift.
3.19.2 Where does one report a lift that is faulty or poses a danger?
One can report it to the Inspection and Enforcement Services (IES) in the Department of Labour.

3.19.3 Procedure to lodge the complaint
A written complaint must be sent to the IES either by fax or by post.

3.19.4 Is there a penalty for failing to maintain a lift?
Yes. If the owner or landlord / landlady is found guilty of breaking the law, he or she could be fined or imprisoned.

3.19.5 What if a tenant vandalises a lift?
• The landlord / landlady can lay a criminal charge.
• Cancel the lease.
• File a complaint with the RHT.

3.20 HEALTH AND FIRE HAZARD

3.20.1 With whom does the landlord / landlady or tenant lodge a complaint regarding health and fire hazards?

Overcrowding:
• If the tenant allows overcrowding, the landlord / landlady can file a complaint with the RHT or lodge a complaint with the local health department.

Fire fighting equipment:
• If the tenant uses the fire fighting equipment for personal use (e.g., to wash a motor vehicle) the landlord / landlady can report the matter to the fire department. Fire and health matters are controlled by bylaws. Generally, the owner or landlord / landlady must allow fire fighting equipment (e.g., fire extinguisher, sprinkler system) to be examined at least once every calendar year by a person who holds a certificate of competence. Check the bylaws or contact the local authority for information.

Rodents, bird lice and borer infestation:
• Should the landlord / landlady fail or neglect to attend to health related matters such as rodents, bird lice or borer infestation, the tenant can file a complaint with the RHT or lodge a complaint with the local health department.
3.21 LOCKOUT

3.21.1 What is a lockout?
It simply means that a tenant is prevented from entering the dwelling because the landlord / landlady or his or her agent has locked the dwelling. Thus, a tenant has no access to his or her personal possessions and to the dwelling. The landlord / landlady, by acting in this way, interferes with the tenant’s “use and enjoyment” of the dwelling.

3.21.2 Are lockouts legal?
NO!
A Landlord / landlady has to use an eviction process, which guarantees the tenant the opportunity of defending the action. The landlord / landlady cannot resort to “self-help eviction” because this would be an unfair practice.

3.21.3 Is there anything a tenant can do once locked out?
YES!

• The tenant can lodge a complaint with the RHT regarding an unfair practice, or
• Bring an urgent application before a Magistrate’s court or High court for immediate relief by way of a spoliation order which should include an instruction to the Sheriff to do all things necessary to have the door unlocked and the tenant restored possession of the dwelling.

3.21.4 Can a tenant re-enter?
If the landlord / landlady is not in physical possession of the dwelling the tenant could simply re-enter the premises. This may amount to Forced Entry and opens the tenant to possible criminal and civil action taken by the landlord / landlady e.g., trespassing, theft or damage as a result of the forced entry. However, should the tenant re-enter, the landlord / landlady will have to explain that he or she took the law into his or her own hands by locking the tenant out in the first place, which was illegal.

The police generally are very reluctant to get involved in disputes of this nature (between landlord / landlady and tenant) because such disputes and conducts are not criminal but civil. However, the police can take action if there is a ruling from the RHT.

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3.21.5 Can a tenant claim for damages in a lockout situation?
YES!

If the tenant cannot get free legal aid, the cost of the court action, the attorney’s fees and any other damages the tenant suffers can be recovered from the offending landlord / landlady in a civil damage action.

Examples of what the tenant can claim:
- cost of alternate accommodation
- damage to goods in the dwelling
- loss of goods in the dwelling
- change of lock

3.21.6 Can a landlord / landlady lockout a tenant for arrear rental?
NO!

A landlord / landlady cannot lock a tenant out or seize a tenant’s goods for unpaid rent [s (4)(3)(c); s (4)(5)(b)]. The landlord / landlady must respond to unpaid rent through proper legal procedure.

It is frustrating when a tenant fails to pay rental on time, and can be financially disastrous for the “average” landlord / landlady when rental arrears are high. Our law, therefore, provides the landlord / landlady the right to take possession of the tenant’s moveable property through a legal process.

3.22 SEIZING TENANT’S PROPERTY

3.22.1 Can a landlord / landlady seize the tenant’s property
YES, but only through a legal process.

The landlord / landlady entrusts his or her dwelling to the tenant for temporary use and enjoyment of the property in return for rental agreed upon.

The tenant’s duty is to pay rental (common law) and the landlord / landlady’s right is to receive prompt and regular payment of rental in terms of the common law which is confirmed by section 4 (5) (a) of the RHA.

3.22.2 What is a tacit hypothec?
The landlord / landlady’s lien or hypothec means the law gives the landlord / landlady a powerful weapon against a tenant who is in arrears.
The landlord / landlady has a real right to the tenant’s goods that are in the landlord / landlady’s dwelling\textsuperscript{81}, including the tenant’s money\textsuperscript{6}. The RHA recognises this common law right of the landlord / landlady over the tenant-debtor’s personal property.

3. 22.3 When can the landlord / landlady seize the tenant’s goods?

- When the tenant fails to pay rent, he or she is in breach of the terms of the contract. The landlord / landlady has the legal right over the tenant’s moveable property for the rental owing and this right is referred to as a tacit hypothec.
- When the tenant falls into arrears and being given an opportunity to remedy the breach (of late payment or non-payment), fails to do so.
- The landlord / landlady has the right to seize the tenant’s moveable but this right which is implied or unspoken, has to be perfected or finalised.
- The landlord / landlady has to follow certain legal procedures that will allow him / her to seize the moveable on the dwelling through a sheriff.

3. 22.4 What procedure must the landlord / landlady follow?

3. 22.4.1 Through the Magistrates’ Courts

There are two ways given to the landlord / landlady by the Magistrates’ Courts Act, 32 of 1944.

i) Section 31 allows the landlord / landlady to issue a summons with an automatic rent interdict. This means that the tenant cannot remove his or her goods identified by the sheriff and listed on an inventory, until the court gives the final order.

ii) Section 32: the landlord / landlady or his agent applies for the tenant’s goods to be attached by telling the court on affidavit where the dwelling is, the amount of unpaid rental, that the tenant was given seven days written notice to pay the arrear rental or that such demand was made and that the tenant is about to remove the goods from the dwelling to avoid payment of the rental.

3.22.4.2 Through the RHT

Can the Tribunal grant an order to seize a tenant’s movable goods?
Yes, but this may lead to serious legal complications unless proper rules are in place.

In terms of section 13 (12) (c) of the RHA, the landlord / landlady can lodge a complaint with the RHT for unpaid rentals and seek an attachment order. This is a new section introduced (by way of amendments) in the RHA and since the RHT is not a court, its ruling cannot be appealed and there is no interpleader proceedings (see 3.20 below “Interpleader Summons). This provision of the RHA may present a constitutional challenge to parties seeking redress or appropriate relief, unless proper procedures are laid down in the Procedural Regulations.

Section 13 (12) (c) of the RHA reads: issue spoliation and attachment orders and grant interdicts.

3.22.5 What can the tenant do when his or her goods are seized without a Court Order?

It is important for the landlord / landlady to get an attorney or to consult the Clerk of the Court to seize the tenant’s goods for rental owing. The tenant whose property is seized must also consult an attorney or the Clerk of the Court to find out what to do. The tenant can lodge a complaint with the Rental Housing Tribunal if the landlord / landlady seized goods unlawfully. Section 4 of the RHA, under the following subsections, is relevant to tenant and landlord in respect of their rights and responsibilities: -

(3) The tenant’s rights as against the landlord include his or her right not to have-
(a) his or her person or home searched;
(b) his or her property searched;
(c) his or her possessions seized, except in terms of law of general application and having first obtained an order of court; or
(d) the privacy of his or her communications infringed.

(4) The rights set out in subsection (3) apply equally to members of tenant’s household and to bona fide visitors of the tenant.

(5) The landlord’s rights against the tenant include his or her right to -
(a) prompt and regular payment of a rental or any charges that may be payable in terms of a lease;
(b) recover unpaid rental or any other amount that is due and payable after obtaining a ruling by the Tribunal or an order of a court of law;
(c) terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease;
(d) on termination of a lease to –
   (i) receive the rental housing property in a good state of repair, save for fair wear and tear; and
   (ii) repossess rental housing property having first obtained an order of court; and
(e) claim compensation for damage to the rental housing property or any other improvements on the land on which the dwelling is situated, if any, caused by the tenant, a member of the tenant’s household or a visitor of the tenant.

The tenant may lodge a complaint of unfair practice (section 4 (3) (c)) with the RHT because the landlord / landlady cannot seize goods unlawfully, and in terms of section 13 (12)(c), seek appropriate relief.

In summary then, the tenant is under duty to pay rental regularly, on time and in full. The landlord / landlady is allowed to seize the tenant’s goods for unpaid rental by following certain legal procedures.

3.22.6 What must a tenant do when he / she brings another person’s movable goods into the landlord / landlady’s dwelling?

The tenant must inform the landlord of goods brought onto the leased dwelling that do not belong to him / her, such as goods bought on hire purchase or belonging to a friend. The landlord / landlady is within his / her rights, if not informed about this, to consider all movable goods as the tenant’s property.

In an Appellate division case the court held that failure by the owner of the goods left with the tenant to notify the landlord in clear expression, means that the owner gives the landlord permission to attach the goods for rental owing.

Curlewis JA: “When goods belonging to a third person are brought onto leased premises with the knowledge and consent, express or implied, of the owner of the goods, and with the intention that they shall remain
there indefinitely for the use of the tenant, and the owner, being in a position to give notice of his ownership to the landlord fails to do so, and the landlord is unaware that the goods do not belong to the tenant, the owner will thereby be taken to have consented to the goods being subject to the landlord’s tacit hypothec, and liable to attachment.”

“To escape the implication that the owner of the goods has consented to the goods being subject to the landlord’s hypothec, when brought into a leased house permanently for the use of the lessee, the owner must, in the absence of any circumstances rebutting such an implication, notify the landlord by a clear expression of his will to the contrary”.

In a judgment of the Botswana Appellate Division the court followed a similar reasoning, categorising the basis for hypothecation:

“The law in regard to a landlord’s hypothec where assets of a third party are on the leased premises when the landlord seeks to exercise his hypothec is well settled. A third party’s assets will be subject to the hypothec if:-
[a] the lessor is unaware that they are owned by the third party;
[b] the goods are brought on to the leased premises with the knowledge and consent, express or implied, of their owner and he, although in a position to do so, fails to notify the lessor of his ownership;
[c] the goods are brought on to the leased premises for the use of the lessee; and
[d] the goods are brought on to the leased premises with the intention that they are to remain there indefinitely.”

3.23 INTERPLEADER SUMMONS
Should the landlord / landlady seize goods that belong to someone else, that person will have to approach the court to set aside the order to seize the goods. It is a costly application and must not be used to mislead the court.

3.24 NOTICE TO VACATE (ENDING A LEASE)
A landlord terminated the residential lease contract because he promised a friend occupation of the dwelling. Subsequently, the landlord’s friend changed his mind, leaving the landlord in a quandary. The landlord then decided to inform his tenant that the notice to vacate was withdrawn.

A notice to vacate is a means whereby the landlord notifies the tenant that the lease is cancelled or terminated and he or she must vacate the
dwelling by a certain day. Similarly, a tenant intending to vacate the
dwelling is required to inform the landlord / landlady of his or her
intention to do so. The notice to vacate must be in writing in terms of
section 5 (5) of the RHA.

The notice must also be clear and unequivocal\(^84\), in other words, it must
be obvious to the parties what is intended: there must be no confusion
about the termination of the lease, the notice period and the date the
dwelling is to be vacated.

A notice to terminate a lease contract, once communicated to the other
party, cannot be “withdrawn”\(^85\) except by mutual agreement. This
“withdrawal” is in fact a new lease because once a lease is terminated
the contract is cancelled. The terms and conditions of the previous lease
do not apply in this instance.

3.24.1 A notice to vacate does not have to be acknowledged by
the other party for it to be valid.

When a notice to vacate is given, parties often make arrangements: the
tenant has to find alternate accommodation and the landlord / landlady
a new tenant. Sometimes both parties have to endure inconvenience,
relocation and advertising costs. Should the tenant reject the
“withdrawal” offer, the landlord / landlady cannot prevent his / her
tenant from moving out. Similarly, the tenant’s “withdrawal” of his or
her notice to vacate cannot stop eviction proceedings.

3.24.2 Is rental payable after lease is terminated?

Whether the notice is accepted or challenged, the tenant is obliged to
pay rental after the lease is terminated and continues to occupy after
the date he / she should have vacated. The landlord / landlady’s claim
would be damages or unjust enrichment\(^86\).

3.24.3 Some factors which ends a lease

- Termination of a periodic lease.
- The lease expires upon its agreed date.
- At the death of one of the parties, if that is what was agreed
  upon
- A lease at the will of a party, that is, as long as a party
  please.
- Cancelling for any breach in terms of the agreement.
3.24.3.1 Some factors which may cause the tenant to end a lease
• Failure to maintain the premises
• Failure to allow the tenant free and undisturbed use and occupation of the premises.

3.24.3.2 Some factors which may cause the landlord / landlady to end a lease
• Late payment of rent
• Being a nuisance to neighbours
• Damage to the dwelling

3.24.4 Does a landlord / landlady have to give a reason for an eviction?
Until recently, our law seemed to have allowed the landlord / landlady to issue a notice to vacate without giving a reason. A month-to-month tenant, for example, can be evicted on a calendar month’s notice, without the landlord / landlady having to state or prove any cause or reason. This calendar month’s notice ends the tenancy. In short, the landlord / landlady is saying, “this is my property, I want it back, I don’t have to explain why – so get out”. Though this sounds unjust and ruthless, and may be so in certain instances, it was legal.

However, in terms of the RHA, the landlord / landlady can terminate a lease provided:
(i) he or she has specified in the lease the grounds for terminating a lease and
(ii) no unfair practice exists for the termination of the lease.

3.24.5 How can a lease be terminated / cancelled (brought to an end)?

3.24.5.1 When notice is NOT required

Mutual Agreement: A lease agreement or tenancy can also be terminated by the landlord / landlady and tenant mutually agreeing to do so. In this case, even if there is a written lease agreement, a written notice is not necessary. The notice to end the lease can be conveyed verbally or can be implied from the conduct of the parties.

Fixed Period: (by effluxion of time) When both the tenant and landlord / landlady have agreed in writing (in a lease agreement) that the
tenancy is for a specific time, e.g., 1st January 2008 to 30th June 2008. The landlord / landlady does not have to remind the tenant that he or she will have to vacate the dwelling at the agreed date because the lease is for a fixed period. The lease comes to an end on the last day agreed by the parties when they signed the lease.

3.24.5.2 When notice IS required

Cancellation:
- the landlord / landlady or tenant can cancel the lease when there is a major (material) breach, e.g., non-payment of rent\(^87\)
- failure to allow the tenant free and undisturbed use and occupation of the premises.

By the giving of Notice:

A The period of notice depends on the agreement between landlord / landlady and tenant.

B If there is no agreement of such a notice then the notice is determined according to law in 2 ways:

a) In a written lease there should be a clause in the lease that states the period of the notice.

b) If this clause is absent then the law has laid down the following:
   i) for a day to day lease, the period is one day - because the rent is paid daily.
   ii) for a weekly lease the period is one week - because the rent is paid weekly.
   iii) for a monthly lease - the period is one month - because rent is paid monthly\(^88\).
   iv) for a lease longer than one month - the period depends on the circumstances\(^89\).

3.24.6 A Calendar Month’s Notice
A calendar month’s notice\(^90\) means that a notice must be given not later than the first day of the month, informing the other party of the intention to vacate the dwelling at the end of that month. Similarly, a weekly periodic lease is ended by giving at least one week’s notice; a day-to-day lease requires at least 24 hours notice.
The notice must be for a whole period, in other words, a notice given on the 22nd of March to end the lease on the 22nd or 23rd of April is not for a whole period, it is not a calendar month’s notice.

The reference to a “30-DAYS NOTICE” is confusing and certainly incorrect.

A periodic lease is therefore for a period: a day-to-day lease, weekly, monthly or yearly that starts on the first day of the period and runs to the last day, even if rental is paid at the middle of the period.

3.25 EVICTION

3.25.1 Arbitrary eviction
The landlord / landlady cannot evict the tenant without permission from a court of law or without giving reasons. In other words, arbitrary eviction is not allowed.

- The Constitution of the Republic of South Africa [s 26(3)] makes it illegal for a landlord / landlady to evict a tenant without a court order:
  
  No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions (Section 26 (3) of the Constitution).

- The Common law: The landlord / landlady cannot evict the tenant without approaching the court to have the tenant evicted from the dwelling.

- The RHA: Should a tenant believe that the eviction is unfair, he or she may lodge a complaint with the RHT. Section 4 (5) (c) of the RHA allows a landlord / landlady to terminate a lease on grounds that do not constitute an unfair practice and are specified in the lease.

The landlord’s rights against the tenant include his or her right to terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease; (Section 4 (5) (c) of the RHA)
• The RHT could give a ruling that the notice to vacate does not constitute an unfair practice and the landlord may approach a court for an eviction order\textsuperscript{91}.

This law (RHA) changes the common law position even further. The landlord / landlady has the right to terminate or cancel the lease contract and in this way inform the tenant to move out of the dwelling by a certain date. However, the landlord / landlady can only do this under certain conditions. The RHA requires the landlord / landlady to make sure that the lease contract is cancelled: -

(i) without any unfair practice
(ii) the reason for such a cancellation is specified in the lease contract, e.g., a cancellation clause must be in a lease contract allowing the landlord / landlady to cancel or “break” the agreement.

In summary, the landlord / landlady has to get permission from a court to evict a tenant by getting an ejectment order. The courts have to follow decisions of superior courts that may affect the eviction process.

3.25.2 \textbf{Is there any other way to challenge an eviction?}

3.25.2.1 Tenants’ committee
A tenant could get support from other tenants, tenants’ committee and organisations to help challenge an unfair eviction or an eviction without a reason.

3.25.2.2 Reasons for defending eviction proceedings
Legally, a tenant can defend an eviction proceeding if he or she has grounds or reasons to do so. Improving the dwelling through necessary repairs and maintenance may be one of the grounds to challenge an eviction.

The poor facing eviction from private property with the possibility of becoming homeless can approach the court to get the municipality to provide alternative housing.\textsuperscript{92}

Tenants can also challenge eviction proceedings by asking the courts to have landlords / landladies provide reasons. Below, a copy of a letter one could send to a landlord / landlady or his or her attorney. This letter
can then be used in court to challenge the eviction. Off course, it is strongly advised that the services of an attorney be used.

It would be unfair to challenge a landlord / landlady simply as a delaying tactic, e.g., tenant cannot pay rental.

3.25.2.3 Some of the other reasons to defend an eviction to challenge its legality

Self-help, alternate accommodation, demolition, conversion
There is an increase in self-help remedies, especially by landlords resorting to illegal disconnection of water and electricity supply, forced evictions and illegal lockouts. The prolonged period to evict an unruly tenant and the sheer magnitude of the legal costs associated with legal proceedings, can be a compelling reason for a landlord to take the law into his own hands. This is, off course, indefensible.

There is also no excuse for an organ of the State to ignore the rule of law and to disrespect the legal process and procedures. Granted that it is frustrating to have a tenant who fails to perform on a lease contract and subsequently evades eviction notices but legal process must still follow. In July 2008, a neighbour informed a tenant at work that her personal property was removed from her flat by the supervisor of the building. It would appear that the supervisor, a municipal employee, was acting on “legal instructions” to “evict” the tenant.

The Constitutional Court (CC) gave a judgment (in February 2008) in a matter that started in 2006. The City of Johannesburg (the City) wanted to evict 400 occupiers of buildings that were unsafe and presented a health risk. The City won an appeal when the Supreme Court of Appeal (SCA) granted the eviction orders but make it conditional that alternative housing be provided to those evictees who may become homeless.

The occupiers took their case to the CC93, which overturned the decision of the SCA. In a unanimous judgment by Yacoob, J, the CC made three major findings: -

1. There must be a process of meaningful consultation between the City and the people it intends to evict. People are human beings.
2. The city must make alternate accommodation available if eviction leads to homelessness of occupiers of buildings that are unsafe and unhealthy.
3. The CC amended the provisions (section 12(6)) of the National Building Regulations and Building Standards Act 103 of 1977.

Where criminal sanction could follow for non-compliance to vacate an unsafe building immediately or within a period specified in a notice issued by a municipality, such action must now follow after the municipality has obtained an eviction order.

What is the impact of CC’s case for other related matters between a municipality and its tenants or tenants in privately owned buildings like the Occupiers of 51 Olivia Road Berea? Can a municipality grant an owner permission to demolish a dwelling without enquiring about occupation by tenants? Can permission be given to convert a dwelling for non-residential use while tenants occupy it?

Municipalities presently grant such permissions at great distress to tenants, even rendering some families homeless. When an owner instructs for the supply of water and electricity to be disconnected on grounds that the dwelling is unoccupied, a municipality does not verify or investigate that if this is indeed the case.

Tenants suffer when they are unable to have basic services restored or find suitable affordable alternate accommodation. It is necessary for a municipality to revise its application form for demolition or to have services disconnected, making provision for an enquiry as to the dwelling being vacant or occupied.

Notwithstanding the hazardous condition of the building, in granting permission to demolish, the municipality is responsible for displacing a family / occupants when its constitutional duty is to provide accommodation. It is the responsibility of the officials to investigate an application, the circumstances that necessitated such an application and the position of both the owner and the occupants. It is also the duty of officials to engage with other departments, to ascertain the negative consequences, if any, in taking a decision to grant an applicant permission to demolish or to have services disconnected or give consent to convert a dwelling for non-residential purpose.

Yacoob J states: “Municipal officials do not act appropriately if they take insulated decisions in respect of different duties that they are obliged to perform. In this case the City had a duty to ensure safe and
healthy buildings on the one hand and to take reasonable measures within its available resources to make the right of access to adequate housing more accessible as time progresses on the other. It cannot be that the City is entitled to make decisions on each of these two aspects separately, one department making a decision on whether someone should be evicted and some other department in the bureaucratic maze determining whether housing should be provided. The housing provision and the health and safety provision must be read together.”

The CC judgment of the Occupiers of 51 Olivia Road, Berea has serious implications for organs of State and municipalities must adhere to the constitutional requirements of the country. Locking out a tenant and removing her personal belongings is unconstitutional and dehumanising. A city must lead by example if it wants its citizens to obey the law.

3.25.3 Warranty against eviction

The common law protects a tenant against a third party’s interference of his / her use and enjoyment of the leased dwelling by the landlord’s warranty against eviction (Grotius 3:19:6 translated by Lee, 1926; Cooper, 1994; Kerr, 2004; and Hugo and Simpson, 2004).

A tenant is not required to establish the landlord / landlady’s right (title) to enter into a lease contract. If it comes to the tenant’ knowledge that the landlord / landlady does not have the right to lease the dwelling, the tenant can cancel the contract for fraudulent misrepresentation. The tenant would have a claim for damages. Should a person with a superior title evict the tenant and the tenant had no knowledge that the landlord / landlady fraudulently concluded the lease, the tenant would have a damage claim against the landlord / landlady.

3.25.3.1 Who would qualify with a better right or superior title?

A lawful owner who has not given the landlord / landlady permission to enter into a lease contract or a person who had signed a lease before the tenant whose right to possession or use and enjoyment of the leased dwelling is disturbed.

3.25.3.2 Who is a landlord in terms of the RHA?

It defines a landlord as “the owner of a dwelling which is leased and includes his or her duly authorised agent or a person who is in lawful possession of a dwelling and has the right to lease or sub-lease it”
We can divide this definition into two parts: 

(a) simple, straight forward (“the owner of a dwelling which is leased and includes his or her duly authorised agent”)
   - The landlord / landlady is the owner who himself or herself enters into a lease with a tenant.
   - A person who concludes a lease on behalf of the owner (duly authorised agent).
   - A duly authorised agent who performs any act on behalf of the landlord based on the lease.

(b) explanation required (“or a person who is in lawful possession of a dwelling and has the right to lease or sub-lease it”)
   - A lawful possessor such as a tenant, spouse, a friend, co-owner or any person or entity who is given the right of possession and the right to lease or sublease.
   - Under common law, a tenant has the right to sublease. The ‘principal’ tenant becomes the landlord and the subtenant becomes the tenant of the ‘principal’ tenant. The tenant may be denied the common law right to sublease without permission by a clause in the lease that states that he or she may not sublease without the landlord / landlady’s written consent.

3.25.3.3 Rights and duties of the contracting parties to a sublease
A person claiming superior title or the owner who denies having granted the right to sublet does not automatically acquire the right to stop the rights and duties of the contracting parties. He or she must prove such a right if disputed or challenged by instituting legal action and having obtained an order (judgment, ruling) from a court to that effect. Until then, the tenant and subtenant as landlord / landlady and tenant have contractual rights and corresponding obligations that are enforceable through the RHT or a court of law.

A, the lawful owner enters into a written lease with B the tenant. B, without written permission, which is required in terms of the lease signed with A, sublets to C the subtenant. A and B have a lease contract but A and C have no contractual relationship. Similarly, B and C have a lease contract but C has no contract with A.

In certain circumstances, the court may join the owner in a dispute between a tenant and subtenant where its decision would have serious implications for the owner or may grant an order without joining the
owner (refer to Mpange and Others v Sithole 2007 (6) SA 578 (W) regarding a specific order performance). There is no provision in the RHA for third parties to be joined as an interested party.

It follows from the above discussion that the definition of a “landlord” in the Rental Housing Act (RHA) has not changed the common law position96.

3.26 ENRICHMENT LIEN
An enrichment lien would be good grounds for refusing to vacate the dwelling. Briefly, let us look at the historical context that changed the law, preventing tenants of rural leases to use an enrichment lien and a recent Supreme Court of Appeal judgment that allows urban tenants the right to retain possession of the dwelling after the lease is terminated.

Common law of Holland
Imagine a situation where the lease was terminated but the tenant refused to move out of the property, claiming cost for repairs and improvements. The tenant was protected by law to remain in possession of the leased property until the landlord compensated for the improvements. This was the common law in Holland but tenants of agricultural property began to deliberately effect costly repairs that led to public violence. Significantly, the cost of repairs and improvements permanently deprived landlords of their property because the landlords could not compensate their tenants.

Statute of Holland
This abuse by tenants of agricultural leases resulted in the passing of statutes or legal decrees or a declaration called Placaeten (singular, Placaet) in Holland in 1658 and 1696 that ended the tenant’s right to retain property for necessary and useful improvements. This change in the law of Holland did however allow tenants of agricultural property the right to claim compensation on the following grounds: -

- the landlord had to give permission to carry out repairs or effect improvements;
- the tenant filed a claim for compensation only after vacating the property.

There was no doubt that our rural tenancies followed the Roman-Dutch law since the South African common law is based on it. The restrictions introduced in seventeenth century Holland therefore applied to South
African rural leases but there was no clarity whether this law affected tenants of urban leases.

South African law
In a unanimous judgment, the Supreme Court of Appeal clarified this controversy. It held that a tenant who is in possession of the leased property in an urban area has an enrichment lien for expenses he / she incurred:

a) to protect or preserve the landlord’s property
b) for the useful improvements to the property

An enrichment lien allows a tenant to remain in possession of the property when the lease is terminated until the landlord / landlady has compensated the tenant for the costs of necessary and useful improvements. Should the landlord / landlady issue a proper notice terminating the lease, duly served on the tenant, the tenant can refuse to vacate because of the claim for reimbursement for necessary and useful improvements. The tenant has this right in the absence of governing provisions of the lease.

Governing clause
A governing clause would restrict the tenant from holding over for compensation. The following are examples of such a clause:

- The tenant shall not make any structural or other alterations, additions to or improvements in the dwelling without prior written consent of the landlady.

- While for any reason or on any ground the tenant occupies the leased dwelling and the landlord disputes her right to do so, then until the dispute is resolved, the tenant is obliged to pay an amount equivalent to the total rental provided for in this agreement. Such payments by the tenant and the acceptance thereof by the landlord shall be without prejudice to and shall not in any way whatsoever affect the landlord’s claim in the dispute. Should the dispute be resolved in favour of the landlord, the payments made are received in terms of this agreement, shall be deemed to be amounts paid by the tenant on account of damages suffered by the landlord by reason of the unlawful occupation or holding over by the tenant.

- Should the tenant make any alterations or improvements, the tenant shall be required, before the expiry or termination of this
agreement to remove the additions and reinstate the dwelling to the condition in which they were before the improvements and/or alterations were made. The tenant shall have no claim for compensation.

- Any alteration and/or improvement shall become the landlady’s property without any compensation being payable to the tenant in respect thereof.

- In the event of any dispute arising as to whether any alteration or addition is structural, non-structural or merely a fixture or fitting, a certificate of any architect appointed by the landlady, who will act as experts and not arbitrators, shall be final and binding upon the parties. The architect’s cost will be borne by the tenant.

- The tenant agrees that the dwelling is fitted with the existing fixtures listed in part A, clause 1.2.4 and agrees not to remove these for any reason whatsoever. The tenant agrees to reimburse the landlord the full cost of replacing any fixture and fitting, which may be damaged, or missing at the termination date of this agreement. The tenant further agrees to have no claim against the landlord for any cost incurred by the tenant for useful repairs and improvements.

**Contracting out of common law**

Landlords are responsible for internal maintenance and repairs under the common law. This can be changed by inserting a written clause that shifts the responsibility to the tenant, which is strictly construed by the courts with the onus of proof on the landlord/landlady. Can a tenant then invoke the enrichment lien for taking on the landlord’s duty to repair and maintain the dwelling?

Tenants of urban tenements should consult an attorney for advice regarding the right to retain the dwelling for useful improvements. Abuse of any aspect of our law can result in our courts, and especially the Constitutional court, when approached by interested parties, to develop the common law to protect individuals and society. It is also possible for a tenant of a rural lease to approach the Constitutional court to challenge the seventeenth century Placaeten of Holland. The prevailing conditions of Holland that necessitated legal reform, does not relate to the South African context and may unfairly discriminate against rural leases.
3.27 THE EVICTION PROCEDURE

3.27.1 Notice to vacate
The landlord / landlady must communicate clearly his or her intention to end the tenancy. It would appear from section 5 (5) of the RHA that the notice to terminate must be in writing.

For the notice to vacate to be valid, it must:

- Specify the names of the parties
- The address of the premises
- In the case of a breach, the nature of breach of agreement or amount of rent overdue
- The date of the notice
- Be signed by the landlord / landlady or his or her agent
- Preferably be delivered by hand or registered mail or by a Sheriff. If the matter comes to court or before the RHT, the landlord / landlady will have to prove that the notice was properly served when the tenant denies having received it.

Non-compliance with the above may result in a delay due to parties disputing the facts of the matter. A written notice to vacate that is communicated clearly prevents confusion or disputes that often results in a long delay and costly court procedures.

The Notice to Vacate does not require acceptance by the tenant. In other words, even if the tenant says that he or she is not accepting the notice to move out of the dwelling, the notice is valid.

3.27.2 Written notice to terminate
In terms of s 5 (5) of the RHA, it would appear that a written notice to terminate a lease must be given by either the landlord / landlady or the tenant. The tenant is also required to follow the procedure of giving the landlord / landlady notice to vacate:

- Specify the names of the parties
- the address of the premises
- In the case of a breach, the nature of breach of agreement
- The date of the notice
- Be signed by the tenant
- Preferably be delivered by hand or registered mail or by a Sheriff. If the matter comes to court or before the RHT, the tenant will have to prove that the notice was properly served when the landlord / landlady denies having received it.
3.27.3 Can a landlord / landlady or his or her agent evict a tenant without legal process?

No!

The landlord / landlady cannot take the law into his or her own hands. It is illegal for a landlord / landlady to evict a tenant, except with an order from court. Even if a proper notice has been given but the tenant remains in occupation, the landlord / landlady cannot “throw” him or her out. The landlord / landlady must issue a summons and obtain a judgment for eviction or bring an application before the High Court (Supreme Court). Only the sheriff may evict a person under a properly issued Warrant of Ejectment.

3.27.4 What about an agreement that allows for an illegal eviction?

A written lease contract contains a clause that stipulates the landlord / landlady has the right to remove the tenant from the dwelling without a court order in the event the tenant is in breach. The clause specifies that failure to pay rent will allow the landlord / landlady to lock out the tenant or seize his / her moveable property without a court order and a subsequent late payment will entitle the landlord / landlady to eject the tenant without a legal process. The tenant agrees to all the terms of the contract, including vesting the landlord / landlady with the powers to take the law into his own hands under specific circumstances.

The tenant’s signature on the lease contract does not make this term of the contract enforceable. The courts and the RHT will not allow parties to a lease contract to defeat or circumvent for unlawful purpose the common law, the provision of the Constitution and the RHA.

“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

“And whereas no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances;”

“his or her possessions seized, except in terms of law of general application and having first obtained an order of court”

3.27.5 What can the tenant do if evicted illegally?

An aggrieved tenant can take legal action and can claim legal costs from the landlord / landlady. Legal action can include asking the court

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or RHT to allow the tenant to move into the dwelling. Our law does not allow a landlord / landlady or his or her agent to remove a tenant by means of physical force or by preventing access to the dwelling. In terms of the RHA this would be an unfair practice and the tenant can obtain a ruling directing the landlord / landlady to reinstate him or her.

3.27.6 What can a landlord / landlady do if the tenant refuses to move out?
The landlord / landlady is also protected by law when the tenant ignores a notice to vacate or refuses to move out. Take for example a lease contract the tenant entered into for 12 months: the tenant agreed to occupy the dwelling from 1 January to 31 December with no option to renew or extend the lease period. The tenant therefore agreed to move out on or before the last day of December and the landlord / landlady does not have to remind the tenant that he or she must vacate the dwelling. Should the tenant fail to move out, the landlord / landlady may approach the courts to have the tenant evicted.

3.27.7 Can the landlord / landlady get an ejectment (eviction) order from the RHT?
No!

It was assumed that given the necessary powers through regulations\textsuperscript{103} or by amending\textsuperscript{104} the RHA, the RHT would be able to consider applications for eviction and grant ejectment orders.

3.27.7.1 Why RHTs cannot be given powers to grant eviction orders\textsuperscript{105}

a) No Appeal Procedure
The RHA allows for a review. It does not allow for the ruling to be appealed. The RHT’s eviction order or order not to grant an eviction would therefore be final.

b) The RHT is not a court\textsuperscript{106}
Section 26 (3) of the Constitution states that no one may be evicted from their home without an order of court made after considering all the relevant circumstances. This alone renders all discussion sophistic because of the constitutionality of the RHA.

c) Arbitrary evictions
It follows that the RHT not being a court, it would be granting
arbitrary evictions because Section 26 (3) of the Constitution further states that no legislation may permit arbitrary evictions.

3.28 SPOLIATION

3.28.1 What does it mean?
It is a form of interdict that was used in Roman law that protected the person’s right of possession by stopping the interference or disturbance. The right to ownership or the right to possess was not decided through the interdict, irrespective if such a right related to the victim (person who was despoiled through dispossession) or the perpetrator (spoliator; the person responsible for the illegal act or threatened to do so). The law was concerned with protecting a person from an illegal action and whatever good reasons or lawful claims the spoliator had, was dealt with through a separate legal action.

This aspect of the common law is still used in South Africa. It is a speedy remedy to grant an urgent relief to a party who has been dispossessed illegally or when services are disconnected illegally. Illegal action to deprive possession or the continued supply of services is a quick-fix or self-help remedy that is not allowed in our law.

In a matter before the court in 1906, Innes CJ summarised the Roman law and Roman-Dutch position that applied in South Africa regarding the unlawful self-help remedy:

“It is a fundamental principle that no man is allowed to take the law into his own hands, no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.”

Approximately a hundred years after Innes CJ’s judgment, self-help remedy is still unlawful and is also disallowed by the Constitution. Farlam JA states, “[t]he considerations set out in the judgment as to self-help are in any event buttressed by the provisions of section 34 of the Constitution, which reads as follows:

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before
a court or, where appropriate, another independent and impartial forum.”

Spoliation is therefore a robust legal remedy not against a threat to dispossess but against every unlawful and involuntary loss of possession and the restoration thereof and without entertaining any argument about the respective rights of the parties. Possession in respect of property includes the supply of services such as water and electricity. It is not allowed where a party wants to compel specific performance in the case of contractual dispute.

3.28.2 Examples of unlawful actions that will lead to spoliation application?
- The landlord / landlady instructing the municipality to disconnect services because the tenant’s lease is cancelled.
- Preventing access to the dwelling, for example, by locking the door.
- Destroying part of the dwelling.

3.28.3 Where can one go for a spoliation order?
A person who wants a spoliation order can approach the High court, magistrate’s court or the RHT. The RHT can now issue such an order in terms of section 13(12)(c) “issue spoliation and attachment orders and grant interdicts.” Whether it has all the rules is another matter because rules set out what is required and details of the procedures to be followed.

3.28.4 What would the court or RHT consider?
Like the ancient Roman law, our courts do not consider the reason for the illegal action even if rental or levy is owed or other debt due to the owner or body corporate. A separate legal remedy is available and the courts will not allow individuals or entities for “sound policy considerations” to take the law into their own hands. In terms of the broad legal principle, no one is allowed to benefit from his or her own bad faith action. Two wrong actions do not render a just solution.

Here, one is reminded of the action of the municipality as the landlord that disconnects services when rental is owed through its consolidated billing system. This policy needs to change. In the case of a single poor parent with young children, the municipality’s policy of consolidating
the rental and basic services accounts of a tenant is unjust and immoral when legal remedy is available for breach. A tenant in such a situation may not have recourse to spoliation as a means to have services restored. Should the tenant breach the contract, the municipality can follow the procedure for breach.

3.28.5 How is an application made?
Spoliation is one of the most effective ways to regain possession of the leased dwelling or to have services such as water and electricity supply restored that were unlawfully disconnected. A tenant files an application with a court or the RHT by way of an affidavit providing information about the illegal action and details of the person(s) who carried out the illegal action. The tenant must inform the court that she or he was unlawfully deprived and dispossessed of the peaceful and undisturbed use and enjoyment of the property or supply of electricity and water.

3.28.6 Is there a time limit – when would spoliation cease to be an urgent application?
According to some of the high court judgments, the time limit is one year and one day but in Jivan v National Housing Commission 1977 (3) SA 890 (W), Steyn J states that there is no authority for this principle. An urgency of a case may be considered even after a year and one day depending on the special circumstances of the case. In Le Riche v PSP Properties CC the court granted a spoliation order even though the application was brought to court after 22 months. The Close Corporation and its member disconnected the water supply to Le Riche’s farm that was a subdivision of the farm owned by Close Corporation and admitted the same day of the unlawful conduct. The circumstances of the delay included attempts to engage the services of the Department of Water Affairs to mediate, offer to install a separate pipe and other settlement proposals that were rejected. The court found that the applicant Le Riche at no time accepted or agreed to the wrongful deprivation of possession that took place by force and without his consent.
3.29 SUMMONS (through Magistrate’s Court)

3.29.1 What is a Summons?
When a party intends to start legal action, he or she issues a summons on which the claim is stated. It is a document a landlord / landlady or tenant or their representative issues but the court rules empowers a sheriff to serve it.

Examples of a landlord / landlady causing summons to be served may relate to the tenant’s failure to vacate after an eviction notice was issued or for failure to pay rental due. It is first presented to the Clerk of the Court who stamps it and files a copy in the (landlord / landlady’s) file in court. There are two types of summons the landlord / landlady could serve on the tenant: -
1. Ordinary
2. Rent Interdict.

3.29.2 What should the tenant do on receiving a summons?
• Enter “an appearance to defend”. If the tenant does not know how to do this, immediately consult an attorney, nearest community organisation or approach the Legal Aid Board.
• If the tenant does not respond to a summons immediately, default judgment can be taken against him or her followed by an ejectment order.
• A tenant must ensure that he or she has a proper defence, i.e. a reason why the court should not give judgment in favour of the landlord / landlady. If the tenant does not have a good defence he or she may lose the case and will have to pay the landlord / landlady’s legal costs as well.

3.29.3 Examples of a good defence, which must be pleaded in papers
a. Where the tenant has in fact paid the rent but the landlord / landlady is suing for arrears.

b. Where the tenant has a claim against the landlord / landlady for some other reason and the money the landlord / landlady owes him or her, cancels out the money owed to the landlord / landlady.

C. Where the landlord / landlady has failed to effect a repair to the dwelling which he or she is obliged to undertake, and the tenant carries out the relevant repair and recovers the cost from the landlord / landlady by withholding
the rent, provided the tenant followed the procedure of “Repair and Deduct”.

d. Complaint lodged with the Rental Housing Tribunal: If the tenant’s complaint relates to the landlord’s failure to carry out repairs and the tenant is not in rental arrears or breached the lease, she can inform the magistrate’s court that the complaint in respect of an unfair practice is unresolved. In the opposing affidavit, the tenant under oath will provide the date the complaint was lodged with the RHT and concise information about the nature of the complaint. She must request the court to refer the matter to the RHT or delay the proceedings until the RHT has finalised the dispute. It is advisable to consult an attorney.

e. The landlord / landlady must satisfy the court that there is a valid and lawful termination and proof that there is no unfair practice. “…the onus lies on the applicant to allege and prove a valid and lawful termination, which in turn includes the averment and proof that the grounds therefore do not constitute an unfair practice,” Knoll J 123.

3.30 REQUEST FURTHER PARTICULARS
A tenant (defendant) who is challenging the legal action, after entering an appearance to defend, may request further particulars from the landlord / landlady (applicant). The court has a guideline or format that must be followed when such a request is made from the defendant and it is advisable to have a lawyer. In fact, the lawyer would decide whether it is necessary to file a “Request further Particulars”.

3.31 SUMMARY JUDGEMENT
After the tenant enters an appearance to defend, the landlord / landlady may inform the court that the tenant has no grounds to defend the summons and is merely playing “for time”. The court is asked to grant judgment immediately. However, the tenant may oppose the “Summary Judgment” within a specified period [e.g., 14 days] by filing an opposing affidavit with the landlord / landlady’s attorney and the court.

There are various other legal procedures that follow after summons is served, after the tenant enters an appearance to defend. It is therefore necessary to seek legal advice immediately.

3.32 EJECTMENT ORDER
This is granted by the court authorising the physical removal of the tenant or occupant and his or her belongings. An ejectment order can be
stayed, i.e. delayed, provided an application is made to Court. A tenant must have good reasons for the court to stay or temporarily stop the ejectment. Such an application can be expensive.

3.33 WITHDRAWING OR RESCINDING A COURT JUDGMENT

3.33.1 What is default judgment?
Court grants an order asked (prayed) for by default in the absence of the defendant having informed the court of his / her intention to defend the action.

3.33.2 Can a default judgment be withdrawn?
Yes, but you must have good reasons and follow certain procedures!

The landlord / landlady may not be aware that the defendant is not the tenant and may for good reason or acting in bad faith claim arrear rentals. However, by instructing the clerk of the court to grant judgment in his or her favour in the absence of the summons being defended, the defendant is considered to be in default and judgment as requested by the plaintiff is granted.

If a default judgment is granted, the person may be able to have it withdrawn or rescinded. This must be done within 20 days of default award. When a magistrates’ court judgment is given by default, it means that the court has decided in favour of the plaintiff (e.g., landlord / landlady). Let us take the case of a landlord who issued summons for unpaid rentals and cancellation of the lease contract. The tenant when served with summons has five days to enter his or her intention to defend the landlord’s court action. If the tenant agrees with the landlord’s claim then he or she does not defend the action but consents to judgment.

3.33.3 Failure to defend
If the tenant denies having received the summons, the sheriff’s return of service will be used in support of how the summons was served. Should the tenant fail to defend a summons of a magistrate’s court within five days, the landlord’s attorney may make a written request to the clerk of the court, with the original summons and the sheriff’s return of service, for judgment against the tenant. The default refers to the failure on the tenant’s part (defendant) to inform the court that he or she intends to challenge the court action. A tenant may believe that
it is not necessary to defend the landlord’s summons. The basis of the landlord’s claim in the particulars of claim is groundless: the claim for arrear rental may be incorrect or false; the reasons for cancelling the lease are not justified or unlawful. Or the defendant referred to in the summons is not the tenant and this may lead the tenant to conclude that it is not necessary to defend the action.

It is very important to seek legal advice so that an action is defended within the time limit allowed by law.

3.34 DEFAULT JUDGMENT
Whatever the court has granted in favour of the claim(s) made by the plaintiff can be executed against the defendant. The plaintiff’s (landlord / landlady) claim for arrear rentals and the ejectment of the tenant and all occupants from the dwelling will be carried out on further instructions from the landlord to the sheriff (warrant of execution).

3.34.1 Cancelling or staying of a default judgment
The defendant who was wrongly sued, within 20 days of having knowledge that a default judgment was made against him / her, can approach the court to have the default judgment rescinded or varied. It is a requirement that all application and court processes must comply with the Magistrates’ Courts Act 32 of 1944 and must follow certain rules.

The tenant (defendant) who wants to have the default judgment rescinded or stayed must follow certain procedure. He or she will have to file an application in court and on all parties to the court proceedings (e.g., the plaintiff). The tenant must set out the reason(s) in an affidavit when making an application to court to consider rescission of the judgment and must show good cause in his or her defence to the landlord / landlady’s claims. The landlord / landlady is given the opportunity to defend the rescission application to inform the court why the default judgment should not be cancelled or changed. If the magistrate is satisfied that good cause exist, the default judgment will be set aside.

3.35 LEGAL PROCESSES AND THE SHERIFF
In terms of the magistrates’ court rules the process of the court has to be carried out through the sheriff. Summons starts the court action that gives the defendant five days within which to defend the action or accept the plaintiff’s claim (consent to judgment).
The person who is responsible for the (civil) summons, landlord / landlady or tenant or an attorney acting on their instructions, preserve the summons and the sheriff’s return of service. The sheriff notifies in writing (return of service) the clerk of the court and the plaintiff (the party who started the action) stating the date and manner of service or the inability to effect service.

3.35.1 Sheriff acts in terms of law
When a sheriff approaches the defendant (tenant) to attach his or her property or to eject the tenant from the dwelling, he does so under legal instruction. A sheriff acts under the Supreme Court Act 59 of 1959 and the Magistrates’ Courts Act 32 of 1944 and rules of the courts. He or she has to perform work as required by law, without demur, favour or delay. If the legal instruction by way of a court order empowers him or her to eject the tenant from the dwelling and to do all things necessary to carry out the ejectment, then the sheriff is obliged to fulfil the “mandate”. Where the sheriff is unable to carry out the task or is aware that he or she would be prevented from performing such a task, the court rules empowers the sheriff to be assisted by the police.

3.35.2 Interdicting the sheriff
To stop a sheriff or to reverse the action of a magistrate’s court ejectment, the aggrieved party has to go to court to interdict the sheriff and to have the judgment rescinded or cancelled. The sheriff cannot falter in carrying out a legal instruction. Let us take the case of a tenant who was served with summons wherein the landlord / landlady claims (cause of action) arrear rentals, cancellation of the lease and prays for the ejectment of the tenant.

The tenant is not aware of the summons or ignores. The sheriff provides a return of service that indicates how the summons was served. It will show for instance that the defendant refused to accept the summons or that it was placed on the defendant’s door. The defendant has five working days in the case of a magistrate’s court summons to inform the court and the plaintiff (landlord / landlady) that he or she intends to defend the action. If no appearance to defend is recorded; served on the plaintiff and the court, the plaintiff may proceed against the tenant as a result of a default judgment.

3.35.3 Withdrawal of notice of action
Should the tenant engage into negotiations with the landlord / landlady or the landlord / landlady’s attorney, it would be prudent to have a
withdrawal of notice of action or a settlement agreement. It is advisable to consult an attorney when summons is served. Ignoring it or not acting in time can lead to serious consequences, to the point of being thrown out into the streets.

Presenting the sheriff with proof cannot stop the legal process under which the sheriff has to act. The defendant will have to approach the court and in this way start a legal process to prevent ejectment or to get reinstated.

3.35.4 Sheriff is independent
The sheriff is a “conduit” who will act for the tenant when instructed to do so through the courts. While the sheriff serves or executes documents, issued by a Magistrate’s court or High court and is appointed by the Minister of Justice, the sheriff is independent and does not work for the courts.

3.36 CHANGE OF OWNERSHIP
3.36.1 What are the rights and obligations when another person buys the dwelling occupied by the tenant?

- The new landlord / landlady steps into the shoes of the previous landlord / landlady without any change to the lease.
- The tenant must abide by all the terms and conditions of the lease that existed with the previous landlord / landlady.
- The new landlord / landlady cannot prevent the tenant from re-occupying the dwelling in the instance of a suspended lease.
- The tenant does not have to pay a security deposit to the new landlord / landlady.
- Should the new landlord / landlady intend to increase the security deposit, a notice must be given to the tenant drawing his or her attention to a written clause in the lease that allows for such an increase.
- The new landlord / landlady cannot present a new lease to the tenant or, in the case of an oral lease, require the tenant to sign a written lease.
- Similarly, where a lease was suspended, the tenant is not legally obliged to enter into a new lease.
The tenant must abide by all the terms and conditions of the lease that existed prior to its suspension. Rental must be paid in full, on time, at the place agreed to, and in the manner it was previously paid (cash, cheque or money order). If the tenant agreed with the previous landlord / landlady that he / she would be responsible for internal maintenance, this obligation will continue. The lease ends when the lease period is over or when the new landlord / landlady and the tenant mutually agree to end the lease or the landlord / landlady has legal basis to terminate the lease.

3.36.2 New owner is bound by the lease
If the dwelling is sold, the new owner is bound to honour any rental agreement existing at the time of the sale. The tenant is also bound by the lease. In the case of a lease, whether oral or written, that is suspended due to renovations, the tenant moves back to the dwelling under the same terms and conditions, resumes payment of rental and all rights, duties and responsibilities are reinstated.

The sale of a dwelling generally does not affect the lease concluded between the tenant and the previous owner (seller). The “huur gaat voor koop” maxim, is a common law principle of great importance. In simple terms, it means “lease goes before sale”; the new owner “steps into the shoes” of the previous owner or landlord / landlady. In other words, the sale of the dwelling that leads to the change of ownership does not break the lease. The new owner becomes the landlord / landlady and the relationship between the tenant and the “new” landlord / landlady continues. The new owner acquires all the rights of the original or previous landlord / landlady under the lease.

Several cases on this point were decided by the Supreme Court of Appeal (Appellate Division) in the 1930s and 1940s and the Provincial Divisions in 1904. In recent years the courts had to deal with the question of whether a tenant was bound to a fixed period lease when change of ownership took place. Can the tenant terminate a lease when the new owner acquires the rights of the previous landlord / landlady?

3.36.3 Tenant is bound by the lease
There are instances where the courts held the view that the tenant was
not bound by the lease in the case of change of ownership and could therefore terminate the lease. A landlord who was told by judge Squires that his tenant was entitled to terminate the lease took the case on appeal to the Appellate Division. In a unanimous judgment, the court clarified this point and concluded that the tenant was not entitled to cancel the lease when the new owner bought from the original landlord.

The new owner or landlord / landlady is required by law to recognise the tenant and is not allowed to “break” the lease as long as the tenant observed the conditions of the lease. Similarly, the tenant has to recognise and observe the new owner’s rights as a landlord / landlady, provided the lease does not have any option or right of election (whether to continue with the lease or not to).

3.36.4 New owner and maintenance
The new owner is therefore responsible for repairs and maintenance that were to be undertaken or completed by the previous landlord / landlady. The tenant who was given a written warning to remedy a breach is under legal obligation to do so with the new owner if the cut-off point passes over with the change of ownership to the new owner:

3.36.5 New owner and security deposit
What could be particularly problematic for the new owner is the security deposit that is refunded to the tenant by the previous owner. The new owner becomes responsible for the refund of the security deposit paid by the tenant to the previous owner even though this was not paid to the new owner.
In terms of the provisions of the RHA, 50 of 1999, the landlord / landlady may require a tenant to pay a deposit before the tenant takes occupation of the dwelling [s5 (3)(c)]. In terms of the “huur gaat voor koop” rule, the lease continues unchanged with the new owner.

3.36.6 New owner and lessor
Remember: An owner does not have to be a landlord / landlady and the legal term “lessor” is used for a person who rents out the dwelling. Even if a person has no permission from the owner to be the landlord / landlady, if a lease is concluded, the tenant has a contractual relationship with the landlord / landlady. The new owner may allow the landlord / landlady to continue with the lease and no contractual relationship will exist in this case with the new owner who does not take over the lease but acquires ownership right to the dwelling.
The new landlord / landlady steps into the shoes of the previous landlord / landlady (seller). The tenant and the new landlord / landlady are bound by the terms that were agreed upon between the tenant and the previous (old) landlord / landlady. If the lease was a month to month lease and the tenant paid his or her rental on a monthly basis, the new owner has to give a calendar month’s notice terminating the lease.

3.36.7 Sale in an auction
If the dwelling was sold in an auction and the new landlord (e.g., a bank) notifies the tenant to vacate the dwelling, the tenant is entitled to certain information. It is possible that the previous landlord / landlady did not disclose relevant information to the new owner, such as an existing lease agreement. It is important for the tenant to provide a copy of the lease agreement to the new landlord / landlady.

The following documents (issued by Court) will give the tenant an idea of the conditions under which the new landlord / landlady bought the dwelling:

- Conditions of Sale
- Sales Notice

3.36.8 Insolvent
If the landlord / landlady becomes insolvent, it does not end the lease.

3.36.9 There are exceptions to “huur gaat voor koop” rule
If the landlord / landlady had mortgaged the property then the property is subject to a prior real right and is sold with the lease to recover the money owed to the bank. If the buyer’s or the highest bidder’s offer is lower than the mortgage debt, the law allows for the property to be sold without the lease. 

3.36.10 Renewal of lease and the “huur gaat voor koop” rule

3.36.10.1 What is the position of a renewal clause when ownership is registered in the name of the buyer?
Take the case of a fixed lease of two years where the owner concluded the lease agreement with his tenant. The lease ends on May 31. Eighteenth months into the lease, the landlord / landlady sells the dwelling and provides the tenant with the details of the new owner.

Let us examine a renewal clause in the fixed lease for a period of two years. The tenant was given the option to renew the lease for a further
two years, provided she informed the landlord in writing of such intention, two calendar months before the lease ran its full term. We will look at three possible types of renewal, one without changes to the extended lease and two with changes.

**Example 1: Renewed lease would be on the same terms and conditions:**
“The tenant has the right to renew this lease for a further two years, on the same terms and conditions contained in the original lease, provided she notifies the landlord / landlady in writing two calendar months before the expiry of the lease.”

**Example 2: The renewal of the lease would be conditional:**
“The tenant has the right to renew this lease for a further two years, on condition that she has not breached the lease. She must notify the landlord / landlady in writing two calendar months before the lease expires of her intention to renew this lease.”

**Example 3:** “The tenant has the right to renew this lease for a further two years, notifying the landlord / landlady in writing two calendar months before the lease expires of her intention to renew this lease. The rental under the renewed lease will be R2500.00 per month with no further option to renew.”

The tenant in exercising the option must remember that the rules of offer and acceptance apply. The tenant who sends the letter of renewal by registered post (as required by the lease) to the landlord / landlady’s address as stipulated on the lease as the address of all communication, would have complied with proper service even if the landlord / landlady failed to notify the tenant of the change of address. The tenant who gives notice on April 2 when the lease terminates on May 31 has failed to provide two calendar month’s notice.

**3.36.11 Is the new owner-landlord / landlady bound by the renewal clause?**
The new owner, who buys the dwelling with the lease, as stated previously, becomes the landlord / landlady and the relationship between the tenant and the “new” landlord / landlady continues. If the new owner was not aware of an existing lease, he or she is still bound to the lease but may have a delictual claim against the seller or some legal remedy available in such an instance.
The new owner acquires all the rights of the original or previous landlord / landlady under the lease. The tenant is under obligation to carry out all the duties and responsibilities as if there was no change of ownership. Rights and obligations are contiguous, the tenant and landlord / landlady mutually dependent. The tenant’s rights must be reciprocated by the landlord / landlady’s performance of his obligation and the tenant must fulfil his/her duties and responsibilities emanating from the lease for the contractual terms and conditions to be realised.

In summary, the renewal of a lease must be separated from the landlord / landlady’s intention to sell or the actual sale and subsequent transfer of the dwelling to the new owner. The new landlord / landlady is in the same position as the previous landlord / landlady should there be a change of ownership during the fixed period and the tenant exercised his / her right to renew within the prescribed period required.

3.36.12 Cases
The renewal of the lease is binding on the new landlord / landlady according Appellate Division (Supreme Court of Appeal) cases, e.g., Uys & another v Sam Friedman Ltd 1935 AD 165 and Hitzeroth v Brooks 1956 (3) 444 AD.

What is the role of the deceased landlord / landlady’s wife to a lease? How is the wording of a renewal clause to be understood when the period in a fixed lease is incorrectly calculated? What is the position of a tenant who holds a lease through cession or assignment and the assignee’s legal relationship to the widow of the deceased landlord / landlady?

These were some of the questions that the court in Hitzeroth v Brooks had to look at. The landlord / landlady Alexander Hitzeroth concluded a lease with a Mrs. Thelma O. Rodkey on September 24, 1951. The lease was for a period of nine years eleven months with the option to renew within a month of the termination of the lease. The renewal was for a further period of nine years eleven months on the same terms contained in the first lease.

The lease contained a clause that allowed for subletting or cession and Mrs. Rodkey ceded the lease to a Margaret S. Brooks about seven years into the lease period. Alexander Hitzeroth died in February 1956 and the cession of the lease took place in October 1958; acknowledged by the executor of the late Hitzeroth’s estate.
The date of expiration in the lease was September 30, 1961, which was an incorrect calculation. Brooks exercised the option to renew in September 1961. The court established August 31, 1961 as the month the lease ended and renewal had to take place within the month of August and not September. The tenant therefore did not renew within the renewal period and the court found the notice of renewal to be out of time.

As for Mrs. Hitzeroth’s contention that she was a “third party” and not bound to the lease, the court concluded that she was a direct party. The fact that she ratified the cession and accepted rentals from Brooks, the court held that she was bound to the original lease. Brooks, to whom the lease was ceded, was her tenant and she was accordingly bound to the renewal of the lease.

Does a right of renewal bind an innocent purchaser to an existing lease? To put it another way, a purchaser is not informed of a written lease but in fact is misled into believing that the tenancy is a monthly one and terminable at a calendar month’s notice. The purchaser is also blissfully unaware that there is a renewal clause. Can the renewal clause be separated from the lease itself? The court in *Shalala and Another v Gelb* (1949 AD 851) arrived at the decision that: -

1. The right to renew clause is an inseparable part of the lease.
2. The right to renew in a lease is linked to the tenant’s right to occupy.
3. The buyer/owner who is misled by the seller/previous owner-landlord / landlady is bound by a right of renewal.
4. “An option to purchase contained in his lease confers upon the tenant the right to acquire dominium of the property: the option to renew relates to an extension of the tenant’s right of occupation of the property to the continuation of the relationship of landlord / landlady and tenant.”

In *Uys & another v Sam Friedman Ltd* the court settled the tenant’s right to a renewal clause as follows: -

1. The right to renew is no different from any other term or condition of a lease.
2. A renewal clause cannot be separated from the lease.
3. A tenant’s right to renew can be exercised even if the landlord / landlady is insolvent.
4. A trustee of an insolvent landlord / landlady is bound by a renewal clause.
It is advisable to consult someone who has knowledge of purchase and sale agreements, preferably an attorney. Generally, any competent attorney will be able to advise the tenant of his or her rights regarding change of ownership, especially when matters are not clear cut.

3.36.13 How does the RHA affect the change of ownership?
The new owner must fulfil duties laid down in the RHA. The tenant is equally duty bound to carry out all the responsibilities of the RHA.

3.37 COMMITTEES / ORGANISATIONS

3.37.1 Tenants’ Committee
Committees are powerful structures through which tenants can voice their grievances and find solutions to problems. It gives tenants confidence and hope by providing a support group. The more organised a committee is the more successful it becomes in realising the rights of tenants. Committees can be formed in many ways and for a number of reasons. We suggest the following approach as a guideline:-

3.37.2 Flat Committees
A meeting could be convened to discuss issues affecting the building. A written or verbal notice should be communicated to tenants informing them of the purpose of the meeting, date, time and venue. After discussing the issues and before closing the meeting, a flat committee could be proposed. Ask for volunteers or nominations of floor representatives (floor reps) – at least one rep per floor. The floor reps could then elect one person to act as a co-ordinator of the flat committee.

3.37.3 Street Committees
Tenants may want to organise an entire area into a residents’ or tenants’ committee or association. The co-ordinators of the different buildings could nominate at least one rep per street to serve on an area or residents’ / tenants’ association.

Sometimes, a public meeting is convened to address certain issues. The meeting may resolve to form or constitute a residents’ or tenants’ body. The newly formed body may then organise structures on the ground (flat / street committees). It is important for the newly formed committee (interim committee) to draft a constitution which will contain the aims and objectives of the committee, what is required of the members, code of conduct, etc. Grassroots structures played a pivotal role during the
apartheid days. People expressed themselves through these structures in their struggle for a democratic society. The RHA protects the rights of tenants to have tenants’ structures in terms of section 15 (1) (f) (ix).

**REMEMBER:** Sometimes, certain people “highjack” committees or organisations for their own selfish interest. Tenants can be given wrong advice that may result in eviction, law suits and financial losses. It is therefore wise even through committees or any structure to exhaust every possible means to resolve differences with the landlord / landlady through discussions. The RHT provides for landlord / landlady and tenant to resolve problems through mediation.

### 3.38 SECTIONAL TITLES ACT (STA), LANDLORD / LANDLADY, TENANT AND BODY CORPORATE

There are rules that govern the relationship of all the residents in a sectional title scheme and for the control, administration and management of the common areas. A tenant would be under legal obligation to observe the relevant rules. The body corporate can enforce a rule with a penalty if the majority of the owners have voted in favour of it. The penalty or fine is then part of the rule but the enforcement and such fines relate to the control, administration and management of the common areas.

#### 3.38.1 Can a body corporate or trustees interview a prospective tenant?

No!

There are House rules that prevent owners from letting out their units or allowing other than the owner or her / his family to occupy the unit. This is a violation of the owner’s constitutional rights. There are many bodies corporate who interview prospective tenants to “screen” them. In other words, to decide whether a person should be allowed to occupy a dwelling as a tenant.

House rules do not have the power of enforcement. It is the standard Conduct and Management rules that are amended and have enforcement powers. The amendments are then lodged with the Deeds office as required by the STA. The lawmakers through an Act of Parliament (Sectional Titles Act) included two sets of rules and carefully constructed what must be in these rules. “There is no mention of house rules in this complex apparatus and, in view of the obvious care that has gone into
the creation of the management and conduct rules, and the systems for amending them, it would be surprising indeed if the legislature intended that these checks and balances could be circumvented by the trustees of a scheme, or even by the members in general meetings, by the expedient of making house rules\textsuperscript{134}.”

Ask the trustees under what authority they claim to have the right to interview your visitors / co-residents? You may have to bring a High court application if the trustees still persists or deny access or confiscate the access disk. The chief registrar of the deeds office\textsuperscript{135} has indicated that he will not accept an amended rule that gives a body corporate the authority to interview a prospective tenant by trustees. Should the registrar accept such a rule, this may result in a legal challenge.

3.38.2 Can a body corporate or trustees restrict the number of occupants?

There is a view that house rules can stipulate such a restriction or the standard conduct rules amended to include a provision to restrict the number of occupants and may be enforced with a penalty. The house rules may stipulate restrictions but it can be challenged. The chief registrar of the deeds office\textsuperscript{136} has indicated that he will not accept an amended rule that restricts the number of occupants per unit.

However, overcrowding in terms of the RHA is not allowed and is determined by city’s health byelaws. Besides, overcrowding can lead to serious consequences for all the stakeholders (landlord / landlady, other unit owners and the body corporate. Maintenance costs may increase; additional consumption on a communal meter means an increase in service charges – all these may be passed onto the owners by an increase in levy and an increase in rentals. The social or communal cohesion between owners and occupants may be affected leading to hostile relationships.

3.38.3 Can a body corporate or trustees prevent visitors or place a time restriction regarding visitations?

\textit{No!}

3.38.4 Can a body corporate or trustees disconnect electricity or water supply or lock a tenant out?

\textit{No!}
Unless the electricity was disconnected by the municipality, it would be illegal. You can get an urgent order to have it reconnected. Refer to section 3.25 above for discussion on spoliation.

Even if the house rules state the body corporate can do this, it is illegal. The conduct and management rules which are annexures to the regulations to the Sectional titles Act are powerful sets of documents (unlike the house rules) but even in this instance, an unlawful authority inserted as a rule will not make it legally enforceable. A legal challenge will lead to costs that will have to be paid by the owners, which is usually done by adding this to the levy.

3.38.5 Can a body corporate collect rental from a tenant because of levies owed by the landlord / landlady?
No!

There is no contractual relationship between the tenant of an owner and the body corporate.

However, if a body corporate has obtained a judgment against the sectional title owner and an order attaching his / her rental income, then it may collect rentals. The body corporate is obliged to provide proof to the tenant that it has obtained the right to do so.

3.38.6 Is a tenant living in a Sectional Title scheme obliged to follow the House Rules?
Yes, but as long as the House Rules do not go against any law, especially the Constitution of the Republic of South Africa, the RHA and the Sectional Titles Act.

The tenant’s relationship is with the owner / landlord / landlady of the unit (dwelling) in terms of a lease agreement (oral or written) and not with the body corporate of the Sectional Title or Share Block scheme.

3.38.7 When must the house rules be given?
A tenant signed a lease contract and was subsequently asked to present herself for an interview by the supervisor of the body corporate. When she discovered that certain rules violated her rights, she informed the landlord that she was cancelling her lease contract and was entitled to a full refund of all payments made.
It is very important to discuss the House Rules with a prospective tenant and have it attached to the lease contract. Section 5(8) of the RHA states, “a copy of any House Rules applicable to a dwelling must be attached as an annexure to the lease.”

In the case of an oral lease, a copy of the house rules should be given to the tenant, preferably with an acknowledgement of receipt from the tenant.

3.38.8 Can the body corporate or trustees sue the owner’s tenant for failing to pay rental or to have the tenant evicted?

No!

In terms of Privity of Contract, a body corporate or a trustee does not have the legal right to do so. Privity of contract means that only parties who entered into the lease contract can sue or be sued. A body corporate or a trustee cannot sue an owner’s tenant for non-payment of rental or for ejectment.

3.38.9 Can tenants form their own committee to act as a body corporate and assume some or all of the functions? Can tenants demand to attend the meeting of a body corporate?

No!

While there are democratic rights and responsibilities, these are laid out in the STA and its regulations. Tenants cannot do as they please and the owner-landlord / landlady is responsible and accountable to the body corporate. There are specific rules (management rules) for the functioning of a body corporate and for owners in the scheme.

There are many instances of tenants “taking control / management” of the sectional titles scheme because of absentee owners by forming their own bodies corporate. This is not allowed by the STA or any other legislation or the common law.

3.38.10 Can the body corporate or trustees evict a tenant or compel the owner-landlord to evict due to pregnancy?

No!

As bizarre as it may seem, several bodies corporate have threatened action against couples who had “broken” the house rules. In one instance, a wife miscarried because of the sheer pressure from the
trustees that having a baby would change the number of occupants from two to three, resulting in overcrowding\textsuperscript{137}.

3.39 OCCUPATIONAL “INTEREST” / “RENT”

3.39.1 Can a person lodge a complaint with the RHT regarding occupational “interest / rent”?

No!

This does not apply to a tenant-landlord lease contract but to a purchase and sales agreement. The RHA and the RHT does not have authority or jurisdiction over matters that affect the sale of a dwelling.

3.39.2 What is occupational “interest” or occupational “rent”? It is an amount the buyer pays for such occupation, normally during the period of negotiating a sale or awaiting transfer of ownership. It could be for use and enjoyment with a fixed amount or it could be an amount fixed as a percentage of the purchase price.

The use of the word “rent” does not equate to a rental of a lease agreement in as much as the concept of “use and enjoyment” of a hired suit or set of clothes for which rental is paid does not result in a lease contract between the hirer and the shop that rented out the suit.

Nienaber JA defines it concisely: “Occupational interest is the return which the seller of immovable property earns by permitting his purchaser, pending payment, to occupy the property sold”\textsuperscript{138}.

3.40 OPTION TO PURCHASE OR RIGHT OF FIRST REFUSAL IN A LEASE AGREEMENT

3.40.1 Can a tenant lodge a complaint of an unfair practice regarding a dispute that the landlord / landlady has refused or failed to offer the dwelling for sale to the tenant as stipulated in the lease contract?

No! A clause reads, “The tenant has the first option to purchase the dwelling during the lease period when the owner decides to sell.”

Or

“The tenant has the first right of refusal on the dwelling for the purchase price R120, 000.00 for a period of 12 calendar months from the start of this lease.”
The tenant’s employment is linked to a lease which in turns allows him the option to purchase provided he fulfil the terms of his employment and the lease\textsuperscript{139}.

This aspect of the lease applies to a purchase and sale of the dwelling and the dispute with the landlord-owner does not relate to the use and enjoyment, rental and other terms and conditions of the lease contract. The RHT does not have authority to resolve such a dispute.

The lease can include a clause that states that the tenant would work for the landlord for a monthly salary. The failure to pay salary does not affect the lease agreement nor can the tenant set off against the rental the salary owed to him or her.

### 3.41 WATER AND ELECTRICITY

#### 3.41.1 Who pays water and electricity charges?
In the absence of an express clause, who is liable for the payment of water and electricity charges? These service charges are due and payable by the owner to the municipality. The owner is liable to the municipality for payment under common law.

Services supplied by local authority to the property relates to the owner of the property or to its occupiers\textsuperscript{140}\textsuperscript{} For the occupiers to be liable there must be an agreement either between the owner and the occupier or between the occupier and the local authority. In the absence of such an agreement, it is implied that the owner would be burdened with the payment for such services.

#### 3.41.2 Tenant or occupier is responsible

Parties transpose their obligations in a written lease contract or even agree orally that the tenant would pay for certain services such as water or electricity. The owner or landlord usually requires the tenant to have the water and electricity account in his / her name so that the tenant is directly contracted to the local authority and liable for the payment of the consumption charges.

#### 3.41.3 The Constitutional court judgment

The Constitutional court gave a judgment that ultimately holds the owner responsible for all outstanding amounts regarding consumption charges due to the local authority even if the account is in the tenant or non-owner occupier’s name. Yacoob J\textsuperscript{141} said,
“The basic reason for the accumulation of consumption charges due in connection with any property occupied by non-owners is non-payment by those occupiers. However, it is ordinarily possible for both the municipality and the owner to guard against an unreasonable accumulation of outstanding consumption charges. The municipality has a duty to send out regular accounts, develop a culture of payment, disconnect the supply of electricity and water in appropriate circumstances, and take appropriate steps for the collection of amounts due.

The owner’s ability to protect her own interest by ensuring that consumption charges are kept within reasonable limits depends to some extent on the nature of the relationship between her and the occupier. If that occupier is on the property with the knowledge and consent of the owner, the latter can, amongst other things, choose the occupier carefully and stipulate that proof of payment in relation to consumption charges be submitted monthly on pain of some sanction including ejectment.”
“A court’s duty is not to write a judgment that shows the law and the facts in the best light for one or the other party. Neither is its duty one of writing a judgment that shows the law and the facts in the light that best justifies its own decision as to the outcome of the case. Courts should not appear as advocates for a cause. A court’s duty is to write a judgment that is seen to be justified in the light of the totality of the relevant facts and the law before it. If facts appear contrary to the court’s desired result, the court has a duty to confront those facts and to justify setting aside, reinterpreting, and/or re-weighing them. The court’s reasoning on those issues should be open and transparent.” Roederer (2001:350)

4. INTRODUCTION
This chapter examines the need for judicial justice and how these may be achieved. Certain relevant matters are discussed to highlight the level at which RHTs should operate if they are to dispense justice. Regular training of members and support staff is imperative for RHTs to render professional and competent service. Integral to training is the need for the subject content of the training manuals and the coach or instructors to have in-depth knowledge of the relevant laws and a thorough understanding of how the RHTs operate.

Objectives / Outcomes
After reading this chapter, RHT members: -
• should have a broad idea of what is expected of them in performing a judicial function,
• will understand the critical need to be acquainted with common law procedures in respect of hearing complaints and finalising matters through its ruling,
• endeavour at all cost to act justly and judiciously,
• debate issues to enhance their knowledge and realisation of the principles of batho pele (people first).

4.1 PERIODIC LEASE
4.1.1 What is a ‘periodic lease’?
A lease for a fixed period presents no legal problem. The period is generally indisputably ascertainable from the term of the contract
where this is clearly set out: ‘beginning on January 1 and terminating on 30 June’; ‘for a fixed period commencing on February 1, 2005 to January 31, 2009’.

There is confusion about a periodic lease, which is further compounded by the RHA. The references to “undetermined” and “indefinite” are contrary to the legal requirement of contract. The RHA defines a ‘periodic lease’ as “a lease for an undetermined period, subject to notice of termination by either party.” Section 5(5) of the RHA reads:-

> If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month’s written notice must be given of the intention by either party to terminate the lease.

Professor Delport in reference to the above statutory provision says, “a periodic lease runs for an undetermined period but can be terminated on one month’s written notice given by either parties” (2007:255).

This notion finds support in case law where the words ‘indefinite’ and ‘undetermined’ are used as legally acceptable terms. Indefinite period may mean for an “uncertain” or “unlimited” period as described by Innes ACJ in *Cohen Appellant v van der Westhuizen Respondent* 1912 AD 519 at 540: “On the whole, however, I prefer to base my judgment on the broader ground that the adverb “indefinitely” in this section should be regarded as meaning without limit or restriction of time.”

van den Heever JA states: “Indefinite lease renewable from month to month at the option of the lessee” (in *Joosub Ltd v Ismail* 1953 (2) SA 400 (A) at 472).

Harms JA : “[t]hat the SANDF should enter into a lease agreement with the communities on an indefinite basis” (in *Khosis Community, Lohatla, and Others v Minister of Defence and Others* 2004 (5) SA 494 (SCA) at 507).

Levenberg AJ : “There is no good reason why a landlord would enter into a lease for a fixed rental for an indefinite period of time without at least reserving the right to increase the rental on short notice” (in *Scopeful 130 (Pty) Ltd v Mechani Mag (Pty) Ltd* 2008 (3) SA 483 (W))
at 490). References are also made to leases for an undetermined period in many cases such as *Ebrahim v Pretoria Stadsraad* 1980 (4) SA 10 (T). Sometimes, a judge will state the position of parties to a lease in respect of an “indefinite” lease period without interrogating or attacking this legally strange notion in lease contracts (e.g. in *Kendall Property Investments v Rutgers* 2005 (4) 81 (C)).

According to South African common law, a lease period is definite: daily, weekly, monthly, yearly (periodic leases) or for a specified fixed period such as 6 months, 1 year or 15 years. The references in judgments to an “indefinite” lease as part of our law should be clarified that the lease is not a fixed lease but one that subsists on a periodic basis.

Erasmus J argued that a lease for an indefinite period is not known in our law. In the Timber Rooftech case, Tebbutt JA said, “[t]he ordinary meaning of the word “indefinitely” is, according to the Shorter Oxford Dictionary, “for an indefinite period” and “indefinite”, in turn, is defined as “of undetermined extent”.”

4.1.2 No undetermined or indefinite period

We can conclude that a lease cannot be for an undetermined or indefinite period. We may therefore define a periodic lease as a lease that is for a definite period whereby the parties decide, either expressly or tacitly that the period would be daily, weekly, monthly or a yearly lease. There is no lease if the lease period is undecided, undetermined or indefinite. In other words, a lease does not exist if the period is without limit or restriction of time.

4.2 HOW TO DEAL WITH NOTICE TERMINATING A LEASE

The preamble of the RHA sets the approach for a distributive justice remedy, that is to say that it is concerned with the well being of the individual and the implications for society. Central to a dispute in terms of corrective justice on the other hand, is the individual rights and responsibilities and the violations of these.

The RHA therefore sets out a corrective justice remedy, notwithstanding its preamble. A right and a corresponding duty or responsibility and justice must be done by correcting the violation of the particular right. The RHT may state, for example, that the notice to vacate complained about, does not constitute an unfair practice and the landlord may
proceed with ejectment through the court. The RHT does not concern itself with the individual but with the individual’s duty to perform as a tenant and the landlord as an individual, whose right to expect performance was violated.

It is the Constitution of the Republic of South Africa that reminds us that one cannot have a simplistic approach to law. Some judges have diligently and painstakingly applied their minds to the Constitutional requirements and guidelines in dealing with matters to bring about a just and equitable solution. Members of the RHTs are bound by the RHA, the common law, court cases and the Constitution. It can be argued that the first step is for RHT members at a hearing to establish the facts of the complaint.

This is followed by examining the legal principles that will include the constitutional guidelines, case law, common law and the relevant legislation (RHA). They will then apply the law to the facts and in doing so, would have investigated the circumstances of the tenant who may be rendered homeless as a single parent or a pensioner. In this exercise, members are faced with the daunting task of balancing corrective justice with distributive justice, having very little, if any, discretionary powers. An order is finally granted that may include an order for costs. The RHTs cannot grant eviction or ejectment orders but its ruling in terms of an unfair practice will determine whether a landlord / landlady can start proceedings in court to have the tenant ejected from the dwelling.

Unlike judicial officers of the courts, RHT members are under constant pressure to finalise a large case load on any given day. A complaint with the RHT may be dealt with within two hours (through oral evidence) and a ruling given shortly thereafter. If it is heard in a court, it may require at least a day of oral evidence and judgment given later. The court proceedings based on English law, are also reinforced by a rigorous and well established set of rules for court processes from inception (issuing of summons) to the actual court proceedings that culminates in its order.

4.3 **SPOLIATION**

In terms of this legal remedy the RHT cannot not allow individuals or entities to take the law into their own hands. Spoliation is one of the most effective ways to restore possession of the leased dwelling or to have services such as water and electricity supply restored that were unlawfully disconnected. A tenant files an application with a court or
the RHT by way of an affidavit providing information about the illegal action and details of the person(s) who carried out the illegal action. The tenant must inform the court that she or he was unlawfully deprived and dispossessed of the peaceful and undisturbed use and enjoyment of the property or supply of electricity and water.

There is no unlawful action and therefore no application for spoliation if the factual situation is that the tenant abandoned the dwelling or voluntarily surrendered it to the landlord/landlady.

It would be a travesty of justice for the RHT to probe the circumstances and motives of the spoliator or to condition restoration to payment of the arrears or complying with any breach.

Cameroon JA summarises the basis for a spoliation when he said that “anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (spoliatus ante omnia restituendus est). Even an unlawful possessor – a fraud, a thief or a robber – is entitled to the mandament’s protection. The principle is that illicit deprivation must be remedied before the courts will decide competing claims to the object or property.”

Rules must be clearly established in Regulations.

4.4 ACCUSATORIAL AND INQUISITORIAL PROCEDURES
In the formal accusatorial procedure of courts, witnesses are interrogated, for example, within an adversarial environment with the one party successfully convincing the court that his or her version is the correct one. ‘It has to be remembered by all concerned that we do not have in this country an inquisitorial procedure for civil litigation. Our procedure is accusatorial.’

Inquisitorial approach like that of the Small Claim’s Court provides a less formal context where the presiding officer asks questions or enquire about facts to establish the truth. Nugent JA provides an interesting perspective:

For although a bail inquiry is less formal than a trial, it remains a formal court procedure that is essentially adversarial in nature. A
court is afforded greater inquisitorial powers in such an inquiry, but those powers are afforded so as to ensure that all material factors are brought to account, even when they are not presented by the parties, and not to enable a court to disregard them. And while a judicial officer is entitled to invite an application for bail, and in some cases is even obliged to do so, that does not make him or her a protagonist. A bail inquiry, in other words, is an ordinary judicial process, adapted as far as need be to take account of its peculiarities, that is to be conducted impartially and judicially and in accordance with the relevant statutory prescripts.”

RHT members have to remain impartial even though they may ask questions of parties in an environment that combine the accusatorial and inquisitorial approaches.

4.5 ORDERS / RULINGS
Each provincial RHT ought to follow the procedures stated above. There are other fundamental legal principles that the RHT must also follow. An example is the *audi alteram partem* rule: this means that parties be given an opportunity to state their side of the case. It is a Latin phrase that means, “hear the other side”. Parties to a hearing or court proceedings are given the opportunity to state their case, to dispute or challenge through cross examination the evidence given by the other party and any witness. At common law, it is one of the fundamental principles of natural justice.

The RHA did not codify landlord-tenant laws that is rooted in the common law and developed in law of contract, other legislation and decided cases. It has changed some aspects of the common law and restricted a few of the contract law requirements. The RHA and its regulations are therefore not exclusive because other relevant laws such as the common law, law of contract and the constitution also apply to residential leases.

What is important to note is that the preamble to the RHA and the RHA as a whole is the result of the government’s Constitutional directive as contained in section 26 of the Constitution to the housing needs and the relevant circumstances relating to eviction. Refer to Knoll J in the Kendall case for an insightful discussion on this aspect of the legislature’s intention.
There are situations when it is argued that the common law or any other relevant law including the RHA can be compromised to bring about a solution. This erroneous reasoning is based on the ‘need to find a solution in a practicable and equitable manner’ and ‘to harmonise relationships’. In the words of Flemming DJP, “Legality must not be considered out of context with desirability.”  

4.6 REVIEW OF RHT’S RULING: s17

The party has to approach the High court in terms of section 17 of the RHA to have the proceedings of the RHT reviewed. Review procedures are concerned with the conduct of the members, whether they were biased or acted prejudicially against a party. The merits of the case cannot be appealed although there is a view that since the ruling of the RHT is a judgment of a Magistrate’s court and enforceable in that court, a party should be allowed to file an appeal. Approaching the High court for relief is costly whether to review the procedures or to file an appeal if that were possible. Review does not necessarily mean the court would set aside a ruling or redirect the RHT to hear the matter de novo (from the start; afresh before a different group of commissioners). In reviewing an application, the court may confirm the RHT’s ruling. Lichtenberg J P states:

“I quote with respectful agreement from Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 755, where the learned authors say the following:

‘Statutory tribunals should conduct their proceedings as follows:

“Certain elementary principles, speaking generally, they must observe; they must hear the parties concerned; those parties must have due and proper opportunity of producing their evidence and stating their contentions, and the statutory duties must be honestly and impartially discharged.”

Their discretion must be exercised “according to the rules of reason and justice” and not arbitrarily. Where the tribunal directs its mind to legal issues which it is entitled to and bound to decide, such as the interpretation of regulations or other rules, a wrong decision in law cannot be said to prevent it from fulfilling its statutory functions or duties, and the Court will not interfere with the decision on review unless it was one to which no reasonable person could have come.’

_Functus Officio_

If a party is affected by non-compliance of the RHT’s ruling, there
is no “Notice to Renew Proceedings” to have the matter heard. The members of the RHT are said to be *functus officio* and the doctrine of the *res judicata* rule applies.\(^\text{154}\) *Res judicata* means that the parties are prevented from having the same matter adjudicated that was already finalised.\(^\text{155}\) 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.\(^\text{156}\) In other words, the case is closed and the RHT has no authority to re-examine the case and to give a new judgment. The comments of Corbett JA\(^\text{157}\) illustrate that even the chief justice is not excused: -

Finally, there is the deletion from the Court’s judgment as originally recorded. I have no doubt that, whatever may have led the trial Judge to alter the record in this way, he should not have done so - for two main reasons. In the first place, the record of the judgment in its original form correctly reflected what had actually occurred in Court and there was consequently no valid ground for the alteration thereof. Secondly, it seems to me that in this instance and at the stage when he acted the learned CHIEF JUSTICE was *functus officio* and had no power, *mero motu*\(^\text{158}\), to amend the record in the way he did.

There are exceptions, which may best be highlighted in the words of Ngcobo J\(^\text{159}\): -

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.

| The RHTs require substantive rules to deal with rescission, simple alterations and grammatical or arithmetical corrections. |

4.7 RELATIONSHIP BETWEEN THE RHTS, PROVINCIAL LEGISLATURE AND LOCAL AUTHORITIES

There also appears to be confusion about the relationship between the RHTs and the provincial and local authorities. The tribunal adjudicates on tenant-landlord matters as an independent body. The provincial and local authorities are landlords who may approach the tribunal by lodging a complaint against their tenants. They may be required to appear before the RHT as a respondent when their tenants have a dispute and a complaint is registered with the RHT.

In the case of the Ministry of Housing, even though national parliament made the provincial minister of housing the person in charge of appointing members to the tribunal, the RHT is independent of the provincial department of housing. In this way, the RHT’s neutrality is protected and the rights of all parties guaranteed. The provincial Ministry of Housing and a local authority are therefore on the same level as a private landlord if summoned to appear before the RHT.

Information Offices

The RHA contemplates Information Offices to advice landlords and tenants on matters relating to the RHA and the functions of the RHT. Even though a municipality can assist with establishing such an office, the independence between the RHT and a municipality remains. In fact,
complaints cannot be lodged at the Information Offices according to parliamentary minutes that deliberated this provision\textsuperscript{160}. -

Mr Khoza (IFP): Section 14 allows the local authorities to establish Rental Housing Information Offices. To what extent can they resolve disputes? Is there any problem in creating local tribunals?
D-G: The local government role is to establish information offices. The information offices assist landlords and tenant with information and they provide advise. Information offices cannot be converted to tribunals. The role of the local government information office is to assess the situation and provide information and advise to the parties. If the matter is serious, it refers the matter to the tribunal.

Mr Lee (DP): Where the local government is the lessor who will solve the problem and who will decide that the matter is urgent because they have an interest in the matter.

D-G: The lodging of complaints is done at the tribunal and not the information office.

It is in this context that section 14 of the RHT must be understood:-

- A local authority may establish a Rental Housing Information Office to advise tenants and landlords / landladies in regard to their rights and obligations in relation to dwellings within the area of such local authority’s area of jurisdiction.

- A local authority may, subject to the laws governing the appointment of local government officials, appoint officials to carry out any duties pertaining to such Rental Housing Information Office.

- Its functions are to:
  - educate, provide information and advise tenants and landlords with regard to their rights and obligations in relation to dwellings within its area of jurisdiction;
  - provide advice to disputing parties on reaching solutions to problems relating to dwellings;
  - refer parties to the Tribunal;
  - comply with any request of the Tribunal in terms of section 13; and
  - keep records of enquiries received by the office and to submit reports in relation thereto to the Tribunal on a quarterly basis.
4.8 RHT AND DELEGATION OF POWERS

The RHT has jurisdiction over all tenant-landlord matters and any person or entity can lodge a complaint (complainant) or has to be present at a hearing as the respondent when summoned to appear before the RHT. All tiers of government, which is a party to a lease contract of a residential dwelling are subjected to the same treatment as any other private citizen when a matter comes before the RHT. Any government administration like the Department of Public Works, the Department of Housing in the province or of a municipality, may also lodge a complaint with the RHT against its tenant. The person to be summoned is the Minister in charge or the city manager but may be represented by an official who is delegated or assigned the duty to act on behalf of the Minister or city manager. The landlord may be the Department of Housing, in which instance the Minister who is the member of the executive for housing in the provincial legislature (MEC) is served with summons.

It is for this reason that a RHT, which performs a judicial function, is established by the (MEC) and not by the Department of Housing and not through the Housing Act which may appoint an administrative body. This places the RHT in a neutral and independent position. It is also for this reasons, the MEC responsible for the appointment of members to the RHT is not given authority to delegate powers. According to Devenish, Govender & Hulme (2001:73) “...delegation must therefore be authorised either expressly or impliedly by an empowering Act”. The RHA, which is the empowering legislation, does not confer such powers on the MEC and does not vest him / her to delegate any power to his / her subordinates.

Section 11 (4) of RHA authorises the RHT to delegate certain powers, with overriding powers over the delegation made. It is for this reason that the Director General (DG) or Head Of Department (HOD) is not appointed to head the RHT. This section states “the Tribunal may, subject to such conditions as it may determine, delegate any powers conferred on it other than a power under section (13)(2)(d), (3), (4) and (5) to a member of the Tribunal or a person appointed in terms of subsection (1) but any such delegation will not preclude the Tribunal from exercising any such delegated powers itself, and the Tribunal may set aside or amend any decision of the delegate made in the exercise of such powers.”

When compared to the Housing Act, certain powers are delegated to the
MEC for housing. Section 7 of the national Housing Amendment Act 4 of 2001 deals with the functions of provincial governments. Subsection 5 reads; “the MEC may, subject to any conditions he or she may deem appropriate in any instance: -

(a) delegate any power conferred on him or her by this Act; or

(b) assign any duty imposed upon him or her by this Act, to an officer or employee of the department responsible for the administration of housing matters in a province, either in his or her personal capacity or by virtue of the rank he or she holds or the post he or she occupies: Provided that the delegation or assignment does not prevent the person who made the delegation or assignment from exercising that power or performing that duty himself or herself.”

There is no provision to have delegated powers conferred on the MEC in the national RHA or duties and functions assigned to an official. A Minister or an official must tread cautiously when acting or prevented from carrying out certain functions. We have a long established set of rules and laws that deals with the authorisation of delegation of powers, mandates, deconcentration and assignment of duties.

Difference between Rental Housing Act (RHA), National Housing Act (NHA) and provincial Housing Act (PHA)

<table>
<thead>
<tr>
<th>RHA - National</th>
<th>RHA – Provincial – MEC responsibility</th>
<th>PHA</th>
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</thead>
<tbody>
<tr>
<td>Applies to all provinces</td>
<td>No changes can be made by Minister of Housing (MEC of a provincial legislature) to the RHA</td>
<td>Provincial - Changes can be made by MEC of a provincial legislature subject to national HA</td>
</tr>
<tr>
<td></td>
<td>Statutory duty on the MEC to establish RHT &amp; to make support staff available to the RHT</td>
<td>MEC can delegate certain powers in terms of the NHA (s 7)</td>
</tr>
<tr>
<td></td>
<td>HoD is the accounting officer – No duties can be assigned to him / her or powers delegated.</td>
<td>HoD and other officials - powers can be delegated; duties assigned</td>
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</table>
Provincial governments do not have powers to amend or modify the RHA. In the Northern Cape Province Budget Statement 2004/2005 reference is made to the Rental Housing Act drafted and approved and the implementation of the Provincial Rental Housing Act. This is not possible.

4.9 BUDGET / FUNDING MANDATE
The department that holds the purse strings deprives the RHT of its independence. The legislature intended to ensure the independence of the RHTs by the provision of s12(1) in enabling the establishment of a separate budget:

The activities of the Tribunal must be funded from moneys appropriated by the Provincial Legislature.

The budget of the RHT is therefore from the Provincial Legislature and not the Department of Housing or any other department. The role of the Minister of Housing in a province is to appoint members and to receive from them an annual report. The head of Department of Housing is given one specific role, to act as an accounting officer in terms of s12(2):

The head of department is the accounting officer in respect of moneys appropriated in terms of subsection (1).

The RHT ought to be in charge and control of its own budget to enable it to function independently and efficiently. It would appear that the RHTs are under the “control” and “direction” of the provincial Departments of Housing, and more particularly, in some provinces, under the dictates of the Department heads.

Several legal opinions procured by some members and heads of department confirm the following:
1. RHTs perform an independent function
2. HODs are accounting officers
3. Staff seconded to or procured for the RHT become the support staff of the RHT with all operational matters under the sole supervision and jurisdiction of the RHT.

4.10 REGULATIONS
Regulations cannot replace the provisions of the RHA or supersede it. Its role is to provide clarity, expand on matters and establish rules.
Some of the anomalies / irregularities of the provincial Unfair Practices Regulations (UPR) and Departments of housing.

**Section on Municipal Services - Self-help**

“A landlord may not interrupt the supply of electricity or gas services except in the following circumstances -

where the tenant is in arrears with the payment of the fees for such services and fails to pay the arrears within 7 days of receipt of a notice from the landlord to do so.”

[Northern Cape (s10(2)(c)) and Western Cape (s8(2)(c))].

KwaZulu Natal’s Rental Regulations (s20(1)(c) although worded differently, gives the landlord the power to interrupt services: -

“not to expose the tenant to the risk of the interruption or loss of services by withholding payment to the service provider when such payment becomes due, provided that the tenant has made payment to the landlord in respect of the amounts due for such services;”

In terms of the above provisions of the draft UPR, a landlord can unlawfully interrupt electricity services. The inclusion of a right to interrupt on “lawful” grounds in regulations, does not make the self-help action lawful. This is against the long standing legal principle that self-help remedies will not be tolerated by the courts. In any event, it is in clear violation of the Constitution (s34).

**Notice to vacate**

Regulations cannot state that at least two month’s notice is required for the termination of a periodic lease when the RHA stipulates one month. Section 5(5) of the RHA states:-

If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month’s written notice must be given of the intention by either party to terminate the lease.
CHAPTER 5

EXAMPLES OF RULINGS AND MEDIATIONS OF RENTAL HOUSING TRIBUNALS (RHTs)

KWAZULU NATAL RENTAL HOUSING TRIBUNAL

Case No. 13/8/3/3/1664/08
Ruling of the Rental Housing Tribunal in terms of section 13 of the Rental Housing Act/ 50 of 1999

In the matter of Complainant : Ms S Singh
Respondent : Mr A Georgiades

WHEREAS the Complainant and Respondent were in dispute under Case No. 13/8/3/1664/08 before the Tribunal, duly appointed by D Moloi (chairperson), P Dabideen (member) and N Kuzwayo (member) As contemplated in section 10(5) of the Rental Housing Act (Act No 50 of 1999).

Having heard the evidence of all the parties, the KwaZulu Natal Rental Housing Tribunal makes the following Ruling in terms of section 13 of the Rental Housing Act (Act No 50 of 1999) :-

The Complainant have lodged a complaint against the Respondent (Landlord) for illegal lockout. Complainant presented evidence that she had been in arrears with her rental for two months (i.e. September and October @ R1700pm) and on 6 November 2008 she found out that the landlord had locked them out and she had been unable to access the premises since then. Mr Ismail further presented evidence that from the day they were locked out they had been living in the car and when they had money they slept at various lodges (Receipts to the amount of R1 130, 00 were presented as evidence). The respondent admitted that he had locked the premises to secure the complainants property as she was in arrears with her rental.

Having heard the evidence, the Tribunal therefore makes the following ruling:-

(a) The lockout of the premises is unfair and illegal
(b) The Respondent is ordered to open the premises immediately
(c) The complainant is ordered to pay the Respondent an amount of R3 400,00 which is the arrear rental for Sept & October plus an amount of R340,00 for 6 days occupation in November, which gives the total of R3 740.

(d) The Respondent is ordered to pay the Complainant damages to the amount of R1 130,00 in respect of expenses incurred as a result of the lockout which amount will be deducted from the arrear rental, thus leaving the Complainant with an amount of R2 610,00 to pay to the Respondent.

(signed by the following : D. Moloi (Chairperson), P. Dabideen and N. Khuzwayo)

**COMMENT**

The ruling should have been the restoration of occupation, nothing less, nothing more. A separate enquiry regarding arrears, costs and damages would follow in the event a party lodges a complaint thereto. This is the established practice of our law, binding in all respect on the RHTs. Refer to discussion above on Spoliation (3.28 and 4).

“It is a fundamental principle that no man is allowed to take the law into his own hands, no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.”
RULING OF THE TRIBUNAL

INTRODUCTION:

1.1 On 5 August 1971 an application for allotment of a letting unit for residential purposes was lodged by the Complainants customary law husband, Phuduhudu Pretorius Mankuroane, who has since died.

1.2 On 20 May 1976, the application referred to in the preceding paragraph was granted by the Pampierstad Municipality. A certificate of occupation No 46222 was issued. The property consisted of two rooms situated in Pampierstad. The rental was R3,76 payable monthly.

SYNOPSIS OF EVIDENCE:

2.1 Nomonde Meriam Mankuroane

2.1.1 The Complainant is a 54 year old pensioner receiving R780.00 grant per month. She and her late husband had been occupying the said house No 265 Pampierstad since 1971. Around November 2004 she was taken by her daughter, Mmabatho to Mafikeng for medical treatment.

2.1.2 Whilst in Mafikeng the Complainant was informed by one of her daughters Sibongile, that her house had been re-
allocated to somebody else. This was in February 2005. She later knew that the new occupant was Kenalemang, a neighbour. She originally said that in fact Kenalemang asked her to put her goods there temporarily in her house since she, Kenalemang, was on a waiting list for the RDP houses. She was just assisting Kenalemang, she said.

2.1.3 The Complainant said that she could not remember when did she last pay rent. A copy of her statement of account was produced. The rental arrears between 31 March 1999 and 31 March 2006 is R4 206,45. During this period the rental payable per month was R15,95. She said that her failure to pay the rental was because she had other financial commitments and that no one was prepared to pay for the rental as her children were unemployed.

2.1.4 At the time of hearing of this matter she was staying at her mother in Pampierstad as Kenalemang was refusing to vacate her house. She said Kenalemang removed her goods from her house. Some goods according to her, were taken to the toilet by Kenalemang.

2.1.5 Later on during her testimony, she said that Sibongile, her daughter, informed her that Kenalemang approached her, Sibongile. Kenalemang was crying asking Sibongile to put her goods in the house as Kenalemang was desperate with accommodation. Kenalemang informed Sibongile that she was on the waiting list for the RDP houses. According to Sibongile she had not asked Kenalemang to pay any rent.

2.1.6 The Complainant further said that she is prepared to pay the rental of R300,00 / R400,00 per month, inclusive of the arrears with effect from June 2006. She said that her children will help her.

2.2 Sibongile Mankuroane:
2.2.1 Sibongile said that she was the person who gave Kenalemang permission to occupy the house as she was desperate with accommodation. She said that Kenalemang told her that she was on the waiting list of RDP houses.
2.2.1 She said that in that house there was a headboard and a bed only. She further said that those goods were removed to give Kenalemang space. She could not communicate all this to her mother because she was in a coma.

2.2.3 Sibongile said she later learnt about the allocation of their house to Kenalemang. She said that after becoming aware of the allocation of the house to Kenalemang, they both went to Man-Alf of the Housing Corporation in Pampierstad. She was told that the house was allocated to Kenalemang. It was then that she telephoned her sister, Mmabatho who was in Mafikeng.

2.3 Mmabatho Gloria Lesetedi:
2.3.1 Mmabatho’s evidence is to the effect that after receiving a report from her sister, Sibongile, she proceeded to lodge a case with the Tribunal of eviction on behalf of her mother. At that time her mother, the Complainant, was with her in Mafikeng undergoing medical treatment.

2.3.2 Mmabatho said that her mother seemed to have been confused because of her illness. She said that they want the house back as they have sentimental attachment to the house. She said they will assist the Complainant with payment of the rent. According to Mmabatho she had been under the impression that the house was their property.

2.4 Modise Deon Thebe:
2.4.1 Modise is an Acting Property Manager of the Respondent. Early 2004 the Respondent was invited by the Pampierstad Municipal Manager. The Municipal Manager complained to them against tenants who were illegally subletting the Respondent’s houses. He further complained against the tenants who were not paying for rental, services and water. They discussed these problems and decided to call a public meeting to address the problems.

2.4.2 Modise said that Kenalemang approached them. Apparently she told them that she had sublet house No 265 Pampierstad. They decided to regularise her in January 2005. Later on Mmabatho approached them to lodge a complaint. He advised her of the importance to have informed the
Respondent about giving Kenalemang permission to occupy the house.

2.4.3 It is evident that mediation was conducted during 2005. After that mediation the Respondent wrote a letter on 15 June 2005 to Kenalemang to the following effect:

Subject: Mediation conducted by the North West Rental Housing Tribunal (N.W.R.H.T)

Our investigation reveals that you have not vacated the premises as per our verbal notification dated the 19th April 2005.

You are therefore given seven days from the 15th June 2005 to vacate the premises, failing which the due process of the law will take its course and you will be liable for all the costs incurred.

The keys to house must be handed to the NWHC office at Pampierstad Library 16h00 on the 27th June 2005.

Signed, Property Manager
N.W.H.C

2.4.4 This letter gives an impression that an agreement was reached during mediation to cause Kenalemang to vacate the house in favour of the Complainant. However, it was realised that the then property manager, Bozwana, verbally directed that Kenalemang should not vacate the house, which was against a letter written on 15 June 2005. Modise also confirmed this during his testimony.

2.4.5 According to Modise the Respondent is in the process of selling its houses. Preference is given to current tenants. Modise testified further that the Respondent allowed Kenalemang without permission of the Respondent. He further said that there is no lease agreement between the Respondent and Kenalemang, except an offer to purchase which is with Man-Alf who was during the hearing alleged to be on leave. He has further conceded that they did not inform the Complainant of the re-allocation of the house.
He also conceded that although they have re-allocated the house since January 2005, they still issued an account statement more than a year after such re-allocation, in the name of the Complainant and/or her husband.

2.5

Kenalemang Motebe:

2.5.1 Although Kenalemang was not a party to the dispute the Tribunal felt that she should be called only to clarity certain issues. In particular, the circumstances under which she took occupation of the house.

2.5.2 Kenalemang denied that she had applied for an RDP house. She said she met the Complainant in October 2004 for an accommodation. She was asked by the Complainant to pay R200,00 rental monthly. She took occupation of the house in November 2004. She initially paid the rental to the Complainant and not Sibongile. She was advised by the Respondent’s officials against paying the rental. Before her occupation one Rebaone had been occupying the house. She said she did not receive any copy from the Respondent although she has signed something. She has not paid anything to the Respondent. She said she was informed by Bozwana after the 15th June 2005’s letter not to vacate the house.

EVALUATION OF EVIDENCE:

3.1 It is difficult to comprehend the Complainant’s evidence. At first the Complainant gave the Tribunal an impression that she personally assisted Kenalemang as Kenalemang was still waiting for the RDP house. Later on she said that it was her daughter, Sibongile, who allowed Kenalemang into the house.

3.2 The Complainant is in breach of the contract of lease by not paying the rental for the past 7 years. Her reasons for such failure are without substance. The rental payable is R15,95. She is receiving R780,00 pension grant. Although originally she had said that her children were not in a position to assist her, all of a sudden they now are in a position to assist her to pay the rental. She has been unable to pay R15,95 per months and she can now afford R300,00 / R400,00 per month.
3.3 According to Sibongile she is the one who allowed Kenalemang into the house on humanitarian grounds. She made an extremely important decision without informing her mother. She said that it was because her mother was in a coma, an aspect which the mother was silent about. It is surprising why did she not at the least inform Mmabatho, her not hers, nor of her mother, but that of the Respondent. She her reach.

3.4 Another aspect in Sibongile’s testimony is her decision to remove her mother’s belongings from the house for safekeeping. This is contrary to what the mother said. In particular, the mother said that some of her her belongings were taken to the toilet by Kenalemang. This removal of goods by Sibongile was not really necessary if the mother had merely gone for medical treatment in Mafikeng and Kenalemang was waiting for her RDP house. The mother could recover within days and at the same time Kenalemang get her RDP house. Further, why only the headboard and the bed were the only belongings of her mother when space was created for Kenalemang. It is not known where were other items like furniture, bedding, clothes, cutlery, etc. It is doubtful whether the mother was really staying in the house shortly before leaving for Mafikeng. This probably support the version that in fact it was Rebaone who was staying in the house shortly before Kenalemang.

3.5 A further aspect in Sibongile’s testimony is the amount of water and services she charged Kenalemang. The rent is R15,95 and she charged R200,00 for water and services. It is doubtful whether this can really be for water and services.

3.6 It was only when Sibongile learnt that the house was allocated to Kenalemang that she rushed to Man-Alf. It was only when she realised the seriousness of her action that she communicated this to her mother and sister.

3.6 Mmabatho said that they have sentimental attachment to something, which does not belong to them. Mmabatho played ignorance about ownership and rental of the house. Reminders had been issued about rental arrears. They knew about the Respondent’s ownership of this house at least early 2005. It is Mmabatho who approached the Respondent then to lodge
a complaint. It is surprising why should Mmabatho plead ignorance about a year later. It is only when the seriousness of the matter has been demonstrated when it is now that she is in a position to assist her mother with the payment of the rental.

3.7 The action and behaviour of the Complainant and her daughters as detailed above does, however, not warrant the Respondent to act as it pleases without following the right procedure.

3.8 The Respondent realised that the house was sublet without their consent. They decided to regularise Kenamelang’s stay whilst they had not cancelled the contract with the Complainant or at least, informed her of their envisaged action. This was tantamount to eviction without following the right eviction procedure and this is regarded as an unfair practice.

3.9 It’s common cause that a lease agreement between the Complainant and the Respondent still subsists. It is also common cause that the Respondent having realised that they made a mistake by allowing Kenalemang into the house rightfully wrote her a letter dated 15 June 2005 to vacate the house after mediation by the Tribunal. Therefore, in the absence of procedural termination of the lease contract and any written notice in writing reversing the 15 June 2005 letter, there is still a relationship of a tenant and landlord between the Complainant and the Respondent. The rights and duties of the parties must, therefore, be observed.

3.10 It is further felt that the Respondent committed an irregularity in entering into a second lease agreement with Kenalemang or made an offer to lease the house to her whilst the original lease is still in force. The Tribunal is, however, not loosing sight of the fact that no proof of any agreement to that effect was produced by either the Respondent or Kenalemang.

CONCLUSION AND RULING:
4

4.1 The Tribunal is of the view that the following ruling will be just and equitable to both the parties:

4.1.1 That the Respondent reinstate house 265 Pampierstad to the Complainant;
4.1.2 That the Complainant enter into an Acknowledgement of Debt and Offer to Repay with respect to outstanding rentals with interest from the date of default; and
4.1.3 That the repayment by the Complainant shall be in the amount of Three Hundred and Fifty Rand (R350, 00) with effect from 1 July 2006.

North West Rental Housing Tribunal

COMMENTS
The evidence is well presented, in detail and logical.
WESTERN CAPE RENTAL HOUSING TRIBUNAL

RULING ON HEARING
CASE NUMBER : H10/3/3/1/2108/K2

COMPLAINT

1. Failure to do maintenance in terms of section 4 of the Unfair Practices Regulations published in terms of the Act

2. Failure to allow remission of rental in terms of section 5 of the unfair Practices Regulations

Complainant: M Katz (Tenant)
Respondent: Perryvale Investments (Pty) Ltd (Landlord)

The property in dispute is flat 801 Shelbourne, Beach Road, Sea Point, Cape Town. A complaint was lodged by the Complainant, Michael Katz, hereinafter also referred to as the “Tenant”, against the owner of the property, the Respondent, Perryvale investments (Pty) Ltd, represented herein by Mr. P. Kawitzky, also hereinafter referred to as the “Landlord”, in respect of two aspects:

1. Failure to do maintenance;
2. Failure to allow a remission of rental.

The relevant sections of the Unfair Practices Regulations which were promulgated in terms of the Rental Housing Act, 1999 (Act No 50 of 1999), are repeated hereunder for ease of reference and to provide a barometer to what is kept in mind in addition to any other Acts. Regulations and by-laws:

Regulation 4 (1) A landlord must —

a) 

b) keep and maintain the dwelling in compliance with all ordinances, health and safety regulations or any other law;

c) 

d) effect repairs for which the landlord is responsible in terms of the lease, and as identified during Inspections by the landlord, or on receipt of a notice from a tenant requesting such repairs, except
that if a lease makes provision to the contrary, the landlord shall not be liable for repairs if the tenant, a member of his or her household or a bona fide visitor brought about the state of disrepair; (own emphasis) and

e) effect repairs as soon as is reasonably possible having regard to the nature of the repairs but not later than 30 days of the inspection or the receipt of the notice contemplated by paragraph (d) or such further period as may be agreed to between the landlord and the tenant.

Regulation 5….

(3) where repairs, conversion or refurbishment are necessary only to a part of a building and the tenant continues to occupy the remaining part, the tenant must receive a remission in rental, the amount of which must be proportionate to the extent of the tenant’s deprivation.

The “yardstick” or terms that the Tribunal uses is a fairly common understanding of what practice and evolution of what has become reasonable in established parts of the rental housing sector where good and harmonious relationships have been achieved between landlords and tenants prior and subsequent to the implementation of the Act. These, as they generally relate to maintenance and repairs, are as follows:

“Maintenance” is generally accepted as acts aimed at keeping the condition of a property as close as possible to the original condition;

“Repairs” are generally accepted as acts meant to restore a property to the condition it was in, prior to some act, need or circumstance which arose necessitating an act of repair,

It follows that acts of maintenance are generally done on an on-going basis with the aim of preventing the need for subsequent repairs, associated costs and problems for both landlord and tenant.

A “formalised” maintenance plan would generally have the following elements:

1. A preventative maintenance component, which would normally include:
   a) regular inspections including some form of schedule to examine the outside structure of the dwelling including the roof
b) maintenance schedule related to the life span of products such as roof material and paint;

c) summer and winter climatic shock or stresses, both in anticipation of the change in season and for effects on the dwelling. A simple example of this would be clearing out gutters, down pipes and drains during Autumn in anticipation of winter rains; and

d) where possible and on due reasonable notice, regular inspection of the interior of the property;

2. An emergency maintenance component such as a nominated person or list of service providers which a tenant, supervisor or caretaker could contact in the event of some unforeseen happening.

3. A list of complaints received and investigations and or action taken,
   The facts that follow are based on the evidence led, photo’s examined, reports filed and an in-loco inspection.
   It is common cause that a lease was entered into on 1 March 1990, some fifteen years ago.

   It is also common cause that for the majority of those years there was a harmonious relationship between the Landlord and the Tenant.

   Though not documented, the evidence led suggests that there was a maintenance and/or repairs system involving a “caretaker”, a maintenance and repair supervisor, only referred to as “Danie” and a handyman, Deon Lionel Bell. Where a job was too big or required additional expertise, this was sourced from an outside supplier of specialist services. It is also common cause that part of the earlier ongoing maintenance was a proper and effective treatment of the entire roof of the building and revamp during 1997 by contractors known as “Voight”. It is a testament to this contractor’s workmanship and the Landlord that subsequent to this intervention there were no major complaints of leaks until sometime near the middle of 2002.

   The first verbal complaints lodged during 2002 by the Tenant related to leaking from the roof into the inside of Flat 801 to “Danie”. There is no record of this complaint as the Landlord led evidence that they do not keep maintenance or complaint records but dealt with them as when they arose. The fact that there was a complaint in 2002 was, however, not disputed and the evidence of “Deon” was that he heard the tenant
complain about the leak to “Danie”. Deon’s explanation of why no action was taken was that he was not given an instruction to do anything by either “Danie”, the Landlord or any of his agents. No explanation was tendered by the Landlord for the non-response to the complaint.

It is alleged that verbal complaints continued during 2002 until February 2003 when a written complaint was submitted. This complaint in essence raised the following issues:

1. there had been an attempt at patch work by “Deon”;
2. the patch work had not been effective;
3. the leak had continued;
4. damage had been caused to a wall, unit, hi-fi, speaker and carpet; and
5. a reduction of rent should be made.

It was the Tenant’s evidence and contention that after this complaint, he started to pay late in an attempt to provoke some form of reaction. No response was however forthcoming.

It was the evidence led by the Tenant that he, however, continued paying the full rental from February 2003 as well as complaining to a “Mrs. Kaplan” and the supervisor of the building. No response was received and the Landlord did not tender any explanation to the Tribunal for not attending to the problem at the time.

On 18 August 2003, the Tenant reminded the Landlord that he still had not received a response to his earlier letter or complaints and that he would not only be asking for a 50% reduction in rental but would also be deducting the costs of damages occasioned by the leak and pay what he considered reasonable under the circumstances.

It is evident that this short payment brought a reaction 10 days later on 28 August 2003 with a letter from the Landlord which demanded the full rental. Though not dealing with the issue of a remission of rental or the complaint about the leak, this is the first documented reaction from the Landlord.

The Tenant’s reaction to this was to advise by letter dated 1 September 2003 that Mrs. Kaplan, a person in the employ of the Landlord, had conveyed to him that a R 200,00 reduction would be considered reasonable and he requested that this R 200,00 reduction “be applied
retrospectively to include the period where no external repairs were carried out."

The Tenant, however, paid the full amount of R 2572.00 being his September rental.

Evidence led at the hearing by the Landlord indicated that Mrs. Kaplan was never given any authority or instruction to agree to a reduction in rental. This was however not communicated to the Tenant.

On the same day (1 September 2003) a letter from the Landlord advised that they had been compelled to increase the rental due “to the rising costs of electricity, water, lift maintenance, etc. etc.”. The new rental that came into effect from 1 November 2003 would be R 3 025.00 made up of R 2 775.00 for the flat and R 250.00 for the garage.

On 27 November 2003, the Tenant wrote a letter enclosing a cheque in the amount of R 450.00 for the amount of the rent increase he had not paid. He also expressed a “trust that the water leak repairs had been properly done and that his by now 18 month complaint or problem had now finally been rectified”. He however made it clear that should it start raining in again as a result of a “patch-up” job he would unfortunately have to make an adjustment to the rental to cater for this fact.

“Deon” the handyman testified that he did not recall repairs being done to Flat 801 or it’s roof in that year. Furthermore, there are no records available from the Landlord which show if repair work was done so it is hard for the Tribunal to fathom why the Tenant “trusted that water leak repairs had been properly done”.

On 25 April 2004 the Tenant again informed the Landlord in writing that he had refused to repair the roof for over 2 years. He stated that water continued to leak into the bathroom, lounge and bedroom through the ceiling. He informed the Landlord that he had attempted to seal the areas which were leaking and when sealant had not worked, he put adhesive waterproof tape on the areas, to no avail. He also advised that he would now have to replace his wall unit and hi-fi speaker. He deducted R850.00 from his April 2004 rental, being the cost of these repairs to the ceiling. The letter itself does not convey that this was a unilateral action, but one which he “trusts that the landlord will be reasonable and allow the reduction made”.

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The response from the landlord to this on 13 May 2004 was to give him 2 months’ notice to vacate in terms of his lease which had “expired and he had to vacate by 31 July 2004”. It should be pointed out at this stage that the anniversary date of the continued lease would have expired on 28 February 2005 and no reasons were given for early cancellation of the lease.

The Tenant’s reaction to the letter of 13 May 2004 terminating his lease was to point out to the Landlord that;
1. This action was an attempt to evict him; and
2. His rights as a tenant had not expired.

While the rest of the letter deals with arguments or debates around the reductions in rental the Tenant felt he was entitled to, he also put into dispute the landlord’s right to unilaterally terminate the lease agreement. He further indicated that he would not be vacating the flat and that in his opinion the Landlord’s action “demonstrate (d) a flagrant disregard for the rights of tenants”, and that he would be approaching the Tribunal for an “interpretation” of this.

On 25 May 2004 Mrs. Kaplan, acting on the advice of an agent of the landlord requested a meeting with the tenant to settle this matter amicably with the landlord. The tenant agreed to this. From the evidence that was led, it appears that the proposed meeting subsequently took place on 29 July 2004.

Meanwhile on 15 July 2004, Mr. Jonathan Mitchell, a building consultant whose expertise, experience and skill was subsequently accepted by the Landlord, was called in by the Tenant to provide an inspection report on the premises.

The report recommended the following:
1. A reputable waterproofing contractor ought to be appointed, to satisfactorily remedy the concrete roof over apartment 801 to prevent any storm water ingress.
2. The spalling concrete on the interior of flat 801 ought to be attended to, and inspected by a structural engineer who ought to issue a detailed specification of how to treat the steel for purposes of inhibiting any further rust and then to specify an appropriate epoxy repair mortar. Thereafter, the ceiling is to be reskimmed and repainted.
3. Where the walls are cracked, these cracks ought to be raked open and sealed with a suitable flexible acrylic sealant, and then painted over.

4. Wherever there is loose and flaking paint as a result of storm water ingress and dampness, this loose paint ought to be scraped off, the area thoroughly prepared and left to dry out prior to re-painting with three coats of good quality paint.

5. The loose plaster, externally, which is visible through the kitchen window, ought to be carefully hacked off, and be satisfactorily remedied. Precautions have to be taken against falling debris to the restaurant patrons below.

6. The damaged furniture; carpets; hi-fi equipment and speakers be replaced.

7. The remedial work be undertaken by suitably skilled artisans, and all under competent supervision (Own emphasis).

8. The remedial work be undertaken in consultation with the Tenant, so as to cause as little inconvenience and disruption as possible.

The consultant came to the conclusion that "there is severe storm water ingress to the apartment through the concrete roof above. The damage to the roof slab as well as consequential damage to the furniture and fitting is regarded as extensive."

According to the evidence provided to the Tribunal, this report was given to the Landlord on 25 July 2004. Mr Mitchell as a witness was impressive in terms of his knowledge and unambiguous replies to questions posed while leading evidence, under cross-examination and answering members’ questions of clarity.

On 22 July 2004 the Landlord advised the Tenant in writing that they had unsuccessfully tried to gain access to his unit on that day and asked for a convenient time to gain access. There was no evidence given at the hearing that any reasonable prior notice to gain access had been given to the Tenant. This flies in the face of good relationships, as there is a need to give reasonable prior notice of inspections or request for entry in terms of the Act and Regulation 6 of the Unfair Practices Regulations.

On 23 July 2004 the Tenant replied in writing that he still had not received a response to a letter sent on 21 July 2004 and advised the Landlord that he was not unreasonably denying access as he had valid reasons. It appears from this letter that some sort of roof repairs had
been attempted on 8 July 2004, but that water was still leaking into flat 801.

On 29 July 2004 a meeting took place between the Tenant and Landlord. The aim of the meeting was evidently to reach some sort of agreement or settlement of the claims between the two parties.

It is alleged by the Landlord that, although no agreement was reached at this meeting, an offer of an alternative unit was made to the Tenant. This alleged offer was denied by the Tenant. The Tenant claims that he brought to the Landlord’s attention a number of cases and the provisions of the Rental Housing Act and Regulations at this meeting. This was not disputed by the Landlord.

On 12 August 2004 an inspection was carried out by the City of Cape Town’s building inspectorate as testified by one of the inspectors of the City, one Alwyn Goodall. Though mention is made of a report that was drawn up which is supposedly for the Landlord or owner of a building, this witness could not answer questions as to what repairs had been done subsequent to the report, Mr. Goodall could only testify that another inspector, one Yusuf Kader, advised him that the matter was “in order”. He could provide no answers to photo’s taken in 2005 which showed that cracks on the external portions of the building had not been attended to or repaired. The Landlord’s answer to this was that, if the inspector said that it was in order, then the work must have been done.

The Tribunal finds this explanation unacceptable as the City’s inspectorate were made aware of the potential danger to people below and appear to be neglecting their duties in ensuring the public safety. At the very least a copy of the report, recommendations and actions taken could have been presented which would protect the City against civil claims of negligence where they have been made aware of a danger to the public and not made any real attempt to address the issue. The Tribunal subsequently undertook an in loco inspection of the property and it was evident that the building was last painted without attention to the cracks, as paint was clearly visible inside the crack outside the kitchen window of flat 801.

It is recommended by the Tribunal that this aspect requires further investigation and the support staff of the Department is hereby instructed to request a copy of the report of the inspector, his recommendations,
actions that were undertaken and all relevant documentation including an explanation of why it is the opinion of the City inspectorate that the matter had been deemed “in order”.

During August 2004 an air monitoring specialist was also called in by the Tenant who conducted several tests to measure the air quality and check for mould in the apartment. The fungi as identified in these tests indicate that the “penicillium” fungi are normally associated with “dead organic material” and in another report it is stated that the dominance of “Epicorium purpurascens” are “known to occur in relatively high numbers in aerosols”. The only evidence of value to this matter provided was that there was damp and mould inside the apartment. This was also evident in the in-locos inspection. When it was suggested to the specialist as witness that damp, lack of direct sunlight and poor ventilation were also contributing factors to damp and mould, the witness could not say. The effect of these spores on humans could also not be tendered by the witness.

It is common cause that by September 2004 there was already a barrage of documentation and correspondence between the Tenant and the Landlord and his attorneys.

On 10 September 2004, two offers were made by the Landlord via his attorneys. The first requested access to the flat to repair and also to redecorate the unit. The second or alternate offer was the first formal offer of alternative accommodation at a “slightly discounted market related rental”. Both offers were however subject to the condition that the Tenant pays the full outstanding rental and the costs of the legal action to date.

The Tenant refused this offer as being unreasonable as in his opinion, the alternative unit was cockroach infested and that, should he have similar problems or a need for repairs or action from the Landlord, they would not be done as his past experiences have proved that these would not take place and lastly, that he would be in a worse financial position than he was before.

On questioning there was no indication of what exactly the rental for the alternate unit would have been and in the absence of this important information to the Tenant, it may indeed be reasonable for the Tenant to suspect that the rent would be the same or possible even more than

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his current rental at flat 801. The question of what the legal costs would have been at that stage was answered vaguely and according to the Landlord, amounted to “a few thousand Rands”. Further questioning on the issue elicited the response that the offer was made more to “placate the tenant”.

It is the view of the Tribunal that this alternative offer could easily be construed as an attempt by the Landlord to induce the tenant to waive his rights in contravention of Regulation 9(1) (g) of the Unfair Practices Regulations. This could have had different implications for the Landlord had this offer been accepted and an issue or dispute subsequently arose. It is however considered appropriate to rest this aspect here but to raise a word of warning to the Landlord that offers made to tenants must firstly be given with the Act and Regulations in mind and secondly that, should such an offer not be clear in terms of not putting a tenant in a more disadvantaged position, it cannot be considered as an offer of alternative accommodation as envisaged in the Act and Regulations. In particular circumstances this can easily be construed as being an attempt to induce a tenant to waive his/her rights.

Aside from the uncertainty of the rental to be paid, the conditions attached in not compromising for the defective repair work which has been acknowledged by the Landlord and the insistence that the legal costs be paid together with all the arrears, amount to an offer which no reasonable or right thinking person could agree to.

It is for the reasons above that the Tribunal comes to conclusion that there was in substance no alternative accommodation offered to the Tenant.

Another concern which the Tribunal noted was that there was a company policy that receipts were only issued to tenants when requested. This is contrary to what is prescribed in the Act and Regulation 7 which states that a landlord must issue receipts for all payments made by the tenant. The Landlord is strongly advised to put this into practice as continued failure to comply may result in the Landlord appearing before the Tribunal again.

In October 2004 further attempts were made to repair the roof on the outside and work was also done on the inside of flat 801, in addition to other flats on the top floor of the building. While no evidence was led
in respect of the conditions of these other flats, the fact that they needed repairs to the inside which are normally the tenants’ responsibility, leads to the conclusion that the maintenance issue of the roof extended to more than just above flat 801. On 3 November 2004, the aforesaid expert, Jonathan Mitchell, again inspected the premises and came to the conclusion that the “remedial work appears to be cosmetic only, and has been executed in an inferior standard of workmanship.”

This conclusion was contested by the evidence of the building supervisor David Kavitzky, as well as Deon Bell, who testified that they had supervised the work and that it was completed satisfactorily in their opinion. Given the evidence led that David Kavitsky has a marketing background and little or no building experience and that Deon Bell by his own admission, is a “handyman” without formal training in building supervision and the Tribunal’s own in-loco inspection, the Tribunal can only concur with Mr. Mitchell’s assessment of the work carried out. The Landlord’s own attorneys acknowledged that “the repair work had failed-again”.

The in-loco inspection by the Tribunal also highlighted the following problems and what appear to be more indications of a lack of maintenance.

- There is evidence of spalling on a number of the balconies with a potential danger to persons using them as well as the garden,
- The roof shows that a number of attempts have been made to “patch” problem areas instead of just doing a more expensive and complete longer lasting waterproofing exercise on the whole roof, reducing the problems for all tenants on the top floor.
- Water reservoirs are not sealed and hold the potential for bird, animal droppings and dirt easy access to easily contaminate the water supply,
- Where there has been spalling or cracks appearing in the outer structure of the building, grouting had been placed in these cracks in what would appear to be an attempt to conceal the problem rather than address it.
- Window frames are generally badly rusted.

A lot of emphasis has been placed on two things or actions by the Tenant:
Firstly, it is alleged that access was denied; and secondly, the subsequent report of the expert, Jonathan Mitchell, was only “discovered” a day or two prior to the start of this case.

The Tribunal’s view on the matters is as follows:

In respect of the alleged denial of access:

- If access was indeed such a major issue or problem as was alleged, it is not clear why the normal procedure of giving proper reasonable notice to gain access was not followed.

- The Tenant has admitted to denying access only once and his evidence and the Landlord’s evidence was that a lot of communication for some reason took place through a Ms Kaplan. The Tenant consistently advised her that she could have the keys at any time should access be required.

- The intention of gaining access to the inside “to make the place habitable” as part of an on-going process “until the roof leak could be properly dealt with” was never conveyed to the Tenant,

- Given that the nature and extent of the problem was clearly documented, a detailed report was in the possession of the Landlord, and related to the outside of the premises the insistence on access to the inside to effect “repairs” does not make sense, as any work on the inside would be a waste of both the Tenant’s time, an unnecessary invasion of his privacy, and a waste of the Landlords’ money as it would not be addressing the maintenance issue.

The trend that seems to appear from these past 2 years is that there were only responses to the Tenant when moneys were short paid or a reduction in the rental was asked. There is no documented evidence that anything was done about the root cause of the Tenant’s complaint or any explanation given to the Tenant of what, if any, steps were being taken to address the complaint or resolve the problem.

**BASED UPON THE GUIDELINES AS PROVIDED BY THE ACT, THE IN LOCO INSPECTION .AND THE EVIDENCE PRESENTED, THE RENTAL HOUSING TRIBUNAL RULES THE FOLLOWING:**

**Complaint 1**

Failure to do maintenance in terms of Regulation 4 of the Unfair Practices Regulations published in terms of the Act

The Act does not prescribe the format in which a notice requesting repairs must be given. In the event that one takes the first verbal notice
as being in 2002 there were no repairs effected within the 30 days as prescribed in Regulation 4(1) (e) of the Unfair Practices Regulations. If one considers the written notice in February 2003, there also were no repairs effected in response thereto. The evidence led would indicate that repairs more of an emergency nature were done, rather than any specific plan to do maintenance. In the absence of any other evidence of maintenance, the Tribunal cannot but agree that there was a serious lack of maintenance as foreseen or envisaged in the Rental Housing Act and the Unfair Practices Regulations.

The long delays and failure to communicate with the Tenant are inexcusable and not characteristic of a good landlord.

The Landlord must submit a detailed repair plan for the whole building to the Tribunal by 31 July 2005, which includes implementation dates to effect at least the maintenance issues raised by the Consultant’s report or which addresses the following:

1. A reputable waterproofing contractor ought to be appointed, to satisfactorily remedy the concrete roof over flat 801 to prevent any storm water ingress.
2. The spalling concrete on the interior of flat 801 ought to be attended to, and inspected by a structural engineer who ought to issue a detailed specification of how to treat the steel for purposes of inhibiting any further rust and then to specify an appropriate epoxy repair mortar. Thereafter, the ceiling to be reskimmed and repainted.
3. Where the walls are cracked, these cracks ought to be raked open and sealed with a suitable flexible acrylic sealant, and then painted over.
4. Wherever there is loose and flaking paint as a result of storm water ingress and dampness, this loose paint ought to be scraped off, the area thoroughly prepared and left to dry out prior to repainting with three coats of good quality paint.
5. The loose plaster, externally, which is visible through the kitchen window, ought to be carefully hacked off, and be satisfactorily remedied. Precautions have to be taken against falling debris to the restaurant patrons below.
6. The remedial work be undertaken by suitably skilled artisans, and all under competent supervision.
7. The remedial work be undertaken in consultation with the Tenant, so as to cause as little inconvenience and disruption as possible.
The Tribunal support staff must ensure that the maintenance plan is adhered to. In the event of the repairs being effected to the extent that it becomes habitable to be let, the Landlord should, in terms of Regulations 5(1) and 5(2), ensure that the Tenant is able to return to the dwelling.

**Complaint 2**

*Failure to allow remission of rental in terms of section 5 of the unfair Practices Regulations*

The general rule is that, a tenant is entitled to remission of rent if through the landlord’s default and/or vis major or casus fortuitus s/he is deprived wholly or partly of the use and enjoyment of the property let to him/her.

Since a lease imposes reciprocal obligations upon the parties, a landlord will not be entitled to claim the whole rent, and conversely a tenant will be entitled to a complete or partial remission of rent (depending upon the circumstances), if the landlord defaults in his obligations to maintain the property or to ensure the tenant has undisturbed use and enjoyment of the property let to him.

The parties to the lease may by agreement regulate the tenant’s right to remission of rent. However, Regulation 9(1)(g) of the Unfair Practices Regulations, published in terms of the Rental Housing Act, 1999 (Act No 50 of 1999) stipulates that a landlord may not induce a tenant to waive his or her rights under the Act, these regulations or any other law, Such a clause in a lease agreement would therefore be invalid.

A reasonable landlord would have, even in the absence of the Act and Regulations, at least investigated the complaint and attended to the maintenance obligations.

The facts in this case indicate that the Landlord’s serious lack of maintenance contributed directly towards the Tenant’s inability to derive proper use and enjoyment of the property let to him. It is therefore the Tribunal’s view that the request for remission of rent was reasonable.

In the light of the above, the Tenant is entitled to a remission of rent and costs incurred calculated as follows:

- 50% remission of R 2 500-00 for 24 months totalling R 30 000-00 (September 2002 — August 2004) and
- 100% remission of R 3 025-00 for 10 months totalling R 30 250-00 (September 2004 — June 2005)
- Repairs to ceiling R 850-00

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Cost of building consultant’s report R 3 000-00
Air Quality Monitoring report R 1 500-00
Swift Microbiology report R 1 500-00

Accordingly, the amount to be paid back to the Tenant is 50% of what was paid in rental from August 2002 to September 2004, plus any rental paid after 01 September 2004, plus the R 6 000-00 paid for the reports stated above, less the amount of R 850-00 already deducted from the rental by the Tenant, less R 1 512-50 rental for July 2004, less R 1 512-50 rental for August 2004.

A reconciliation of the amount to be repaid to the Tenant must be provided to the Support Staff within 14 days of the date of this ruling and payment (if any) in terms thereof, must be effected within 7 (seven) days thereafter. In respect of the additional claims for compensation, pain and suffering, it is suggested that the Tenant takes this matter up with another court as more evidence and evidence of a different nature would need to be led in respect of this claim.

NOTE: It is an offence in terms of Section 16 of the Rental Housing Act, 1999 not to comply with this ruling. If convicted you may be liable to a fine or imprisonment, not exceeding two years or to both a fine and imprisonment.

S. Patel (Chairperson)
Date 23/06/2005.

The High Court made the following order: -
(a) It set aside the RHT’s decision dated 5 August 2005 to prosecute the Applicant (landlord)
(b) The Applicant had to provide the RHT within 60 days of the order (judgment), a report detailing what repairs and maintenance were carried out in terms of the RHT’s ruling in 5 August 2005.
(c) The rental remission was 50% for the period September 2002 until August 2004, less the amount of R850.00, less the amount of R1512.50 rental for July 2004, less the amount of R1512.50 rental for August 2000;
(d) Parties (landlord and tenant) would share the costs equally for
the building consultant’s report (R3000.00); air quality and monitoring report (R1500.00) and Swift microbiology report (R1500.00).

(e) The RHT’s ruling of 100% rental remission for the period September 2004 until July 2005 was set aside.

COMMENT
The RHT set out its ruling in a comprehensive manner and applied itself to the issues of law and to the facts of the case. This ruling was challenged by the landlord who brought an application for review in the Cape High Court. The application was brought in terms of PAJA – Promotion of Administrative Justice Act 3 of 2000. The first respondent S Patel N.O. in an Explanatory Affidavit questioned the relevance of PAJA on which the application was largely founded. The RHA allows a party to bring review proceedings in terms of section 17.

Davis J, however, made no pronouncement on this issue and the applicability of PAJA was left untested. In fact, the review proceedings in terms of the RHA and the common law, allow the high court to investigate procedural fairness. Davis J would appear to have applied his mind to an application for an appeal and perhaps considered the RHT as another administrative departmental appendage rather than an independent body with powerful authority.

KWAZULU-NATAL RENTAL HOUSING TRIBUNAL

Ref:13/8/3/1426/06 Tel: (031) 336 5222

RULING OF THE RENTAL HOUSING TRIBUNAL IN TERMS OF SECTION 13 OF THE RENTAL HOUSING ACT, 50 OF 1999

CASE NUMBER: 13/8/3/1426/06

IN THE MATTER OF:

Complainant Stanley Williams

Respondent Ethekwini Municipality
Whereas the complainant and respondent, as listed above, were in dispute under the abovementioned case number before the Rental Housing Tribunal as contemplated in section 10(5) of the Rental Housing Act 50 of 1999,

Duly constituted by:-
1. Dr SI Mohamed
2. Mrs P Dabideen
3. Mr XMB Zondo

Lease – cancellation by landlord for breach - breach for non-occupation in terms of lease contract - tenant’s request for an extension granted - Complaint lodged by tenant with the Rental Housing Tribunal to have the cancellation declared an “unfair practice”. Landlord’s Dispute Panel – reviewing tenant’s objection based on investigation and social workers’ reports. Tribunal deems certain provisions of lease not in compliance with the Rental Housing Act and the Constitution. Tribunal further deems the process and procedure of the landlord’s Dispute Panel to be deficient

First Appearance-for hearing was adjourned on February 2007, both parties seeking an adjournment.

This matter was heard on 14 March 2007. The tenant Stanley Williams (Williams), the complainant in this matter, represented himself. The Ethekwini Municipality (the Municipality), the landlord was represented by a Ms. Nomusa Ntombela, an employee of the Municipality, employed as a renting officer. Mr. Sazi Ngubo was the Municipality’s legal representative.

The dispute emanated from the Municipality’s termination of the lease. Parties entered into a written lease contract on 14 March 1997. The dwelling occupied by Williams is situated at 424A John Dory Drive, Newlands East, Durban. The leased dwelling is part of the Municipality’s social housing project intended for poor tenants. The crucial materials terms of the lease were: -

(a) the income level of the tenant (clause 3.0 of the lease: Housing Code)
(b) the restrictive nature of the period of occupation (clause 4.0 of the lease: Use of the Premises, particularly 4.1 "the LESSEE shall at all times personally occupy and reside in the premises unless otherwise permitted by the COUNCIL")
The Dispute Panel’s policy allows for the reinstatement of a tenant whose objection to cancellation is based on good cause and other factors, provided the tenant’s non-occupation of the lease dwelling is less than two years.

The Municipality cancelled the lease for breach, in that, Williams was not personally in occupation of the dwelling for approximately seven years. Williams lodged a complaint with the KwaZulu Natal Rental Housing Tribunal on 12 October 2006 against the Municipality. The Tribunal had to consider whether the lease contract terminated by the Municipality constituted an unfair practice. The evidence by the parties required the Tribunal to examine the validity of the notice to vacate, the circumstances of the tenant, the Municipality’s policy relating to “illegals”, the procedure followed by the Municipality’s Dispute Panel, social workers’ reports and other relevant matters.

The delay in producing a ruling was due to the Municipality’s failure to provide documents requested by the Tribunal.

**Brief Background**
Williams received a notice to vacate (undated - Exhibit 2) from the Municipality, headed “cancellation of tenancy agreement.” It made reference to clause 11.0 of the agreement that provided for breach. An investigation revealed that Williams was not in permanent and continuous occupation and that his lease was therefore cancelled with immediate effect. He was however accorded 30 days to give vacant possession of the flat.

Clause 11.0 of the agreement (Exhibit 3) reads:

11.0 **BREACH**
11.1 In the event of the LESSEE committing a breach of any of the terms and conditions of this lease whether by making default payment of any rental on the date or otherwise, then the COUNCIL may summarily cancel this lease without notice and immediately enter upon and take possession of the premises and eject the LESSEE or any other person or persons thereupon.

**Summary of Complainant’s Evidence:**
Williams in his evidence confirmed that he did not occupy the dwelling for approximately seven years. He bought a flat in the Bluff area and
lived there at the time he and his wife Merle Morrow separated. They eventually divorced and Morrow later moved out of the leased dwelling to live with her mother in 2004.

Williams sold his Bluff flat in 2004 and later re-occupied the leased dwelling at 424A John Dory Drive with his fiancée Antoinette in mid 2004. Morrow’s son Dale (William’s step-son) was in occupation of the leased dwelling with his fiancé in 2004 but was “forced” to move to his fiancé’s house by Antoinette because Williams had re-occupied the dwelling.

**Witness:**
Antoinette’s evidence confirmed that she moved into the leased dwelling with her two children and that she got Dale to move out.

**Respondent’s version of events:**
Ntombela’s evidence was that the Municipality’s Dispute Panel, established with a specific mandate to “adjudicate” its housing allocation process and regularisation of “illegal” tenants, considered Williams’s objection. The Panel was established by the Municipality, comprising of senior housing officials and councillors, to ensure a fair and just allocation process.

The Tribunal could not ascertain the following crucial information from the Municipality’s evidence in respect of Williams:

a.) who comprised the Panel
b.) minutes of the proceedings
c.) Constitution or rules governing the process and procedure of the Panel.

The following were not in dispute though:

(i) the fact that Williams who objected to the termination of his lease was not given the opportunity to state his case in person before the Panel;

(ii) the Panel’s decision was final without recourse to an appeal procedure to have the decision reviewed.

Ntombela explained the process involved in arriving at the cancellation of Williams’s tenancy. Exhibit 9 was the summary of the case history. She also summarised the social workers’ findings and stated that one social worker who had compiled the report (Ms. Zuma) appeared before the Panel recommending the reinstatement of Williams.
Ntombela’s evidence together with Williams and correspondence from the latter’s attorney presented makes it common cause that the lease was cancelled in February 2006. The question that arises is whether the cancellation was proper and as a consequence, if it presented an “unfair practice”?

Assessment of the evidence and facts of the case
The Tribunal is under statutory duty to consider the Municipality’s policies and the provisions of a lease “to the extent that it does not constitute an unfair practice”:

s13 (6) When acting in terms of subsection (4), the Tribunal must have regard to-
(a) the regulations in respect of unfair practices;
(b) the common law to the extent that any particular matter is not specifically addressed in the regulations or a lease;
(c) the provisions of any lease to the extent that it does not constitute an unfair practice;
(d) national housing policy and national housing programme; and
(e) the need to resolve matters in a practicable and equitable manner.

The Tribunal is also bound by the provisions of the Constitution of the country to satisfy itself that a fair and equitable decision was made by the Municipality in terms of s33(1) of the Constitution: -

[Just administrative action: (1) “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.

While it was not the intention of the Tribunal to review the decision of the Municipality and, it most certainly does not have the powers to do so, the hearing proceedings provided an opportunity for Williams to put forward his case in person, which did not happen during the Municipality’s investigation by the Panel.

Regarding the breach and ejectment clause, there are several critical issues that conflict with the provisions of the Rental Housing Act and the Constitution: -

11.0. **BREACH**
11.1 In the event of the **LESSEE** committing a breach of any of the terms and conditions of **this lease** whether by making
default payment of any rental on the date or otherwise, then the COUNCIL may summarily cancel this lease without notice and immediately enter upon and take possession of the premises and eject the LESSEE or any other person or persons thereupon.

Read with

15.0. EJECTMENT
15.1. The COUNCIL shall have the right summarily to eject the LESSEE and his or her belongings, without notice, if he or she ……

The following points are impossible to enforce due to their unconstitutionality nature, although all other provisions of the lease are enforceable in all other respects: -

1. “and immediately enter upon and take possession of the premises and eject the LESSEE or any other person or persons thereupon”
2. summary ejectment –

The reference to “summarily cancel this lease without notice…” appears to be harsh but may be considered a forfeiture clause and strictly enforceable (Venter v Venter 1949 1 SA 768).

The powers envisaged by clause 11 and clause 15, provide the Municipality with the absolute right to take possession of the dwelling and eject the tenant without a court order. Section 26 (3) of the Constitution states that no one may be evicted from their home without an order of court made after considering all the relevant circumstances and that no legislation may permit arbitrary evictions. This is repeated in the Rental Housing Act 50 of 1999 which is the law of general application, governing tenancy contracts.

Williams did not challenge the undated notice but, in fact, requested an extension (making reference to 3rd of February 2006 as the date of receipt of the said notice), which was granted by the Municipality. He also changed his mind about having his own son Duwayne substituted as the legal tenant. He then decided to lodge a complaint with the Tribunal. Williams’s non-occupation for 7 years of the Municipality’s dwelling, was motivated by a marital dispute, led him to move out. He stated
that he purchased a property on the bluff which he then occupied for a considerable period. This in itself is sufficient grounds for cancellation in terms of the Municipality’s allocation policy and regularisation process. The maximum period, with good cause, is two years that a tenant is allowed to be in non-occupation of the Municipality’s dwelling. Williams occupied his own property at the Bluff for 7 years and thereby breached his contract with the Municipality.

The Municipality, however, failed to cancel for breach at the time Williams was not in occupation of the leased dwelling. It is after his return and re-occupation did the Municipality proceed with cancellation. It also ignored the social worker’s recommendation that Williams be reinstated; the recommendation was based on a detailed investigation that included all persons who occupied the leased dwelling with or without his permission.

The Tribunal’s observation:

1. The Municipality’s Panel is seriously in need of overhauling to adhere to the principles of Administrative justice.
2. The Tribunal finds that in terms of s13(6)(c) of the Rental Housing Act, clause 11.0 and 15.0 of the Municipality’s lease stated above constitute an unfair practice and violates the provisions of the Constitution. The Tribunal strongly recommends that the Municipality effect the necessary adjustments to the problematic provisions of its lease contracts to bring it in line with the statutory requirements imposed by the Rental Housing Act and the Constitution.

Ruling
The Tribunal rules that the notice to vacate constitutes an unfair practice. Williams is therefore the legal tenant of the leased dwelling.

Dr. S I Mohamed (chaired); Mrs P Dabideen & XMB Zondo

16 November 2007
CONFIDENTIALITY AGREEMENT

COMPLAINT LODGED WITH THE RENTAL HOUSING TRIBUNAL IN TERMS OF SECTION 13 OF THE RENTAL HOUSING ACT (ACT NO. 50 OF 1999)

IN THE MATTER BETWEEN

TENANTS OF LINCOLN: MANSIONS
COMPLAINANT / TENANT (REPRESENTED BY MR BHOEPESH BHAGWAN)

AND

DR JACKPERSAD & PARTNERS:
RESPONDENT / LANDLORD (REPRESENTED BY MS OMAR)

CONFIDENTIALITY AGREEMENT

In order to facilitate the mediation and to ensure that all parties can speak freely to each other, and to the mediator, we agree to the following:--

1. All discussions and debates will be conducted in a constructive manner with all parties respecting the process.
2. All discussions will be regarded as privileged and all parties will adhere to a strict policy of confidentiality.
3. Should any other proceedings arise a result of the subject matter of the mediation no party will subpoena the mediator to give evidence regarding any discussion or decisions which occurred during the mediation will provide a certificate to this effect and the matter will be referred automatically to the Rental Housing Tribunal for determination. Provided that the landlord reserves the right to withdraw the rental increase and institute eviction proceedings under law.
4. Should the mediation not be successful, the mediator will record, with the consent of parties, those issues upon which the agreement has been reached. In respect of all other areas in which there is no agreement, the parties will return to the positions taken at the commencement of the mediation.
SIGNED AT Durban ON THIS 28th DAY OF October 2003 by Signed by B N Bhagwan and S U Khoosal (Complainants) and for Radprop Trust (Respondent) and Sayed-Iqbal Mohamed (Mediator)

MEDIATION AGREEMENT

COMPLAINT LODGED WITH THE RENTAL HOUSING TRIBUNAL IN TERMS OF SECTION 13 OF THE RENTAL HOUSING ACT (ACT NO. 50 OF 1999)

IN THE MATTER BETWEEN

Tenants of Lincoln: Mansions COMPLAINANT / TENANT (REPRESENTED BY MR BHOEPESH BHAGWAN)

AND

DR JACKPERSAD & PARTNERS: RESPONDENT / LANDLORD (REPRESENTED BY MS OMAR)

AGREEMENT between Radprop Trust (“Landlord”) and The Tenants of Lincoln Mansions (“The Tenants”)

The Parties agree as follows:-

1. The tenants lodged a complaint with the KwaZulu Natal Rental Housing Tribunal on the 19th of August 2003 under reference No. 13/8/3/703/03

2. The complaint related to a rental increase from R 656.66 to R 950.00 with effect as from 1st September 2003.

3. The dispute has been resolved on the basis set below:-

3.1 The tenants of Flat nos. 10, 13, 20, 23, 25 and 26 will pay the prescribed increase of R 950.00 with effect from 1st November 2003, such rental and escalation to be determined in accordance to the written tenancies concluded with the landlord.
3.2 The tenants of Flat nos. 7, 8, 9, 11, 12, 14, 15, 16, 17, 18, 21, 22, 24 and 27. (herein after referred to as “the Affected Tenants”) shall pay a monthly rental of R800.00 per month with effect from 1st November 2003.

3.3 Such rental shall escalate each year at the rate of 15% per annum compounded, the first such increase shall take effect on the 1st of November 2004 and the remaining increases shall take effect on the same day of each successive year.

3.4 Each of the affected tenant undertakes to sign a written tenancy agreement, which shall be terminable on one calendar month’s notice, which shall record the terms set forth in clauses 3.2 and 3.3 above and any other relevant matter in accordance with landlord’s standard terms and conditions.

3.5 It is recorded that each of the affected tenants currently occupy in terms of oral monthly tenancies, terminable upon one calendar month’s notice

4. This agreement is subject to the consent of the trustees of the landlord, which consent shall be communicated to Mr Bhoopesh Bhagwan at Fax No. 031 307 2020.

5. No variations or amendments or cancellations shall be valid unless reduced to writing and signed by the parties hereto.

6. Mr Bhoopesh Bhagwan and Mr Suresh Khusal hereby warrant that they are authorised to sign this agreement on behalf of the tenants in terms of the authority annexed herewith marked “A”.

DATED AT DURBAN ON THIS 28TH DAY OF OCTOBER 2003.

Signed by B N Bhagwan and S U Khoosal (COMPLAINANT) and for Radprop Trust (RESPONDENT) and Sayed-Iqbal Mohamed (MEDIATOR)
The landlord took the matter to the High court seeking the ejectment of the tenants based on notices to vacate. Among other defences, the tenants sought to have the mediation agreement declared unenforceable on the grounds that they were ignorant of their rights in terms of the Rent Control Act that provided certain “protection”.

The court held that the settlement agreement concluded at the RHT was valid and binding.

KWAZULU-NATAL RENTAL HOUSING TRIBUNAL

RULING OF THE RENTAL HOUSING TRIBUNAL IN TERMS OF SECTION 13 OF THE RENTAL HOUSING (ACT NO 50 OF 1999)

CASE NUMBER: 13/8/3/92 & 636/08

IN THE MATTER OF:

COMPLAINANT Mr Carlos Kabongo & Others

RESPONDENT Mr Sewnarain Ashok

Whereas the complainant and respondent, were in dispute under the abovementioned case number before the Rental Housing Tribunal as contemplated in section 10(5) of the Rental Housing Act 50 of 1999.

Duly constituted by

Mr DAS Moloi (Chairperson), Mr L Dube and Adv. N Kuzwayo

As contemplated in section 10 of the Rental Housing Act (Act No 50 of 1999)

Having heard the evidence of all parties, the KwaZulu Natal Rental Housing Tribunal makes the following Ruling in terms of Section 13 of the Rental Housing Act (Act No 50 of 1999):

Evidence was presented by Mr Kabongo, Mr Andile Dube and Miss Tsidi Elizabeth Shelembe. The sum total of their complaint is that the notice to vacate dated 29th September 2008 is unfair and should
be set aside. In evidence Mr Kabongo stated they would want the whole of 2009 to remain in these flats as they have already registered their children in schools in the vicinity of the block of flats.

The Respondent, through Mr Nkosi submitted that notice complies with the law and is not unfair.

**Finding:** The tenants had no signed lease. The respondent did not even have an obligation to enter into written lease if he did not wish to offer his tenants one. In terms of the law a verbal lease operates on a month to month basis and is terminable on (sic) one month’s notice.

Therefore the notice to vacate dated 29th September 2008 is not unfair and is found to be valid in law.

**Signed:** Mr Das Moloi (chairperson); MR L Dube & Adv N Kuzwayo

26 January 2009

**COMMENT**

There appears to be an obvious confusion about fundamental principles of contract law and the RHA. It does not make sense referring to tenants “had no signed lease” because there were oral leases in place. The respondent does have a serious obligation to reduce to writing the terms and conditions on oral lease when requested by tenant in terms of section 5(2) of the RHA. This section states: A landlord, must if requested thereto by a tenant, reduce the lease to writing. Alternatively, the part of the ruling may imply that because the tenants do not have signed (written?) leases, the respondent/landlord is not obliged to continue with the leases.

Since the notice concerns ultimately displacement, the RHT needs to consider other factors, refer to 4.2 above, Chapter 4. There is no summary of the evidence but on examination of the records presented by the tenants, their complaints were lodged in early 2008 regarding two different notices. The RHT heard the matter almost a year later and in the interim, there were other notices to vacate cancelled by rent increases and obvious withdrawals of the notices. The complaints were lodged in January 2008 and May 2008 under the above reference numbers but the RHT ruled on a notice issued in September 2008 that was not formally before it.
APPENDIX 1: RENTAL HOUSING ACT 50 OF 1999 AS AMENDED

ACT

To define the responsibility of Government in respect of rental housing property; to create mechanisms to promote the provision of rental housing property; to promote access to adequate housing through creating mechanisms to ensure the proper functioning of the rental housing market; to make provision for the establishment of Rental Housing Tribunals; to define the functions, powers and duties of such Tribunals; to lay down general principles governing conflict resolution in the rental housing sector; to provide for the facilitation of sound relations between tenants and landlord / landladys and for this purpose to lay down general requirements relating to leases; to repeal the Rent Control Act, 1976; and to provide for matters connected therewith.

PREAMBLE

WHEREAS in terms of section 26 of the Constitution of the Republic of South Africa, 1996 everyone has the right to have access to adequate housing;

AND WHEREAS the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right;

AND WHEREAS no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances;

AND WHEREAS no legislation may permit arbitrary evictions;

AND WHEREAS rental housing is a key component of the housing sector;

AND WHEREAS there is a need to promote the provision of rental housing;

AND WHEREAS there is a need to balance the rights of tenants and landlord and to create mechanisms to protect both tenants and landlord against unfair practices and exploitation;
AND WHEREAS there is a need to introduce mechanisms through which conflicts between tenants and landlord can be resolved speedily at minimum cost to the parties;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

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CHAPTER 1
INTRODUCTORY PROVISIONS

1. **Definitions** - In this Act, unless the context otherwise indicates - 
   “**dwelling**”, includes any house, hostel room, hut, shack, flat, 
   apartment, room, outbuilding, garage or similar structure which is 
   leased, as well as any storeroom, outbuilding, garage or demarcated 
   parking space which is leased as part of the lease;  
   “**financial institution**” means a bank as defined in the Banks Act, 
   1990 (Act No. 94 of 1990);  
   “**head of department**” means the officer in charge of a department 
   of the provincial government responsible for housing in the province; 
   “**House Rules**” means the rules in relation to the control, 
   management, administration, use and enjoyment of the rental housing 
   property;  
   “**landlord**” means the owner of a dwelling which is leased and 
   includes his or her duly authorised agent or a person who is in lawful 
   possession of a dwelling and has the right to lease or sub-lease it;  
   “**lease**” means an agreement of lease concluded between a tenant 
   and a landlord in respect of a dwelling for housing purposes;  
   “**MEC**” means the member of the Executive Council of a province 
   responsible for housing matters;  
   “**Minister**” means the Minister of Housing;  
   “**periodic lease**” means a lease for an undetermined period, subject 
   to notice of termination by either party;  
   “**prescribed**” means prescribed by regulation by the MEC, by 
   notice in the Gazette;  
   “**regulation**” means a regulation made in terms of section 15;  
   “**rental housing property**” includes one or more dwellings;  
   “**Rental Housing Information Office**” means an office established 
   by a local authority in terms of section 14(1);  
   “**tenant**” means the lessee of a dwelling which is leased by a 
   landlord;  
   “**this Act**” includes any regulation;  
   “**Tribunal**” means a Rental Housing Tribunal established under 
   section 7;  
   “**unfair practice**” means (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”.

CHAPTER 2
PROMOTION OF RENTAL HOUSING PROPERTY

2. Responsibility of Government to promote rental housing -
(1) Government must –
(a) promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures that –

(i) improve conditions in the rental housing market;
(ii) encourage investment in urban and rural areas that are in need of revitalisation and resuscitation; and
(iii) correct distorted patterns of residential settlement by initiating, promoting and facilitating new development in or the redevelopment of affected areas;
(b) facilitate the provision of rental housing property in partnership with the private sector.

(2) Measures introduced in terms of subsection (1) must -
(a) optimise the use of existing urban and rural municipal and transport infrastructure;
(b) redress the inhibit urban fragmentation or sprawl;
(c) promote higher residential densities in existing urban areas as well as in areas of new or consolidated urban growth; and
(d) mobilise and enhance existing public and private capacity and expertise in the administration or management of rental housing.

(3) National Government must introduce a policy framework, including norms and standards, on rental housing to give effect to subsection (1).

(4) Provincial and local governments must pursue the objects of subsection (1) within the national policy framework on rental housing referred to in subsection (3), and within the context of broader national housing policy in a balanced and equitable manner and must accord rental housing particular attention in the execution of functions, the exercise of powers and the
performance of duties and responsibilities in relation to housing development.

3. Measures to increase provision of rental housing property -
   (1) The Minister may introduce a rental subsidy housing programme, as a national housing programme, as contemplated in section 3(4)(g) of the Housing Act, 1997 (Act No. 107 of 1997), or other assistance measures, to stimulate the supply of rental housing property for low income persons.
   (2) Parliament may annually appropriate to the South African Housing Fund an amount to finance such a programme.
   (3) A separate account of income and expenditure in respect of such programme must be kept.
   (4) Section 12(1)(b) of the Housing Act, 1997 (Act No. 107 of 1997), does not apply to any amount appropriated by Parliament for purposes of such programme.

CHAPTER 3
RELATIONS BETWEEN TENANTS AND LANDLORDS

4. General Provisions -
   (1) In advertising a dwelling for purposes of leasing it, or in negotiating a lease with a prospective tenant, or during the term of a lease, a landlord may not unfairly discriminate against such prospective tenant or tenants, or the members of such tenant’s household or the visitors of such tenant, on one or more grounds, including race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth.
   (2) A tenant has the right, during the lease period, to privacy, and the landlord may only exercise his or her right or inspection in a reasonable manner after reasonable notice to the tenant.
   (3) The tenant’s rights as against the landlord include his or her right not to have-
      (a) his or her person or home searched;
      (b) his or her property searched;
      (c) his or her possessions seized, except in terms of a law of general application and having first obtained a ruling by a Tribunal or an order of court; or"
      (d) the privacy of his or her communications infringed.
(4) The rights set out in subsection (3) apply equally to members of tenant’s household and to visitors of the tenant.

(5) The landlord’s rights against the tenant include his or her right to -
   (a) prompt and regular payment of a rental or any charges that may be payable in terms of a lease;
   (b) recover unpaid rental or any other amount that is due and payable after obtaining a ruling by the Tribunal or an order of a court of law;
   (c) terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease;
   (d) on termination of a lease to –
      (i) receive the rental housing property in a good state of repair, save for fair wear and tear; and
      (ii) repossess rental housing property having first obtained an order of court; and
   (e) claim compensation for damage to the rental housing property or any other improvements on the land on which the dwelling is situated, if any, caused by the tenant, a member of the tenant’s household or a visitor of the tenant.

5. Provisions pertaining to leases

(1) A lease between a tenant and a landlord, subject to subsection (2), need not be in writing or be subject to the provisions of the Formalities in Respect of Leases of Land Act, 1969 (Act No. 18 of 1969)

(2) A landlord, must if requested thereto by a tenant, reduce the lease to writing.

(3) A lease will be deemed to include terms, enforceable in a competent court, to the effect that -
   (a) the landlord must furnish the tenant with a written receipt for all payments received by the landlord from the tenant;
   (b) such receipt must be dated and clearly indicate the address, including the street number and further description, if necessary, of a dwelling in respect of which payment is made, and whether payment has been made for rental, arrears, deposit or otherwise, and specify the period for which payment is made: Provided that a Tribunal may in exceptional cases, and on application by a landlord, exempt the landlord from providing the information contemplated in this paragraph;
(c) the landlord may require a tenant, before moving into the dwelling, to pay a deposit which, at the time, may not exceed an amount equivalent to an amount specified in the agreement or otherwise agreed to between the parties;

(d) the deposit contemplated in paragraph (c) must be invested by the landlord in an interest-bearing account with a financial institution and the landlord must subject to paragraph (g) pay the tenant such interest at the rate applicable to such account which may not be less than the rate applicable to a savings account with that financial institution, and the tenant may during the period of the lease request the landlord to provide him or her with written proof in respect of interest accrued on such deposit, and the landlord must provide such proof on request;

(e) the tenant and the landlord must jointly, before the tenant moves into the dwelling, inspect the dwelling to ascertain the existence or not of any defects or damage therein with a view to determining the landlord’s responsibility for rectifying any defects or damage or with a view to registering such defects or damage, as provided for in subsection (7);

(f) at the expiration of the lease the landlord and tenant must arrange a joint inspection of the dwelling at a mutually convenient time to take place within a period of three days prior to such expiration with a view to ascertaining if there was any damage caused to the dwelling during the tenant’s occupation thereof;

(g) on the expiration of the lease, the landlord may apply such deposit and interest towards the payment of all amounts for which the tenant is liable under the said lease, including the reasonable cost of repairing damage to the dwelling during the lease period and the cost of replacing lost keys and the balance of the deposit and interest, if any, must then be refunded to the tenant by the landlord not later than 14 days of restoration of the dwelling to the landlord;

(h) the relevant receipts which indicate the costs which the landlord incurred, as contemplated in paragraph (g), must be available to the tenant for inspection as proof of such costs incurred by the landlord;

(i) should no amounts be due and owing to the landlord in terms of the lease, the deposit, together with the accrued interest in respect thereof, must be refunded by the landlord
to the tenant, without any deduction or set-off, within days of expiration of the lease;

(j) failure by the landlord to inspect the dwelling in the presence of the tenant as contemplated in paragraphs (e) or (f) is deemed to be an acknowledgement by the landlord that the dwelling is in good and proper state of repair, and the landlord will have no further claim against the tenant who must then be refunded, in terms of this subsection, the full deposit plus interest by the landlord;

(k) should the tenant fail to respond to the landlord’s request for an inspection as contemplated in paragraph (f), the landlord must, on expiration of the lease, inspect the dwelling within seven days from such expiration in order to assess any damages or loss which occurred during the tenancy;

(l) the landlord may in the circumstances contemplated in paragraph (k), without detracting from any other right or remedy of the landlord, deduct from the tenant’s deposit and interest the reasonable cost of repairing damage to the dwelling and the cost of replacing lost keys;

(m) the balance of the deposit and interest, if any, after deduction of the amounts contemplated in paragraph (l), must be refunded to the tenant by the landlord not later than 21 days after expiration of the lease;

(n) the relevant receipts which indicate the costs which the landlord incurred, as contemplated in paragraph (l), must be available to the tenant for inspection as proof of such costs incurred by the landlord;

(o) should the tenant vacate the dwelling before expiration of the lease, without notice to the landlord, the lease is deemed to have expired on the date that the landlord established that the tenant had vacated the dwelling but in such event the landlord retains all his or her rights arising from the tenant’s breach of the lease; and

(p) any costs in relation to contract of lease shall only be payable by the tenant upon proof of factual expenditure by the landlord.

(4) The standard provisions referred to in subsection (3) may not be waived by the tenant or the landlord.

(5) If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are
deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month’s written notice must be given of the intention by either party to terminate the lease.

(6) A lease contemplated in subsection (2) must include the following information:
(a) The names of the tenant and the landlord and their addresses in the Republic for purposes of formal communication;
(b) the description of the dwelling which is the subject of the lease;
(c) the amount of rental of the dwelling and reasonable escalation, if any, to be paid in terms of the lease;
(d) if rentals are not paid on monthly basis, then the frequency of rental payments;
(e) the amount of the deposit, if any;
(f) the lease period, or, if there is no lease period determined, the notice period requested for termination of the lease;
(g) obligations of the tenant and the landlord, which must not detract from the provisions of subsection (3) or the regulations relating to unfair practice;
(h) the amount of the rental, and any other charges payable in addition to the rental in respect of the property.

(7) A list of defects registered in terms of subsection (3)(e) must be attached as an annexure to the lease as contemplated in subsection (2).

(8) A copy of any House Rules applicable to a dwelling must be attached as an annexure to the lease.

(9) A landlord must ensure that the provisions of subsections (6), (7) and (8) are complied with.

CHAPTER 4
RENTAL HOUSING TRIBUNAL

6. **Application of Chapter** - Unless a province has, before or after the commencement of this Act, enacted legislation providing for matters dealt with in this Chapter, this Chapter will apply to such province.

7. **Establishment of Rental Housing Tribunals** - The MEC may by notice in the Gazette establish a tribunal in the Province to be known as the Rental Housing Tribunal.
8. **Functions of Tribunal** - The Tribunal must fulfill the duties imposed upon it in terms of this Chapter, and must do all things necessary to ensure that the objectives of this Chapter are achieved.

9. **Composition of Tribunal** - (1) The Tribunal consists of not less than three and not more than five members, who are fit and proper persons appointed by the MEC, and must comprise -
   (a) **a chairperson**, who is suitably qualified and has the necessary expertise and exposure to rental housing matters;
   (b) **not less than two and not more than four members**, of whom
      (i) **at least one and not more than two shall be persons** with expertise in property management or housing development matters; and
      (ii) **at least one and not more than two persons shall be persons** with expertise in consumers matters pertaining to rental housing or housing development matters.
   (I A) The MEC must appoint a deputy chairperson from the members referred to in subsection (1)(b).

   (2) The chairperson and members of the Tribunal must be appointed only after -
   (a) the MEC has through the media and by notice in the Gazette invited nominations of persons as candidates for the respective positions on the Tribunal; and
   (b) the MEC has consulted with the relevant standing or portfolio committee of the Provincial Legislature which is responsible for housing matters in the province.

   (3) The MEC may appoint two persons to serve as alternate members of the Tribunal in the absence of any member referred to in paragraph (b) of subsection (1) but such persons must have the relevant expertise contemplated in paragraph (b) of subsection (1).

   (4) Any appointment in terms of subsection (1) or (3) must be for a period not exceeding three years but a person whose term of office as a member has expired may be reappointed by the MEC for an additional period not exceeding three years.

   (5) (a) Any vacancy in the office of a member of the Tribunal must, within three months of such vacancy occurring, be filled by the MEC appointing another member.
under subsection (1) or (3).

(b) Any member so appointed holds office for the unexpired portion of the predecessor’s term of office.

(6) The MEC may at any time for reasons which are just and fair remove from office any member appointed under subsection (1) or (3) and appoint another person to the vacancy resulting therefrom in accordance with subsection (5).

(7) A member or an alternate member of the Tribunal other than a person who is in the full-time employment of the State or an organ of state, must be appointed on the conditions of service determined by the MEC with the approval of the Member of the Executive Council responsible for provincial expenditure in the relevant province.

(8) Conditions of service so determined may differ according to whether the person concerned is appointed on a full-time or part-time basis.

(9) Members of the Tribunal must be reimbursed by the head of department out of funds appropriated in terms of section (12) (1) in respect of reasonable expenditure incurred in the exercise of their duties under this Act.

10. Meetings of Tribunal

(1) The Tribunal will sit on such days and during such hours and at such places as the chairperson of the Tribunal may determine.

(2) Meetings of the Tribunal must be held or resumed at such times and places throughout the area of a Province as the chairperson may at any time determine.

(a) The Chairperson presides at all meetings of the Tribunal.

(b) Where the Chairperson is not present at a meeting, the Deputy Chairperson presides or, if the Deputy Chairperson is not present, the members of the Tribunal present must appoint from amongst themselves a member to preside at such a meeting.

(3) A local authority may, at the request and at no cost to the Tribunal, make a venue available for meetings of the Tribunal.
Meetings of the Tribunal must be convened for the consideration of:

(a) any complaint referred to the Tribunal in terms of section 13;
(b) any other matter which the Tribunal may or must consider in terms of this Act.

The quorum of any meeting of the Tribunal is three members, of which at least two members must be appointed in terms of subsection 9(1)(b)(i) and (ii), respectively.

All decisions of the Tribunal, subject to subsection (7), must be taken by consensus.

Where consensus cannot be reached by the Tribunal, the decision of a majority of the members of the Tribunal must be the decision of the Tribunal.

In the event of an equality of votes on any matter, the person presiding at the meeting of the Tribunal will have a casting vote in addition to that person’s deliberative vote.

A member or any alternate member of the Tribunal must not attend or take part in the discussions of or decision-making on any matter before the Tribunal in which he or she or his or her spouse, or his or her relative within the second degree of affinity, or his or her partner or his or her employer, other than the State, or the partner or the employer of his or her spouse, has any direct or indirect pecuniary interest.

Minutes of the proceedings of the Tribunal must be kept and retained at the offices of the Tribunal.

No decision taken by the Tribunal will be invalid merely by reason of a vacancy in the Tribunal or of the fact that any person not entitled to sit as a member of the Tribunal, sat as such a member at the time when the decision was taken, if the decision was taken by the majority of the members of the Tribunal present at the time and who were entitled to sit as members of the Tribunal.

Any person may, in the prescribed manner, obtain copies of minutes contemplated in subsection (10) against payment of a prescribed fee.

11. Staff

The staff required for the proper performance of the Tribunal’s functions and the administration of this Act, must be appointed subject to the laws governing the Public Service.
(2) The staff contemplated in subsection (1) may include inspectors, technical advisers, mediators and administrative support staff.

(3) Any person appointed in terms of subsection (1) must be provided with a certificate of appointment signed by or on behalf of the head of department.

(4) The Tribunal may, subject to such conditions as it may determine, delegate any powers conferred on it other than a power under section (13)(2)(d), (3), (4) and (5) to a member of the Tribunal or a person appointed in terms of subsection (1) but any such delegation will not preclude the Tribunal from exercising any such delegated powers itself, and the Tribunal may set aside or amend any decision of the delegate made in the exercise of such powers.

Funding of and reporting on activities of Tribunal

12. (1) The activities of the Tribunal must be funded from moneys appropriated by the Provincial Legislature.

(2) The head of department is the accounting officer in respect of moneys appropriated in terms of subsection (1).

(3) An annual report on the activities of the Tribunal must be submitted by the chairperson of the Tribunal to the MEC as soon as possible after, but within four months of, 31 March in each year.

(4) The MEC may require the Tribunal to submit additional reports to him or her as the MEC may require from time to time.

(5) Any report referred to in subsection (3) must be tabled in the Provincial Legislature within 30 days after receipt thereof by the MEC if the Provincial Legislature is in ordinary session, or if the Provincial Legislature is then not in ordinary session, within 30 days of the commencement of the next ensuing ordinary session.

Complaints

13. (1) 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.

(2) Once a complaint has been lodged with the Tribunal, the Tribunal must, if it appears that there is a dispute in respect of a matter which may constitute an unfair practice –

(a) list particulars of the dwelling to which the complaint refers in the register referred to in subsection (8);

(b) through its staff conduct such preliminary investigations as
may be necessary to determine whether the complaint relates to a dispute in respect of a matter which may constitute an unfair practice;

(c) where the Tribunal is of the view that there is a dispute contemplated in paragraph (b) and that such dispute may be resolved through mediation, appoint a mediator, which may be a member of the Tribunal, a member of staff or any person deemed fit and proper by the Tribunal, with a view to resolving the dispute;

(d) where the Tribunal is of the view that the dispute is of such a nature that it cannot be resolved through mediation or where a mediator contemplated in paragraph (c) has issued a certificate to the effect that the parties are unable to resolve the dispute through mediation, conduct a hearing and, subject to this section, make such a ruling as it may consider just and fair in the circumstances.

(3) For purposes of a hearing contemplated in paragraph (d) of subsection (2), the Tribunal may -

(a) require any Rental Housing Information Office to submit reports concerning the inquiries and complaints received, as well as on any other matters concerning the administration of this Act within the area of jurisdiction of that office;

(b) require any inspector to appear before the Tribunal to give evidence, to provide information, or to produce any report or other document concerning inspections conducted which may have a bearing on any complaint received by the Tribunal;

(c) require any Rental Housing Information Office to advise the Tribunal on any matter concerning a dwelling or concerning a complaint received from any landlord or any tenant within the area of jurisdiction of that office;

(d) summon any tenant or landlord or any other person who, in the Tribunal’s opinion may be able to give evidence relevant to a complaint, to appear before the Tribunal;

(e) summon any person who may reasonably be able to give information of material importance concerning a complaint or who has in such person’s possession or custody or under such person’s control any book, document, or object to attend its proceedings and to produce any book, document or object in his or her possession or custody or under his or
her control, to give evidence or to provide information under his or her control;

(f) call upon and administer an oath to, or accept an affirmation from, any person present at the meeting in terms or paragraph (a), (b) or (c), or who has been summoned in terms of paragraph (d) or (e).

(4) Where a Tribunal, at the conclusion of a hearing in terms of paragraph (d) of subsection (2) is of the view that an unfair practice exists, it may -

(a) rule that any person must comply with a provision of this Act;

(b) where it would appear that the provisions of any law have been or are being contravened, refer such matter for an investigation to the relevant competent body or local authority;

(c) make any other ruling that is just and fair to terminate any unfair practice, including, without detracting from the generality of the foregoing, a ruling to discontinue –

(i) overcrowding;

(ii) unacceptable living conditions;

(iii) exploitative rentals; or

(iv) lack of maintenance.

(5) A ruling contemplated in subsection (4) may include a determination regarding the amount of rental payable by a tenant, but such determination must be made in a manner that is just and equitable to both tenant and landlord and takes due cognisance of -

(a) prevailing economic conditions of supply and demand;

(b) the need for a realistic return on investment for investors in rental housing; and

(c) incentives, mechanisms, norms and standards and other measures introduced by the Minister in terms of the policy framework on rental housing referred to in section 2(3).

(6) When acting in terms of subsection (4), the Tribunal must have regard to -

(a) the regulations in respect of unfair practices;

(b) the common law to the extent that any particular matter is not specifically addressed in the regulations or a lease;

(c) the provisions of any lease to the extent that it does not constitute an unfair practice;

(d) national housing policy and national housing programmes; and

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(e) the need to resolve matters in a practicable and equitable manner.

(7) As from the date of any complaint having been lodged with the Tribunal, until the Tribunal has made a ruling on the matter or a period of three months has elapsed, whichever is the earlier -

(a) the landlord may not evict any tenant, subject to paragraph (b);

(b) the tenant must continue to pay the rental payable in respect of that dwelling as applicable prior to the complaint or, if there has been an escalation prior to such complaint, the amount payable immediately prior to such escalation; and

(c) the landlord must effect necessary maintenance.

(8) The Tribunal must keep a register of complaints received and complaints resolved with such details as may be prescribed and quarterly provide the local authority in whose jurisdictions dwellings are situated in respect of which complaints have been received with a list of complaints received and complaints resolved in such format as may be prescribed.

(9) 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.

(10) Nothing herein contained precludes any person from approaching a competent court for urgent relief under circumstances where he or she would have been able to do so were it not for this Act, or to institute proceedings for the normal recovery of arrear rental, or for eviction in the absence of a dispute regarding an unfair practice.

(11) 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.

(12) The Tribunal may -

(a) make a ruling as to costs as may be just and equitable;

(b) where a mediation agreement has been concluded pursuant to section 13(2)(c), make such an agreement a ruling of the Tribunal; and

(c) issue spoliation and attachment orders and grant interdicts.

(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.

(14) The Tribunal does not have jurisdiction to hear applications for eviction orders.
Information Offices

14. (1) A local authority may establish a Rental Housing Information Office to advise tenants and landlords in regard to their rights and obligations in relation to dwellings within the area of such local authority’s area of jurisdiction.

(2) A local authority may, subject to the laws governing the appointment of local government officials, appoint officials to carry out any duties pertaining to such Rental Housing Information Office.

(3) The functions of a Rental Housing Information Office are to -
   (a) educate, provide information and advise tenants and landlords with regard to their rights and obligations in relation to dwellings within its area of jurisdiction;
   (b) provide advice to disputing parties on reaching solutions to problems relating to dwellings;
   (c) refer parties to the Tribunal;
   (d) comply with any request of the Tribunal in terms of section 13; and
   (e) keep records of enquiries received by the office and to submit reports in relation thereto to the Tribunal on a quarterly basis.

Regulations

15. (1) The Minister must, after consultation with the standing or portfolio on housing and every MEC, by notice in the Gazette, make regulations relating to—
   (a) anything which may or must be prescribed under Chapter 4;
   (b) the procedures and manner in which the proceedings of the Tribunal must be conducted;
   (c) the forms and certificates to be used;
   (d) the notices to be given by the Tribunal in the performance of its functions, powers and duties;
   (e) the functions, powers and duties of inspectors for the purpose of carrying out the provisions of this Act;
   (f) unfair practices, which, amongst other things may relate to –
      (i) the changing of locks;
      (ii) deposits;
      (iii) damage to property;
      (iv) demolitions and conversions;
      (v) forced entry and obstruction of entry;
(vi) House Rules, subject to the provisions of the Sectional Titles Act, 1986 (Act No. 95 of 1986), where applicable;
(vii) intimidation;
(viii) issuing of receipts;
(ix) tenants committees;
(x) municipal services;
(xi) nuisances;
(xii) overcrowding and health matters;
(xiii) tenant activities;
(xiv) maintenance;
(xv) reconstruction or refurbishment work; or
(g) anything which is necessary to prescribe in order to achieve the purposes of this Act.

(2) At least one month prior to the publication of any regulations contemplated in subsection (1), the Minister must by notice in the Gazette set out the Minister’s intention to publish regulations in the form of a Schedule forming part of such notice setting out the proposed regulations, and inviting interested persons to comment on the said regulations or make any representations which they may wish to make in regard thereto.
CHAPTER 5
GENERAL PROVISIONS

Offences and penalties

16. (1) Any person who -
   (a) fails to comply with sections 4 or 5(2) or (9);
   (b) has been duly summoned under section 13 and who fails, without sufficient cause –
      (i) to attend at the time and place specified in the summons;
      or
      (ii) to remain in attendance until excused by the Tribunal from further attendance;
   (c) has been called upon, in terms of section 13(3)(f) and who refuses to be sworn or to make an affirmation as a witness;
   (d) fails, without sufficient cause –
      (i) to answer fully and satisfactorily any question lawfully put to any such person in terms of section 13(3);
      (ii) to produce any book, document or object in any such person’s possession or custody or under any such person’s control which any such person was required to produce in terms of section 13(3)(e);
   (e) with intent to deceive the Tribunal, produces before the Tribunal any false, untrue, fabricated or falsified book or document;
   (f) wilfully furnishes the Tribunal with information, or makes a statement before the Tribunal, which is false or misleading;
   (g) fails to comply with any ruling of the tribunal in terms of section 13(4);
   (h) fails to comply with a request of the Tribunal in terms of section 13(3)(a)(b) or (c);
   (hA) unlawfully locks out a tenant or shuts off the utilities to the rental housing property; or
   (i) contravenes any regulation,
will be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years or to both such fine and such imprisonment.

Review

17. Without the prejudice to the constitutional right of any person to gain access to a court of law, the proceedings of a Tribunal may be brought under review before the High Court within its area of jurisdiction.
Repeal and amendment of laws
18. The laws specified in the Schedule are repealed or amended to the extent indicated in that Schedule.

Short title
19. This Act is called the Rental Housing Amendment Act, 2007.

Schedule

LAWS REPEALED OR AMENDED BY SECTION 18

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<th>No. and year of law</th>
<th>Short title</th>
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<tr>
<td>Act No. 95 of 1986</td>
<td>Sectional Titles Act, 1986</td>
<td>Section 10(1) by the deletion of the words: “or, in the case of a unit which is controlled premises referred to in the Rent Control Act, 1976 (Act No. 80 of 1976), and is subject to the provisions of that Act, within a period of 365 days, of the date of offer, of has, on the expiration of any such applicable period, not accepted the offer”</td>
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### APPENDIX 2: QUICK REFERENCE TO RELEVANT SECTIONS OF THE RHA

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APPENDIX 3:  
DRAFT UNFAIR PRACTICES REGULATIONS  
GOVERNMENT GAZETTE, 14 MARCH 2008  No. 30863  109  
P.N..../2008  
RENTAL HOUSING AMENDMENT ACT, 1999, (ACT 50 OF 1999)  
UNFAIR PRACTICES REGULATIONS  
The Minister of Housing has, in terms of section 15(1)(f) of the Rental  
Housing Act, 1999, (Act 50 of 1999), as amended, and in consultation  
with the select and portfolio committee and every MEC, made the  
regulations in the Schedule.  

SCHEDULE  

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2. Disclosure  
3. Leases  
4. Effect of unsigned or undelivered lease agreement  
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6. Conditions, obligations and maintenance  
7. Reconstruction, refurbishment, conversion and demolition  
8. Eviction and changing of locks  
9. Entry  
10. House Rules  
11. Receipts  
12. Municipal Services  
14. Offences and Penalties  

1. Definitions  
In these regulations, any word or expression to which a meaning has  
been assigned to it in the Rental Housing Act, 1999 (Act No. 50 of  
1999), as amended, shall have the meaning so assigned to it and, unless  
the context otherwise indicates otherwise–  
“services” means the provision of water, electricity, gas services and
refuse removal; “the Act” means the Rental Housing Amendment Act; “Tribunal” means the Rental Housing Tribunal established in terms of section 7 of the Act, and “Unfair practice” means a failure to comply with these regulations constitutes an unfair practice contemplated in the definition thereof in section 1 of the Act.

2. Disclosure
   (a) Parties to a lease agreement (oral or written) must provide their full details in respect of payments, their names as they appear in the Identity Document, address for service of documents, telephone numbers and other contact details.
   (b) Where a representative is authorised to negotiate and concludes a lease, details required in (a) above must be provided by the representative.

3. Leases
   (a) The rights and duties of a landlord and a tenant set out in these regulations apply to a landlord and a tenant even if the lease agreement between them has not been reduced to writing.
   (b) A landlord and a tenant may include in a lease agreement terms and conditions not prohibited by these regulations, the Act or any other law, including rent, term of the lease, and other provisions governing the rights and obligations of the parties.
   (c) A lease agreement must not contain any provision which—
      (i) imposes a penalty for late payment of rent, whether or not the penalty takes the form of administrative charge or any other form, other than interest;
      (ii) excludes liability of either party for failing to comply with a duty under the lease, these regulations, the Act or any other law;
      (iii) limits or prevents either party from using the normal rights of recourse against the other party because of the other’s failure of one party to comply with any duty under the lease, these regulations, the Act or any other law, unless provided for in these regulations, the Act or any other law; or
      (iv) precludes either party from being a member of a landlords’ or tenants’ association.
4. **Effect of unsigned or undelivered lease agreement**
   (a) If a landlord does not sign and deliver a written lease agreement, signed and delivered to the landlord by a tenant, acceptance of rent by landlord gives the lease agreement the same effect as if it had been signed and delivered by the landlord.
   (b) If a tenant does not sign and deliver a written lease agreement, signed and delivered to the tenant by the landlord, acceptance of possession of the dwelling and payment of rent gives the lease agreement the same effect as if it had been signed and delivered by the tenant.

5. **Rentals**
   (a) A tenant must pay rental due to the landlord under the lease.
   (b) Rent is payable without demand or notice at the time and place agreed upon and unless a tenant is otherwise notified in writing, rent is payable at the dwelling on the first day of each month.
   (c) A landlord must give a tenant at least 2(two) months written notice of an intention to increase rental.

6. **Conditions, Obligations and Maintenance**
   (1.) A landlord must-
   (a) if the lease has been reduced to writing, stamp the lease and furnish the tenant with a copy thereof within 21 (twenty-one) days.
   (b) Let a dwelling which at the commencement of the lease is in a condition-
      (i) that is reasonable fit for human habitation; and
      (ii) which does not contravene the provisions of these regulations, the Act or any other law;
   (c) keep and maintain the dwelling in accordance with these regulations, the Act or any other law;
   (d) take reasonable steps to ensure that the tenant enjoys undisturbed use of the dwelling and in a multi-tenanted building and that no tenant or other person conducts any activity within a dwelling which is expressly prohibited under these regulations, the Act or any other law, which shall include disturbance of the peace of the area;
(e) formulate a set of house rules which must also take into consideration the interest of the neighbourhood with particular emphasis on preserving the peace;
(f) maintain the common property, if any, in good order, condition and repair;
(g) maintain the outside of the dwelling, including the walls and roof in good order, condition and repair;
(h) maintain the electrical, plumbing, sanitary, heating, ventilation, air conditioning systems and elevator system, if any, in good order and repair
(i) repair any damage to the dwelling or common area caused by fair wear and tear;
(j) provide and maintain appropriate container and places for the removal of ashes, garbage, rubbish and other waste incidental to the dwelling and arrange for its removal;
(k) provide all services agreed to in the lease;
(l) effect repairs which a landlord is responsible for under the lease and as identified during inspections by the landlord, or on receipt of a notice from a tenant to do such repairs, but a landlord is not liable for repairs if the tenant, a member of his or her household or a visitor brought about the state of disrepair; and
(m) effect repairs for which the landlord is responsible for, under the lease and as identified during inspections by the landlord or on receipt of a written notice from the tenant to do such repairs within 14 days) or such further periods as may be agreed to between the landlord and the tenant.

(2) A tenant must-
(a) use the dwelling in a proper manner and for the purpose for which it is let, and in a manner which does not contravene these regulations, the Act or any other law;
(b) dispose from the dwelling of all ashes, garbage, rubbish and other waste in a reasonably clean and safe manner;
(c) maintain the dwelling in a clean, tidy and safe state of repair
(d) use, in a reasonable manner, all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, on the premises;
(e) refrain from intentionally or negligently damaging, defacing, impairing, or removing any part of the dwelling or common property or knowingly permitting any person, who is on the premises with the permission of the tenant or is allowed
access to the premises by the tenant, to do so and the tenant is liable for the repair of such damage, fair wear and tear excluded, at the tenant’s own cost;

(f) return the dwelling in the same condition as the tenant received it, fair wear and tear excluded;

(g) during the period of lease be liable to maintain, replace or repair electrical globes, fittings and switches and also be liable for the maintenance, repair or making good all water-borne taps, stoves, locks, handles, and windows where such damage has not been due to natural causes;

(h) Maintain the garden, if any, and keep the same in a neat and tidy condition;

(i) comply with the house-rules, which are enforceable pursuant to these regulations and must respect the peace of the area; and

(j) maintain the swimming pool, including but not limited to, all pumps, hoses and accessories, in good order and repair, subject to fair wear and tear;

7. **Reconstruction, refurbishment, conversion or demolition**

   (1) A landlord may only-

   (a) request a tenant to vacate the dwelling if any repairs, conversions or refurbishment are necessary and cannot be properly done while the tenant remains in occupation;

   (b) cancel the lease and repossess the dwellings, without being liable for damages in terms of these lease, these regulations, the Act or any other law, in circumstances where the dwelling is in uninhabitable condition.

   (2) In the circumstances referred to in paragraph (a) of sub regulation (1), the landlord must-

   (a) allow the tenant remission of rental for the period during which the tenant is not in occupation;

   (b) effect the repairs, conversion or refurbishment within a reasonable time so as to cause the tenant as little inconvenience as possible; and

   (c) ensure that the tenant is able to return to the dwelling as soon as possible after the completion of the repairs, conversion or refurbishment.
(3) where a landlord is required to make necessary repairs, conversions or refurbishment only to a part of the dwelling and a tenant continues to occupy the remaining part, a tenant is entitled to a remission in rental, the amount of which is proportionate to actual from which a tenant has been deprived.

(4) if a tenant, having been requested to vacate the dwelling, does not do so, a

(5) tenant has no claim against the landlord for injuries suffered while the dwelling is being repaired, converted or refurbished.

8. **Eviction and Changing of locks**

(a). A tenant must not be evicted from the dwelling without an order of court.

(b) A tenant evicted from the whole part of the dwelling by a third person has, subject to the common law, a claim for damages against the landlord.

(c) A landlord or tenant must not change locks or doors providing access to the dwelling-
   (i) unless it is necessary to replace the locks or doors due to fair wear and tear or other reasonable causes
   (ii) without reasonable notice of the proposed change to the other; and
   (iii) unless duplicate keys are provided to the other immediately upon such change of locks.

(d) If a tenant breaches the lease and in order to deprive the tenant access to a dwelling, the landlord must-
   (i) give the tenant seven (7) days notice in which to remedy the breach, unless the tenant is in default of rental payment and remains in default for a period of seven (7) days of due date, then such notice will be dispensed with; and
   (ii) obtain a valid court order to evict the tenant.

9. **Entry**

(1) A landlord may only enter a dwelling on reasonable notice to the tenant-
   (a) to inspect the dwelling,
   (b) to make repairs to the dwelling;
(c) to show the dwelling to a prospective tenant, purchaser, mortgagee or its agents;
(d) to inspect the dwelling for damages as referred to in Section 5(3)(e)(f) of the Act or upon notification by the landlord or the tenant of the intention to terminate the lease;
(e) if the dwelling appears to be abandoned by the tenant; or
(f) pursuant to an order of court.
(2) A tenant must allow a landlord to enter a dwelling for the purposes set out under sub regulation (1), but such entry must be carried out at reasonable time.

10. House Rules
(1) A landlord must make house rules in relation to the control, management, administration, use and enjoyment of the dwelling.
(2) A house rules is enforceable against a tenant only if-
(a) its purpose is to-
   (i) promote the convenience, safety health, or welfare of the tenant in the premises and that of the neighbours;
   (ii) preserve the landlord’s property from abuse; or make a fair distribution of services and facilities available to the tenant.
   (b) it is reasonably related to the purpose for which it is adopted;
   (c) it applies to all tenants in the premises in a fair manner
   (d) it is sufficiently explicit in its prohibition, direction, or limitation to the tenant’s conduct and fairly informs the tenant of what is expected;
   (e) it is for the purpose of evading the obligations of the landlord; and
   (f) the tenants has notice of the house rule at the time the tenant enters into the lease agreement.

11. Receipts
(1) A landlord must furnish a tenant with a written receipt for all payments made by the tenant to the landlord, in the manner prescribed in section 5(3) (a) and (b) of the Act.
(2) A landlord must furnish a receipt even where payments are made into his / her banking account and where a deposit slip
exists as proof of payment or where any other method of payment is used as agreed upon by the tenant and landlord.

12. Municipal Services
(1) A landlord who is obliged by law or in terms of the express or implied terms of the lease to provide water, electricity or gas services to a tenant, must –

(a) provide such services;
(b) not cause the non-supply or interrupted supply of services to a dwelling without a court order, except-
   (i) in an emergency; or
   (ii) after reasonable notice to the tenant to do maintenance, repairs or renovations, but the services must be resumed as soon as reasonably possible after such emergency, maintenance, repairs or renovations;
(c) ensure that the tenant is not exposed to the risk of interruption or loss of service provider when such a payment become due, if the tenant has made payment to the landlord in respect of the amounts due for such services;
(d) charge the tenant the exact amount for services consumed in the dwelling if such dwelling is separately metered; and
(e) comply with any law or obligation regarding the amount to be charged to the tenant for services, if any dwelling is not separately metered for services;
(f) in a multi-tenanted building not recover collectively, from the tenants for services provided in excess of the amounts totally charged by the utility service provider and the landlord; or
(g) must without requesting payment of any fee be obliged to provide the tenant with copies of the amount of the account of the aforesaid service provider and copies of accounts rendered to the tenants with regard to such services;

(2) If a dwelling is separately metered for services and payment must be made directly to the landlord, the landlord must provide the tenant with a monthly statement which must contain at least the following information:

(a) the names of both the landlord and the tenant, as well as the physical address of the dwelling;
(b) the name, address and telephone number of each service provider;
(c) the previous and current months meter readings;
(d) the actual consumption for each service and the amounts charged therefore;
(e) the total payment due;
(f) the date of the next meter reading for each service; and
(g) the amount of any arrears.


(1) A landlord may not –

(a) intimidate, discriminate or retaliate against a tenant for exercising any right under these regulations, the Act, or any other law;
(b) preclude a tenant from establishing or being a member of any tenants committee or any similar body;
(c) make a false representation regarding the official nature of any document or refuse to accept any notice lawfully presented or sent by the tenant;
(d) engage in oppressive or unreasonable conduct;
(e) fail to comply with the Tribunal complaint procedures or any agreement concluded with the Tribunal or with the tenant through the Tribunal’s complaint procedures;
(f) conduct any activity which unreasonably interferes with or limits the rights of the tenant or which is expressly prohibited under the lease, these regulations, the Act, or any other law; and
(g) induce a person to waive that person’s rights under these regulations, the Act or any other law, or to withdraw from proceedings before the Tribunal.

(2) A tenant may not –

(a) cede the tenant’s rights, assign the tenant’s obligations or sublet the dwelling or any part thereof to any person without written consent of the landlord, which in the case of subletting must not be unreasonably withheld;
(b) allow more than the maximum number of persons specified by the landlord to reside in the dwelling;
(c) intimidate, discriminate or retaliate against a landlord for exercising any right under these regulations, the Act, or any other law;
(d) make a false representation regarding the official nature of any document or refuse to accept any notice lawfully presented or sent by the landlord;

(e) engage in oppressive or unreasonable conduct;

(f) fail to comply with the Tribunal complaint procedures or any agreement concluded with the Tribunal or with the landlord through the Tribunal’s complaint procedures;

(g) conduct any activity which unreasonably interferes with or limits the rights of the tenant or which is expressly prohibited under the lease, these regulations, the Act or any other law;

(h) cause or permit any nuisance upon the dwelling; and neighbouring properties; and

(i) induce a person to waive that person’s rights under these regulations, the Act or any other law, or to withdraw from proceedings before the Tribunal.

(3) Every obligation under these regulations, the Act, or any other law and every act which must be performed as a condition precedent to the exercise of a right or remedy, imposes an obligation of good faith in its performance or enforcement.

(4) The Tribunal is entitled to serve any document, notice or process upon a person collecting or receiving rent for or on behalf of a landlord.

14. Offences and Penalties
Should the landlord or tenant fail to comply with any provision of the Act or the Regulation or a ruling of the Tribunal, and found guilty, a fine may be imposed or imprisonment not exceeding two years or to both such fine and such imprisonment.

15. Short Title
These regulations are called Unfair Regulations, 2008.
APPENDIX 4: DRAFT PROCEDURAL REGULATIONS

GOVERNMENT GAZETTE, 14 MARCH 2008 No. 30863 83 P.N..../2008

RENTAL HOUSING ACT, 1999, (ACT NO 50 OF 1999)
PROCEDURAL REGULATIONS, 2008

The Minister of Housing has, in terms of section 15(1) (f) of the Rental Housing Act, 1999 (Act 50 of 1999), as amended, and in consultation with the select and portfolio committee and every MEC, made the regulations in the Schedule.

SCHEDULE
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Sections     Pages
1. Definitions
2. Lodging complaints
3. Tribunal responsibility on receipt of complaint
4. Jurisdiction
5. Requirements if no dispute exists
6. Procedures on determination that disputes exists
7. Mediation
8. Hearing
9. Spoliation and interdicts procedure
10. Duties and functions of Tribunal Staff
11. General provisions
Annexure

1. Definitions
In these regulations, any word or expression to which a meaning has been assigned to it in the Rental Housing Act, 1999 (Act No. 50 of 1999) shall have the meaning so assigned to it and, unless the context indicates otherwise –

“complainant” means a person or persons who lodges a complaint with the Tribunal;
“mediation” means a voluntary process in terms of which parties are to resolve a dispute;
“party” means a person who is participating in mediation or a hearing;
“register” means the register contemplated by section 13 (8) of the Act;
"respondent" means a person against whom a complaint has been lodged with the Tribunal;  
"the Act" means the Rental Housing Act, 1999 (Act 50 of 1999);  
"Tribunal" means the Rental Housing Tribunal established in terms of section 7 of the Act;  
"unfair practice regulations" means the unfair practice regulations made under section 15 (1) (f) of the Act.

2. **Lodging of complaints**
   (1) Any tenant or landlord or group of tenants or group of landlords or other interest group may lodge a written complaint with the Tribunal concerning an alleged unfair practice as contemplated in the Act or as prescribed in terms of the Unfair Practices Regulations.
   
   (2) If the complaint is lodged in a representative capacity, except if the representative is a practicing attorney, a letter or a petition signed by the complainant(s) authorising the representative to lodge a complaint, shall be furnished to the Tribunal.
   
   (3) A complaint lodged with the Tribunal must be in writing and must be in the prescribed form appearing in (Annexure A) to these regulations and may –

   (a) be sent by registered mail or facsimile transmission to the office of the Tribunal;
   (b) confirmation of a successful transmission of the facsimile will be proof of receipt of the complaint, or
   (c) be delivered in person to the office of the Tribunal or at the relevant Rental Housing Information Office within the jurisdiction of the local authority in which the dwelling is situated.

3. **Tribunal’s responsibilities on receipt of complaint**
   (1) The following steps must be taken in respect of any complaint received by the Tribunal:

   (a) A file must be opened and a reference number must be allocated to the complaint;
   (b) file cover will reflect the name of the Tribunal, reference number of the case and names of the parties;
   (c) The particulars of the dwelling to which the complaint refers must be listed in the register referred to in section 13 (8) of the Act;
(d) The complainant must be provided with an acknowledgement of receipt of the complaint which contains the reference number of the case;

(e) The Tribunal must conduct such preliminary investigations as may be necessary to determine whether the complaint relates to a dispute in respect of a matter which may constitute an unfair practice, and for this purpose any additional information required to provide a full and complete description of the matter may be obtained from either the complainant or the respondent;

(f) If the Tribunal considers it necessary, it may instruct an inspector to first inspect the property and compile a report on the complaint;

(g) The Tribunal must within 30 days of the receipt of the complaint, determine, as contemplated by section 13(2)(b) of the Act, whether the complaint relates to a dispute in respect of a matter which may constitute an unfair practice;

(h) The determination contemplated by paragraph (g) must be recorded in the file referred to in paragraph (a).

4. **Jurisdiction**

   (1) If a complaint is not within the jurisdiction of the Tribunal, as determined by the Tribunal, the Tribunal must-

   (a) notify the complainant in writing within thirty (30) days of the receipt of the complaint that the Tribunal cannot act on the matter;

   (b) advise the complainant that he or she may within thirty (30) days of the date of such notification make a request for the Tribunal to review the decision on jurisdiction;

   (c) re-consider its decision on jurisdiction as soon as possible after receipt of a request contemplated in (b) and notify the complainant in writing of the outcome thereof, and

   (d) where possible be given a referral to the appropriate forum within thirty (30) days of the receipt of the complaint

5. **Requirements if no dispute exists**

   (1) If the Tribunal determines that the complaint does not relate to a dispute in respect of a matter which may constitute an unfair practice, the Tribunal must –

   (a) notify the complainant in writing of it’s decision;

   (b) if possible, furnish the complainant with an appropriate institution to which the matter should be referred, and
(c) record that the matter has been disposed of and close the relevant file.

6. **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.

(2) A complainant may withdraw his or her complaint in writing to the Tribunal within five days before the date of the mediation or hearing.

7. **Mediation: Process and Procedure**

(1) If the Tribunal has appointed a mediator to resolve a dispute, the Tribunal must–

(a) in writing inform the parties of the (Annexure B): -
   (i) nature of the dispute;
   (ii) particulars of the parties;
   (iii) relevant information of mediation;
   (iv) the date mediation is to be conducted;
(b) at least 10 days before the date of the mediation, a Notice of Mediation (Annexure B) be served on the complainant and respondent:

(i) by handing a true copy thereof to the named person personally; or

(ii) by leaving such copy thereof at the place of residence or business of the said person with any person apparently in charge of the premises at the time of delivery, being a person apparently above the age of 18 years and apparently in authority over him or her; or

(iii) by delivering such copy thereof at the place of employment of the said named person to some person apparently above the age of 18 years and apparently in authority over him or her; or

(iv) in the case of a corporation, company or other body corporate or juristic person, by delivering such copy thereof to a responsible employee thereof at its registered or head office, or in the case of its principal place of business, within the jurisdiction of the Tribunal, or where there is no such employee willing to accept service, by affixing a copy to the main door of such office or place of business; or

(v) where any partnership, firm or voluntary association is to be served service must be effected in the manner referred to in paragraph (iv) at the place of business of such partnership, firm or voluntary association;

(c) ensure that a mediation is conducted in a language that all the parties concerned can comprehend and, for this purpose, the Tribunal must, if necessary, provide the services of a qualified interpreter.

(d) if the parties are unable to reach agreement, the mediator will issue a certificate as contemplated by section 13(2)(d) of the Act (Annexure C);

(e) if a party fails or refuses to attend mediation, after being duly notified, the mediator shall refer the matter to the Tribunal for a decision by completing the mediation certificate (Annexure C).

(f) if the mediation results in an agreement or is partly successful, the mediator will record the outcome in the mediation certificate (Annexure C).
The mediation process must be conducted as follows:

(a) The mediator shall be impartial; must explain the mediation process, help and guide parties to arrive at a mutually acceptable solution;

(b) The mediator must explicitly discuss the issue of confidentiality with the parties prior to the commencement of any mediation. If a party requests that information be kept confidential either during the course of the mediation or afterwards, and the other parties agree to mediate under those terms, the explicit provisions of the confidentiality agreement must be made part of the mediation agreement (Annexure C);

(c) The mediator must at the outset inform the parties that the mediator acts only as a facilitator in trying to resolve the dispute between them, and that the final decision must be the decision of the parties and not that of the mediator.

(d) Parties do not take an oath or make affirmation because they do not give evidence.

(e) The mediator must also inform the parties involved that the mediation process will be conducted as follows:

(i) Each party will be given an opportunity to present its case.

(ii) Each party may at any stage of the proceedings request a recess in order to caucus in another room or office.

(iii) If the other party does not have any objection thereto, then the mediator may attend the caucus meeting and make suggestions and proposals at the invitation of a party seeking the mediator’s assistance.

(iv) If the party in a caucus does not have any objection thereto, then the mediator must convey to the other party, any proposal, attitude, indication or suggestion stemming from a caucus meeting.

(f) The mediator must mediate only those disputes in which the mediator can be impartial with respect to all of the parties and the subject matter of the dispute.

(g) At any time the mediator is of the opinion that any party to the mediation is unable to understand and participate fully in the proceedings due to mental impairment, emotional disturbance, intoxication, language barriers or other reasons, the mediator must—
(i) limit the scope of the mediation, to a level consistent with the parties ability to participate;
(ii) make a recommendation that the party may obtain appropriate assistance in order to continue with the process, or
(iii) terminate, adjourn or postpone the mediation process.

3 The mediator must attempt to obtain information or documents, which are considered necessary, from a person who is not a party to the mediation, and such person should be requested to volunteer such information or documents to the mediator, who must record in the file all efforts to obtain the information or documents.

4 A mediation process must be completed within thirty (30) days from the date on which it commences. If this is not possible, then the process may be extended beyond the thirty (30) day period with the consent of the parties and the Tribunal.

5 If the parties cannot reach agreement through mediation, the matter must be referred to the Tribunal for a formal hearing and ruling in terms of section 13 (3), (4), (5), (6) and (12) of the Act.

6 The parties must not be coerced in any manner to reach agreement.

7 If the mediation results in an agreement it must be reduced to writing and signed by all the parties, including the mediator (Annexure C), and a copy of the signed agreement filed in the register.

8 Should the mediation be partly successful, the mediator will record, with the consent of the parties, those issues upon which an agreement has been reached. In respect of all other areas in which there is no agreement, refer these to the Tribunal for a hearing by completing a mediation certificate (Annexure C).

9 Before requesting the parties to sign the agreement the mediator must ensure that each party fully understands the agreement and is entering into it voluntarily.
(10) Copies of the signed agreement must be given to each party.

(11) The Tribunal may convert the signed mediation agreement into a ruling in terms of section 12(b) of the Act, which is deemed to be an order of a magistrate’s court [s13(13)] in terms of the Magistrate’s Court Act, 1944 (Act No. 32 of 1944).

(12) In the event the mediation has failed, the mediator being privy to the discussions through mediation shall not be part of the Tribunal hearing.

8. Hearing: Process and Procedure

(1) The Tribunal is competent to hear a complaint and make such a ruling as it may consider just and fair in the circumstances, based on the provisions of the Act, facts of the case, relevant law and regulations:

(a) where the dispute is of such a nature that it cannot be resolved through mediation; or

(b) where a mediator has issued a certificate to the effect that the parties are unable to resolve the dispute through mediation;

(2) Summoning of Parties to a Hearing

(a) The Tribunal through its staff members shall notify parties of the date, time and place of the hearing at least ten days prior to the hearing date.

(b) The staff of the Tribunal shall issue a summons (Annexure D) to be served upon the parties to the dispute, which summons will be served in terms of subregulation 8(1)(m).

(3) Hearing Proceedings

(a) At least three Tribunal members shall preside at any hearing, one of whom shall be the chairperson or deputy chairperson, or another member appointed by the members present, to chair the proceedings;

(b) All hearings will be held in public, unless any of the parties successfully applies for a hearing to be held in camera;

(c) The Tribunal may call upon and administer an oath to, or accept an affirmation from, any person present at the hearing or who has been summoned to appear before the Tribunal;
(d) Parties will be informed of their rights, the procedure to be followed by the Tribunal, the effect of its rulings and the consequences of contravention thereof;
(e) Parties will be afforded the opportunity of stating their case, to cross examine, call witnesses and produce any relevant book, document, or object.
(f) The rules of evidence will be observed and the members may, should the need arise, ask questions of the parties at any stage of the hearing proceedings;

(4) Process to be followed by parties before a hearing-

(a) If a Tribunal 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; and the Tribunal shall issue a hearing certificate: (Annexure E)
(b) Parties will exchange all relevant documents with each other, at least five days before the hearing;
(c) Parties will inform each other and provide details of witnesses they intend to use, at least five days before the hearing;
(d) Parties may meet before the hearing in an attempt to resolve the dispute, clarify issues or to agree on the exact nature of the complaints to be adjudicated.

(5) General responsibilities of members-

(a) Members in dealing with matters before the Tribunal, shall act and conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the Tribunal;
(b) Members shall be patient, dignified and courteous to the parties, representatives, witnesses and others before the Tribunal and shall require similar conduct of others;
(c) Members shall accord to every party to a proceeding, or to that party’s representative, the right to be heard according to law.
(d) Members shall not initiate, permit or consider ex parte communications, unless required by the Act or regulations;
(e) Members shall not initiate, permit or consider communications with the public or parties that falls under the administrative responsibilities of the staff

9. **Spoliation and Interdicts Procedure**

   (1) In terms of s13 (12) (c) of the Act, a tenant or landlord may lodge a complaint on an urgent basis for spoliation or interdict.

   (2) The staff of the Tribunal shall conduct any preliminary inquiry and investigate the circumstances surrounding the complaint to ascertain the urgency thereof, and will advise the Tribunal accordingly.

   (3) The respondent will be served immediately with the Tribunal’s interim ruling made, together with a copy of the complainant’s statement.

10. **Duties and functions of Tribunal Staff**

    (1) In terms of section 11 of the Act, the staff employed by or seconded to the Tribunal, is the Tribunal staff and in terms of this regulations, their duties and responsibilities shall be determined by the Tribunal;

    (2) The Tribunal staff must perform the following functions: -

       (a) Conduct routine building inspections and provide written inspection reports when requested to do so by the Tribunal.

       (b) Trace and contact property owners from information held by the Registrar of Deeds.

       (c) Hold consultations with complainants and respondents and record all the information received.

       (d) Obtain relevant documents (e.g. lease contracts, receipts) and place such documents in the complainant’s file;

       (e) Obtain sworn statements, if required, from disputing parties and other parties concerned.

       (f) Give evidence before the Tribunal when requested to do so.

       (g) Obtain or examine copies of all books and documents, which may be relevant to a case.

       (h) Contact any local authority to determine the amount of arrears in rates and taxes owed in respect of a dwelling.

       (i) Deliver notices and other documentation to the relevant parties involved in a dispute.
(j) Obtain copies of all receipts in respect of a dwelling, which is the subject of a complaint.

(k) Obtain from a Rental Housing Information Office established under the Act, any reports concerning enquiries and complaints received in terms of section 13(3)(a) of the Act.

(l) Provide any information and produce any report or other documents concerning an inspection conducted, which may have a bearing on any complaint.

(m) Serve a notice for mediation or summons on a party to a dispute or any other person who may reasonably be able to give information of material importance concerning a complainant, to appear before the Tribunal in terms of section (13) (3) (e) of the Act, and to produce any book or any other document as the Tribunal may require.

(n) Assist in conducting any preliminary inquiry to provide a complete record of all relevant information acquired as a result of inspections and investigations.

(o) Submit applications to a Magistrate’s Court to prosecute when instructed by the Tribunal to do so.

(p) Deliver written recommendations of the Tribunal to parties against whom action will be taken for non-compliance with unfair practices regulations.

(q) Do anything in the reasonable execution of functions and duties required by the Act or the Tribunal.

(r) Receive written complaints, open files and enter the cases in the register.

(s) Review complaints and screen cases and advise complainants accordingly in writing.

(t) Conduct preliminary investigations.

(u) Keep records of the status of matters and their outcomes.

(v) Receive and carry out the instructions of the Tribunal and prepare the necessary documentation for the Tribunal.

(w) Schedule mediation hearings and notify parties about the place, date and time of such hearings in writing.

(x) Record proceedings on a mediation and hearing.

(3) In terms of general responsibilities, the staff shall: -

(a) observe the standards of impartiality, integrity and shall diligently discharge his or her administrative responsibilities without bias or prejudice, maintain professional competence
and diligence in carrying out the administrative business of the Tribunal.

(b) refrain from manifesting bias or prejudice towards any person in the execution of his or her duties and responsibilities

11. General provisions

(1) It shall be the responsibility of the Tribunal and its staff to collect, review, retain, take custody and store in chronological or numerical order or all information and of mediation and other proceedings and hearings, including recordings of hearings and transcript thereof when requested and where prepared, to make these available for all lawful purposes on written request;

(2) Hearings of the Tribunal must be recorded and verbatim transcripts thereof shall, upon request by any lawfully interested person or party, be made available to such person or party at a reasonable time upon payment to the Tribunal of the actual costs of the preparation and production of such transcripts; and any translation thereof;

(3) All transcripts shall be made from the original recordings;

(4) A landlord or tenant cannot lodge a complaint with the Tribunal if action was initiated in a magistrate’s court, or any other competent forum, unless the magistrate’s court refers the matter to the Tribunal in terms of section 13(11) of the Act, and such referral is made in writing,

(5) Correct details of parties must be lodged with the Tribunal, (e.g. the names as they appear on a written lease or in the instance of an oral lease, the names exchanged between the parties. If the landlord or tenant is a company that concluded the lease, the name of such company shall be deemed to be the landlord or tenant. The address for the service of documents and correspondence shall be the address as agreed between the parties);

(6) A legal representative or agent shall not be cited as a landlord or tenant unless such persons or entities are the parties to a contract;
(7) Any person or group which has an interest in public safety, health and security may lodge a complaint with the Tribunal specifying its interest;

(8) Members may be referred to as Commissioners;

(9) All correspondence from the Tribunal shall be on the letterhead of the Tribunal

11. **Short title and Commencement**

These regulations are called the Rental Housing Procedural Regulations, 2008.

**Annexures**

**Annexure A complaint form**

a complaint lodged with the Tribunal must be in writing and must be in the prescribed form appearing in Annexure 1 to these regulations and may –

**Annexure B notice of mediation**

in writing inform the parties of the nature of the dispute, particulars of the parties and relevant information of mediation (Annexure 2),

**Annexure C mediation certificate**

if the parties are unable to reach agreement during mediation, the mediator will issue a certificate as contemplated by section 13(2)(d) of the Act (Annexure 3).

**Annexure D** summons and subpoena

**Annexure E** hearing certificate
APPENDIX 5: SPECIMEN LEASE AGREEMENT

Attached to this Agreement are: “A” List of Defects (signed by both parties) and “B” House Rules (signed by both parties)

1. PARTIES
The parties to this agreement are

___________________________ hereinafter called “Landlord / landlady”, and

___________________________, hereinafter called “Tenant”.

If Landlord / landlady is the agent of the owner of said property, the owner’s name and address is

__________________________________________________________________________

__________________________________________________________________________

2. PROPERTY
Landlord / landlady hereby lets the following property to Tenant for the term of this Agreement:

(a) the property located at: -

__________________________________________________________________________

(b) this property is a house / outbuilding / room / shack / hostel

room or other (specify) ____________________________ and

(c) the following furniture and appliances are on said property:

__________________________________________________________________________

3. TERM
The term of this Agreement shall be for ______, beginning on ___ and ending on ____________

4. RENT

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4.1 The monthly / weekly / daily or other (specify) rental for said property shall be R________ due and payable on the day of each month / week / day or other (specify) to the Landlord / landlady at _____________ for which the tenant shall be given a written rent receipt.

4.2 The landlord / landlady has the right to receive prompt and regular payment of rental and the tenant knows and accepts his or her duty to pay the rental regularly, in full and on time.

5. MUNICIPAL SERVICES
Municipal services shall be paid by the party indicated as follows:

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<tr>
<th>Electricity</th>
<th>Water</th>
<th>Refuse removal</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Landlord / landlady</td>
<td>Tenant</td>
<td>shared between tenants</td>
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</table>

The landlord / landlady undertakes to provide the tenant the original municipal billing / statement of account.

6. USE OF PROPERTY
Tenant shall use the property only for residential purposes, except for incidental use in trade or business (such as telephone solicitation of sales orders or arts and crafts created for profit), so long as such incidental use does not violate local municipal laws or affects Landlord / landlady’s ability to obtain fire or liability insurance.

7. TENANT’S DUTY TO MAINTAIN PREMISES
Tenant shall keep the dwelling in a clean, tidy, safe and sanitary condition and shall otherwise comply with all local municipal laws requiring tenants to maintain rented dwelling. If damage to the dwelling (other than normal wear and tear) is caused by acts or neglect of Tenant, Tenant’s visitors or others occupying the dwelling under his / her control, Tenant must repair such damage at his or her own expense.
Upon Tenant’s failure to make such repairs and after reasonable written notice by Landlord / landlady, Landlord / landlady may carry out such repairs to be made and Tenant shall be liable to Landlord / landlady for any reasonable expense thereby incurred by Landlord / landlady. The landlord / landlady upon request will provide tenant with all receipts and vouchers regarding the repairs.

8. ALTERATIONS
No substantial alteration, addition, or improvement shall be made by Tenant in or to the dwelling without Landlord / landlady’s permission in writing. Such permission shall not be unreasonably withheld, but Tenant may have to agree in writing to restore the dwelling to its prior condition upon moving out.

9. NOISE
Tenant agrees not to allow on the dwelling any excessive noise or other activity that disturbs the peace and quiet of other tenants in the building or neighbourhood. Landlord / landlady agrees to prevent other tenants and other persons in the building or common areas from similarly disturbing Tenants peace, quiet and use and enjoyment of the dwelling.

10. INSPECTION BY LANDLORD / LANDLADY AND TENANT

10.1. Joint inspection by both parties before the tenant takes occupation and within three days before the tenant moves out.

10.2. Landlord / landlady or his agent may enter the dwelling upon SEVEN (7) days written notice and with Tenant’s consent, for the following purposes: to make repairs, when the landlord / landlady has reason to believe that the dwelling is damaged or vandalised and to exhibit the dwelling to prospective purchasers, mortgages, and tenants. Such entries shall not be so frequent as to seriously disturb Tenant’s peaceful use and enjoyment of the premises. Such entries shall take place only with the consent of Tenant, which shall not be unreasonably withheld.

11. SECURITY DEPOSIT

a) Tenant shall pay Landlord / landlady, upon execution of this Agreement, a security deposit of R________. The said
deposit will be kept in a separate interest bearing account and the tenant shall be duly notified of the bank and the account number.

b) Within seven (7) days after Tenant vacates the premises, Landlord / landlady shall return to Tenant the security deposit together with accrued interest.

c) However, on the expiration of the lease, the deposit with accrued interest may be applied by Landlord / landlady toward reimbursement for any reasonable cost of repair or cleaning necessitated by tenants’ acts or omissions in violations of this Agreement (normal wear and tear excluded) and for rental which is due, unpaid, and owing. Provided Landlord / landlady notifies Tenant of his / her intention to apply the deposit toward reimbursement for any reasonable cost of repair or cleaning if Tenant fails to do so within a reasonable period. If any deduction is made, Landlord / landlady shall also give tenant a written itemised statement of such deductions and explanations thereof and refund any balance within fourteen (14) days after Tenant vacated the dwelling.

If the Landlord / landlady fails to comply with sections (b) or (c) of this paragraph, then the Landlord / landlady waives the right to make deductions from the security deposit and will be responsible for returning the entire deposit to Tenant when Tenant vacates the premises together with accrued interest.

12. **LANDLORD / LANDLADY’S OBLIGATION TO REPAIR AND MAINTAIN PREMISES**

a) Landlord / landlady shall provide and maintain the building and grounds belonging to the dwelling in a decent, safe, and sanitary condition, and shall comply with all local laws, regulations, and ordinances concerning the condition of dwelling which at a minimum must be maintained in decent, safe, and sanitary condition and reasonably fit for human habitation.

b) Landlord / landlady shall take reasonable measures to provide and maintain security on the dwelling and the building and grounds belonging thereto to protect tenant and
other occupants and guest on the dwelling from burglary, robbery, and other crimes. Tenant agrees to use reasonable care in utilising such security measures.

c) As repairs are now needed to comply with this paragraph, Landlord / landlady specifically agrees to complete the following repairs on or before the following dates:

<table>
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<tr>
<th>Repair</th>
<th>Date</th>
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</table>

This list is not intended to be exhaustive, nor is it to be constructed as a waiver as to any other defective conditions, which may exist.

d) If landlord / landlady fails to substantially comply with any duty imposed by this paragraph, Tenant’s duty to pay rent shall be reduced until such failure is remedied. Upon Landlord / landlady’s failure to make necessary repairs, Tenant may make or cause to be made said repairs and deduct the reasonable cost of said repairs from the rental. This section (d) shall apply to defects within Tenant’s dwelling unit only, and then only if Tenant has notified Landlord / landlady or his agents of such defects and has given Landlord / landlady a reasonable time to make repairs. The remedies provided by this section (d) shall not be exclusive of any other remedies provided by the RHA or any other law to Tenant for Landlord / landlady’s violation of this Agreement.

13. SUBLEASING / ASSIGNMENT
Tenant shall not assign this Agreement or sublet the dwelling without consent of Landlord / landlady. Such consent shall not be withheld without good reason relating to the prospective tenant’s ability to comply with the provision of this agreement. This paragraph shall not prevent Tenant from accommodating guests for reasonable periods, provided no overcrowding is allowed.
14. RETALIATION
If Tenant reasonably and peacefully exercises any right granted under this Lease Agreement or any relevant law, or if Tenant joins or organises a tenants’ union, Landlord / landlady agrees not to retaliate against or harass Tenant in any way, specifically including but not limited to eviction, rent increase or services decrease, refusal to renew a term tenancy, or substantial alteration of lease terms.

15. DESTRUCTION OF PREMISES
If the dwelling become partially or totally destroyed during the term of this Agreement, either party may thereupon cancel this Agreement upon reasonable notice.

16 (a) TENANT’S TERMINATION FOR GOOD CAUSE
Upon a calendar months written notice, for good cause, Tenant may cancel this Agreement and vacate the dwelling. Said notice shall state good cause for termination. Good cause shall include, but not be limited to, entry into active duty with the military services, employment in another community, and loss of the main source of income used to pay the rental.

16 (b) LANDLORD / LANDLADY’S TERMINATION FOR GOOD CAUSE
The following are just causes to terminate a lease (by no means an exhaustive list):
   i) Failure to pay rent when due;
   ii) The tenant habitually fails to pay the rent;
   iii) Failure to pay a rent increase, provided such an increase is not unconscionable and complies with any other relevant legislation;
   iv) Disorderly conduct – disturbing the peace and quiet of other tenants or the neighbourhood;
   v) Damage to the premises resulting from wilful conduct or gross negligence;
   vi) The accommodation is reasonably required for repairs and renovations, reconstruction or rebuilding scheme or demolition.

17. TERMINATION
Upon termination of this Agreement, Tenant shall vacate the dwelling, remove all personal property belonging to him or her, and leave the dwelling in the condition he or she found them (normal wear and tear excepted). Landlord / landlady and tenant must jointly carry out an inspection of the dwelling within three days before the lease expires.
18. LAWSUITS
If either party commences a lawsuit against the other to enforce any provision of this Agreement, the successful party may be awarded reasonable attorney fees and court costs from the other. Landlord / landlady specifically waives any right to recover treble or other punitive damages.

19. DISPUTE RESOLUTION
(a) ARBITRATION
Parties to the agreement undertake to use all amicable ways to resolve any resultant problem or conflict arising from this contract, including arbitration. Both parties agree that should they submit themselves to arbitration, the decision of the arbitrator will be final and binding.

(b) RENTAL HOUSING TRIBUNAL
The Rental Housing Tribunal has jurisdiction over unfair practices as well as jurisdiction to regulate landlord / landlady – tenant relationship, to receive complaints and to either mediate or hold a hearing. Parties agree to approach the Rental Housing Tribunal.

(c) COURTS
Parties also have the option of using the courts, in the absence of an unfair practice.

20. HOLDOVERS
If Tenant holds over upon termination of this Agreement and Landlord / landlady accepts Tenant’s tender of the monthly rent provided by this Agreement, this Agreement shall continue to be binding on the parties as a month-to-month agreement unless landlord / landlady accepts the rental as damages.

21. NOTICES
(a) All notices provided by this Agreement shall be in writing and shall be given to the other party as follows:

To the Tenant: at the dwelling.
To the Landlord / landlady: at _____________________________

(b) Domicilium
All notices hereunder by the LANDLORD / LANDLADY to the TENANT shall be considered to be duly served when sent by prepaid registered letter post to the TENANT or delivered at the LEASED

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PREMISES, which the TENANT nominates and chooses as his or her place for the service of all legal processes.

WHEREFORE we, the undersigned, do hereby execute and agree to the Lease Agreement that this agreement was entered into without any coercion, deception or injustice.

___________________________________  ______________________
Signatures of the parties, including witnesses
APPENDIX 6: SPECIMEN LETTERS

Letter 1
Letter Regarding Prevention of Unlawful Action or Providing Grounds for Spoliation Application

Attorney acting on behalf of client indicated that the water and electricity supply would be disconnected on December 1. Notice to vacate was dated November 5 requiring tenants to move out by December 1. Renovation was the reason for terminating the lease. Notice was not a calendar month’s notice and termination was not for breach.

Dear Sir / Madam

Re: Notice of Eviction/ Notice of Increase: 34 Finch Street

We act for the following tenants who reside at the above address: -
Tenants names

Your notices of rent increase and notices to vacate, dated October 2, 2008 and November 5, 2008 respectively, refer.

Our instructions are to inform you as follows: -

1. The notices to vacate are not valid.
2. Disconnecting electricity and water supply would be unlawful.
3. Should there be any disconnection, either through non-payment, instruction to the municipality or any other manner, our clients will bring a spoliation application and hold your client and yourselves responsible.
4. The court’s attention will be drawn to the fact that you and your client were notified that the intention to disconnect as per your letter dated November 5, 2008 would be unlawful.
5. Your client will also be held liable for all legal costs and the court will be asked to make a punitive cost order against your client and Fiedels Inc. and to grant any other appropriate relief for the disconnection.
6. All our clients’ rights are expressly reserved.

Yours faithfully
Letter 2 (a) Challenging Notice To Vacate
Date To Attorney or Landlord / Landlady
Dear Sirs

NOTICE TO VACATE

I am extremely concerned at your clients’ failure or oversight to state the reason or cause for demanding that I vacate the premises.

1. In the circumstances I demand, as I hereby do, that you kindly take instructions on the reason or cause that has brought about this unfortunate action on the part of your client, and to deliver the response to me within five[5] days of date hereof.

2. In the event that no response is forthcoming from you within 5 days, and assuming that legal proceedings are commenced subsequently, the court will be asked to draw the following inferences:-

   2.1 That no reason or cause existed at the relevant time to terminate the lease agreement or seek the eviction; alternatively,

   2.2 That in terms of unfair practices, a bad, improper, or irregular reason or cause motivated the termination of the lease agreement and eviction.

   2.3 Any one or a combination of the above would constitute an unfair practice.

   2.4 That no reason was given as required by the Rental Housing Act 50 of 1999.

3. In the event that a reason or cause does eventually surface during the said legal proceedings, the court will be asked to infer that the reason or cause was “manufactured” ex post facto. As such, is evidence on the part of your client of arbitrary or bad faith or irrational conduct or behaviour, or a combination of these.

4. To sum up then, legal proceedings by your client will be defended if it seeks to employ the courts to lend credence to arbitrary, bad faith or irrational conduct and behaviour. Obviously, this letter / fax will be used as evidence in the said legal proceedings.

All my rights are expressly reserved.
Yours faithfully
Tenant

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Letter 3
(b) Challenging Notice To Vacate

Dear Sir / Madam

RE: ONE MONTH’S NOTICE TO VACATE

Thank you for your response dated October 27, 2008.

1. Our instructions are to confirm that several notices were indeed given to our clients with different reasons.

2. These notices were subsequently withdrawn. However, these now appear to be still in force in terms of the letter of the 27th instant.

3. If your client’s contention is that sufficient time was given, please indicate which notice our clients are expected to follow. Our clients are confused by the ambiguity created by these notices, both in terms of the periods as well as the contents thereof.

4. Our clients require proof of application for conversion and the permit granting such conversion.

5. Our clients believe that the notices resulted from complaints regarding their living conditions and therefore constitute an unfair practice.

6. Any legal proceedings will be challenged and all correspondences and notices will be used in such proceedings to draw the court’s attention to mala fides that actuated such proceedings.

7. Your client will be held responsible for all legal costs.

Our clients’ rights are expressly reserved.

Yours faithfully
Letter 4  
Challenging Alleged Rental Arrears  

February 12, 2009  

To Attorney / Landlord  

Dear Sir/ Madam  

**Re: ALLEGED RENTAL ARREARS**  

Your letter dated January 26, 2009 refers.  

I deny being arrears. Please provide a detailed explanation of the alleged arrears.  

Please note that any legal proceedings will be defended and your client will be held liable for all legal costs.  

All my rights are expressly reserved.  

Yours faithfully  
Tenant
## APPENDIX 7: CONTACT DETAILS OF PROVINCIAL RENTAL HOUSING TRIBUNALS as at December 01, 2008

<table>
<thead>
<tr>
<th>Name Tribunal</th>
<th>Telephone No.</th>
<th>Contact Person</th>
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<tbody>
<tr>
<td><strong>North West RHT</strong></td>
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<td>-Tribunal is operational</td>
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<td>-Tribunal is operational</td>
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<tr>
<td>Other Numbers</td>
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<td></td>
<td>011 630 5036</td>
<td>Lebo Mokate</td>
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<td>Violet Mehale</td>
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<td></td>
<td>011 630 5059</td>
<td>Betty Kgobe</td>
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<td><strong>KwaZulu Natal RHT</strong></td>
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<td>031 336 5300</td>
<td>Andre Erasmus</td>
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<td></td>
<td>031 336 5222</td>
<td>S’bu Dlamini</td>
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<td><strong>Limpompo RHT</strong></td>
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<td>Mr Masingi</td>
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<td></td>
<td>040 609 5414</td>
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<td></td>
<td>079 882 3402</td>
<td>Mandla Labase</td>
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<td>Poppie Madibane</td>
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</table>
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ENDNOTES:

1 Mahatma Gandhi’s list of the Seven Blunders of the World to his grandson Arun: Wealth without work, Pleasure without conscience, Knowledge withoutcharacter, Commerce without morality, Science without humanity, Worship without sacrifice and Politics without principle.

2 Dwelling includes any house, hostel room, hut, shack, flat, apartment, room, garage.

3 The Rental Housing Act 50 of 1999 as amended in May 2008 (Rental Housing Amendment Act 43 of 2007), will be referred to as the RHA.

4 For example, Rules 56 of the Magistrates’ Court Act 32 of 1944. Abbott v Von Theleman 1997 (2) SA 848 (C).

5 Brisley v Drotsky 2002 (4) SA 1 SCA.

6 Section 18 of the RHA. Also, Batchelor v Gabie 2002 (2) SA 51 (SCA).

7 Jackpersad NO and others v Mitha and Others 2008 (4) SA 522 (D).

8 Harlequin Duck Properties 204 (Pty) Ltd v Fieldgate T/A Second Hand Rose 2006 (3) SA 456 (C).

9 Referred to as the RHA in this book.

10 Referred to as the RHT.


12 Singh (2007).

13 Kusa Kusa CC v Mbile 2003 (2) BCLR 222 (LCC).

14 Section 18 of the RHA; Batchelor v Gabie 2002 (2) SA 51 (SCA); Ndlovu v Ngcobo, Bekker and Another v Jika 2003 (1) SA 113 (SCA); Davids and Others v van Straaten and Others 2005 (4) SA 468 (C); Jackpersad NO and others v Mitha and Others 2008 (4) SA 522 (D).

15 Public participation through the provincial housing portfolio committees and direct written comments on the draft regulations.


17 Section 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.” Mncube & others v District Seven Property Investments CC & Others 2006 JOL 17381 (D).

18 Kendall Property Investments v Rutgers 2005 (4) 81 (C).

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

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

21 Knop v Johannesburg City Council 1995 (2) SA 1 (A).

22 Kendall Property Investments v Rutgers 2005 (4) 81 (C).

23 MEC for Economic Affairs, Environment and Tourism v Kruisenga and Another 2008 (6) SA 264 (Ck).

24 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).

25 Thorpe and Others v Trittenwein and Another 2007 (2) SA 172 (SCA).

26 Kritzinger v Newcastle Local Transitional Council and Others 2000 (1) SA 345 (N) at 349.

27 Harlequin Duck Properties 204 (Pty) Ltd v Fieldgate T/A Second Hand Rose 2006 (3) SA 456 (C).
The dwelling / leased premises must be agreed upon and rental fixed for the tenant’s use and enjoyment of the dwelling. A third party (e.g., an arbitrator) can be nominated to determine the rental. Refer to Total South Africa (Pty) Ltd v Bonaiti Developments (Pty) Ltd 1981 (2) SA 263 (D); Bekker v RSA Factors 1983 (4) SA 568 (T); Southernport Developments (Pty) Ltd v Transnet Ltd 2005 (2) SA 202 (SCA); Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd 1993 (1) SA 179 (A) and Jordaan NO v Verwey 2002 (1) SA 643 (E).

“The contract of hire cannot be concluded except for a definite time …” (Grotius, 3:5:8; trans by Lee 1926:387).

Shaik and others v Pillay and others [2008] 2 All SA 465 (N).

Goldbatt v Fremantle 1920 AD 123; Woods v Walters 1921 AD 303.

Filjoen v Cleaver 1945 NPD 332 at 336

Hunter v Cumnor Investments 1952(1) SA 735 (C) at 740.


First National Bank Ltd v Avtjoglou 2000 (1) SA 989 (C) A.

Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd 1991 (3) SA 35 (A).


Deemed provisions (section 5(3)).

Salmon v Dedlow 1912 TPD 971.

Pareto Ltd and others v Mythos Leather Manufacturing (Pty) Ltd v Venucci 2000 (3) All SA 286 (W). Refer to ‘Renewal of lease and the “huur gaat voor koop” rule’ below (3.6.10) for further discussion.

Kain v Khan 1986 (4) SA 251 (C); Kessoopersadh v Essop 1970 (1) SA 265 (A); Ridler v Gartner, 1920 TPD 249.

van der Walt (2005).

Ismail v Ismail and Others 2007 (4) SA 557 (E).

Soffiantini v Mould 1956 (4) SA 150 (E).

Mukheibir (2000).

Van Zyl v Rossouw 1976 (1) SA 773 (NC).

Protea Assurance Co Ltd v Presauer Developments (Pty) Ltd 1985 (1) SA 737 (A).

Chang NO v Coral Blue Trading No. 3 CC 2008 JDR 0594 (E).

Fir & Ash Investments (Pty) Ltd v Cronje and Others 2008 (1) SA 556 (C).

Scopeful 130 (Pty) Ltd v Mechi Mag (Pty) Ltd 2008 (3) SA 483 (W).

Myerson v Osmond Ltd 1949 (2) SA 583 (N).

Absa Bank Ltd v Bismath NO and Others 2007 (2) SA 583 (D)

Mignoel Properties (Pty) Ltd v Kneebone 1989 (4) SA 1042 (A).

Rishworth v Secretary for Inland Revenue 1964 (4) SA 493 (A); Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (And Others As Third Parties) 2008 (2) SA 156 (D).

Estate Frankel and Others v Estate Fitzpatrick; Estate Frankel and Others v Denoon and Another 1943 AD 207.
RHTs in most instances disregard this mandatory requirement and the KZN RHT for example, has granted exorbitant increases.

Ö K Bazaars (1929) Ltd v Cash-In CC 1994 (2) SA 347 (A); Naicker v Pensil 1967 (1) SA 198 (N).

Ntsiqa v Andreas Supermarket (Pty) Ltd, 1996 (3) All SA 154 (Tk).


Ethekwini Metropolitan Unicity Municipality (North Operational Entity) and Pilco Investments CC 2007 JDR 0397 (SCA) (not reportable).

“J” after a judge’s name refers to a judge of the High Court; instead of judge Satchwell, it is written as Satchwell J. JA refers to a judge of the Supreme Court of Appeal (previously the Appellate Division; van Heerden JA would refer to judge of the Supreme Court of Appeal. AJ after the name of the judge means acting judge of the High Court and AJA after the name of the judge means acting judge of the Supreme Court of Appeal. JP refers to the judge president.


Michel v Rex 1944 OPD 227 at 239

Pillay v Krishna 1946 AD 946 at 955.

Liebenberg v Loubser 1938 TPD 414 at 415.

Coch v Lichtenstein NO 1910 AD 178.

Mpange and Others v Sithole 2007 (6) SA 578 (W)

Thompson v Scholtz 1999 (1) SA 232 (SCA).

Soffiantini v Mould 1956 (4) SA 150 (E).


Hunter v Cumnor Investments 1952(1) SA 735 (C).

Bowen v Doverin 1914 AD 632.

Harlin Properties (Pty) Ltd and Another v Los Angeles Hotel (Pty) Ltd 1962 (3) SA 143 (A).

The Treasure Chest v Tambuti Enterprises (Pty) Ltd 1975 (2) SA 738 (A).

Webster v Ellisson 1911 AD 73.


Bloemfontein Municipality v Jacksons, Ltd 1929 AD 266.

Timber Rooftech CC v Mendel Welding and Engineering (Pty) Ltd and Another, 1997 BWCA 30. Also, Paradise Lost Properties (Pty) Ltd v Standard Bank Of South Africa (Pty) Ltd and Another 1997 (2) SA 815 (D).

Ntsobi v Berlin mission society 1924 TPD 378

De Vos v Monnik and Visser 1944 CPD 30

Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd 1975 (1) SA 161 (T).

Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd 2006 SCA 160.

Pareto Ltd and others v Mythos Leather Manufacturing (Pty) Ltd t/a Venucci 2000 (3) All SA 286 (W).

To establish what the parties intended, courts may look at the surrounding circumstances of the contract entered into and the subsequent conduct of the parties: Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd 1996 (1) SA 1182 (A); Snyman en Andere v Odendaalsrus Plaaslike Oorgangsraad 1998 (2) SA 297 (O).

Fulton v Nuun 1904 TS 123; Pemberton NO v Kessell 1905 TS 174; Tiopaizi v Bulawayo Bulawayo Municipality 1923 AD 317; Stocks and Stocks Holdings Ltd and Another v Mphelo 1996 (2) SA 864 (T).

Mainik CC v Ntuli & others [2005] JOL 16307 (D).
Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue and another [2009] 1 All SA 485 (W)

Covenant of quiet title: In English and American law, it is known as a covenant of quiet title, the tenant under a leasehold has the right to unimpaired or undisturbed use and enjoyment of the dwelling or dispossession by a third party.

Delport (2001).

Frye’s (Pty) Ltd v Ries 1957 (3) SA 575 (A).

Business Aviation Corporation v Rand Airport Holdings 2006 SCA 72.

lien means the right to possess or hold onto the property until the debt is paid.

Sarkin v Koren 1949 (3) SA 545 (C)

Refer to s 4(5)(c) of the Rental Housing Act that requires the landlord to specify in the lease the grounds for terminating a lease.


Preamble to the RHA

s 4 (3) (c) of the RHA

In Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA): “Then there is the Rental Housing Act 50 of 1999. Its preamble is in many respects strikingly similar to that of PIE; it purports to protect a landlord’s right to apply for the eviction of a tenant at the conclusion of the tenancy (s4(5) (d)); and it even anticipates regulations regulating evictions (s 15(1) (f) (v)).”

A few members of the national portfolio committee on housing and various landlords’ representatives that lobbied with the national Ministry and department of housing.

Mohamed (December 2007).

Judicial System - s166 – Rental Housing Tribunal is not listed as a court.

Street Pole Ads Durban (Pty) Ltd and Another v Ethekwini Municipality 2008 (5) SA 290 (SCA).

Also refer to section 30 of the Magistrates Court Act 32 of 1944 as amended under IV.Mändamenten Van Spolie and the Magistrates Court’s rules 55 and 56 for the definition and procedure.

Nino Bonino v De Lange 1906 TS 120, at 122.

status quo ante means the position before the unlawful action took place.

Impala Water Users Association v Lourens NO and others 2004 2 All SA 476 (SCA).

Abbott v Von Theleman 1997 (2) SA 848 (C).

Rikhotso v Northcliff Ceramics (Pty) Ltd 1997 (1) SA 526 (W).

Impala case above; Telkom SA Ltd v Xsinet (Pty) Ltd 2003 SCA 35; First Rand Ltd v Scholtz NO 2006 SCA 98.

ATM Solutions (Pty) Ltd v Olkru Handelaars CC 2008 (2) SA 345 (C); Telkom SA Ltd v Xsinet (Pty) Ltd 2003 (5) SA 309 (SCA); First Rand Ltd t/a Rand Merchant Bank et al v Scholtz NO 2008 (2) SA 503 (SCA).

Painter v Strauss 1951 (3) 307 (O); Naidoo v Moodley 1982 (4) SA 82 (T).

Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Dept of Education & Culture Services, 1996 (4) SA 231 (C).

Rikhotso case above.

Stocks Housing case above.

Griesel v Liebenberg Case No.: 201/2007 Judgment Delivered ON: 24 APRIL 2008 (Orange Free State Provincial Division)

Frye’s (Pty) Ltd v Ries 1957 (3) SA 575 (A).

Wightman v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA).
The number of days may change and such changes are gazetted.

South African Board of Sheriffs, PO Box 5454, Cape Town, 8000. Tel: 0214616622; Fax: 0214619619; email: contact@sheriffs.org.za; website: www.sheriffs.org.za

The act by which a party (e.g., a tenant) assigns or transfers a lease; Estate Frankel and Others v Estate Fitzpatrick; Estate Frankel and Others v Denoon and Another 1943 AD 207.

The transferring of a legal right, e.g., a tenant transfers a lease to another person who then becomes the lawful tenant.

A party to whom a right is legally transferred.

A tenant enters into a lease to rent a dwelling to another, thereby becoming the “landlord” the right of ownership of a property and its control

Wood-Bodley (2003)

van der Merwe (2009).

Complaints handled by the Organisation of Civic Rights (2005-2008).

Thompson v Scholtz 1999 (1) SA 232 (SCA) at 238.

Mittermeier v Skema Engineering (Pty) Ltd 1984 (1) SA 121 (A).

Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd 1991 (3) SA 735 (A).

Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC).


Davids and Others v van Straaten and Others 2005 (4) SA 468 (C).

Timber Rooftech CC v Mendel Welding and Engineering (Pty) Ltd and Another, 1997 BWCA 30; also Lace v Chantler 1944 KB 368.

Refer to 3.25 above for a more detailed discussion.

Wightman v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA).

Froman v Herbmore Timber & Hardware (Pty) Ltd, 1984 (3) SA 609 (W).

Tsweelopele Non-profit Organisation & others v City of Tshwane Metropolitan Municipality & others 2007 JOL 20003 (SCA).

Frangos v Corpcapital Ltd and Others 2004 (2) SA 643 (T).

S v Mabena and Another 2007 (1) SACR 482 (SCA) at 487.

Kendall Property Investments v Rutgers 2005 (4) 81 (C).

Joubert and Others v Van Rensburg and Others 2001 (1) SA 753 (W).

African National Congress v van Deventer No and Another 1994 (3) SA 270 (EO) at 275.


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).

S v Mpopo 1978 (2) SA 424 (A) at 428-429.

acting impulsively or out of own accord.

Zondi v Mec, Traditional and Local Government Affairs, and Others 2006 (3) SA 1 (CC) at 11-13.
Rental Housing Bill (B29-99): Discussion, Housing Portfolio Committee, 7 September 1999.

Northern Cape Province Budget Statement 2004/2005, Department of Housing and Local Government (at 250)

*status quo ante* means the position before the unlawful action took place.

*Nino Bonino v De Lange* 1906 TS 120, at 122.


Parties sign a confidentiality agreement prior to the commencement of mediation but this matter is included here since this dispute was dealt with in the High Court.

*Jackpersad NO and others v Mitha and Others* 2008 (4) SA 522 (D).
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