REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14908/18

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

30/01/19
DATE

SIGNATURE

FERNFLAT SHARE BLOCK (PTY) LTD — First Applicant

and

CARO NAUDE nee WILLIMSE — First Respondent

CITY OF JOHANNESBURG — Second Respondent

GAUTENG RENTAL HOUSING TRIBUNAL — Third Party

JUDGEMENT

MATSEMELA AJ

[1.] The Plaintiff seeks to evict the first respondent from her home in a block of flats called Habitat, at 268 Surrey Avenue, Fernadale, Randburg ("Habitat") where she lived since 1997. The applicants allege that the first respondent's lease has been validly cancelled and as a result that the first respondent is an unlawful occupier.

BACKGROUND TO THIS APPLICATION

[2.] The first respondent has lived in a bachelor flat in a block of flats called Habitat, located at 268 Surrey Avenue, Ferndale, Randburg, since 1997.

[3.] At various times since November 2013, the first respondent lodged complaints to the Tribunal regarding unfair practices committed by applicants. These complaints were made by her

and she also assisted various other tenants to lodge similar complaints.

[4.] In 2015, the Tribunal dealt with the following issues raised by the first respondent and other tenants of Habitat in their complaints.

13.1 *Locus standi* of the complainants.

13.2 Substantial increases in rental, and intimidation and harassment regarding alleged arrear rental.

13.3 Rentals increased without providing the requisite two months' notice prior to the increased rent being levied.

13.4 Deposits and interest accruing on the deposit.

13.5 Maintenance of the premises.

13.6 Remission of rental.

[5.] I was addressed that some of the issues which follow below were dealt with during the course of the hearing and did not form part of the ruling.

5.1 The tenants provided a new mandate which dealt with the issue of the complainants' locus standi to bring the complaints.

5.2 The applicants presented sufficient proof that the deposits of the complainants have been invested in an interest bearing account as prescribed in terms of the Act.

[6.] On 22 August 2015, the Tribunal made a detailed ruling with these issues. The ruling is summarized as:

6.1 The applicants were required to undertake a variety of maintenance tasks in the complainants' flats and the outside and common areas of the building.

6.2 In light of the lack of maintenance undertaken by the applicants, which led to the reduction in the tenants' use and enjoyment of their rented property, the Tribunal granted the complainants a 10% remission of rental.

6.3 The Tribunal found that the rental increases were reasonable in one-bedroom flats. However, the increases were found to be excessive in two- and three-bedroom flats (as the increases were 34-35% which is substantially more than the 10-15% increase which the Tribunal held is the general rate of increase on a twelve months cycle), particularly when backdated to December 2013 The Tribunal ultimately granted the increased rental sought by the applicants, less than 10% remission for the lack of maintenance, but did not backdate the rental to December 2013 but rather to December 2014.

[7.] Since this ruling, the first respondent together with other tenants, have lodged further complaints with the Tribunal that were not dealt with and such complaints appear to have been lost. The cancellation of the first respondent's lease was first attempted on 2 July 2016 and then again on 26 September 2017. T**hese complaints include whether the applicants have committed an unfair practice in cancelling the first respondent's lease.**

[8.] On 7 November 2018, the first respondent was asked by the Chairperson of the Tribunal to resubmit all the complaints that she and the other tenants had made previously which have not been adjudicated.

[9.] On 7 November 2018, the first respondent, along with other tenants, submitted a multi-part complaint encompassing a wide range of issues. This multi-part complaint was attached to the supplementary answering affidavit on 31 October 2018 as Annexure CN10. These complaints include:

9.1 The cancellation of the first respondent's lease is on grounds that constitute an unfair practice because the true basis for the cancellation is retaliation for the previously complaints lodged with the Tribunal.

9.2 Deduction from tenants' accounts for visitors' car park fees without any communication.

9.3 Deduction of a "cash deposit fee" even where tenants have been paid their rent via electronic funds transfer.

9.4 The applicants have charged tenants for the cleaning of carpets, however those carpets have been replaced by tiles.

9.5 The tenants were notified that they would now be charged for water, however on the same day as the tenants were notified of this additional charge their monthly invoices were generated and show that this charge has been included. This is in breach of the tenants' leases as well as Regulation 6(4) which requires two months' notice prior to increases in rental. In addition, the applicants refused to allow the first respondent to view the invoices from Joburg Water as she is entitled to under Regulation 13(1)(g).

9.6 Charges for legal fees were deducted from the tenants' accounts. These amounts are still reflected in the first respondent's accounts as "outstanding rent". This is breach of Regulation 13(1)(g).

9.7 Rent paid by the first respondent has not been reflected on her invoices despite these discrepancies being brought to the attention of the applicants.

LEGAL ISSUES

[10] The following legal issues were raised;

10.1 Did the Tribunal determine whether the cancellation of the first respondent's lease is an unfair practice and the applicants have failed to show that the Tribunal has dismissed the first respondent's complaints.

10.3 Were the applicants are entitled to cancel the lease without complying with the Act.

10.4 The Tribunal is the appropriate forum to decide whether the cancellation is on the basis of an unfair practice.

10.5 It was argued on behalf of the Respondents that, the first respondent's lease has not been validly cancelled, and she is not an unlawful occupier. Is the cancellation of the lease agreement on grounds which constitute an unfair practice.

THE TRIBUNAL HEARINGS

[11.] On 3 April 2018, all parties appeared before the Tribunal. At that hearing, the applicants submitted that the complaints were res

judicata on the basis that these complaints are related to those complaints adjudicated on in August 2015 under case number RT 2392/14. In response to this submission, the Tribunal issued a ruling on 7 April 2018.

The 7 April 2018 Ruling states:

"8.1 The evidence before me is clear that both the complainants and the Respondent are not in agreement with what is heard before and what is not.

8.2 It is important to note that I am not mandated to review the Ruling made by my colleague but merely indicate which of the items she dealt with from her ruling giving direction to the current case.

8.3 Upon assessing the complainants and going through the ruling made by my colleague, I only found that only two of the complainants are dealt with:

8.3.1 Harassment and intimidation based on false amount as arrears rental.

8.3.2 Unfair rent increase.

8.4 It is therefore my analysis and decision that the rest of the complaints are not adjudicated to."

[12.] The Tribunal on 7 April 2018, then held:

"10.1 That the only complaints that are adjudicated to is, Harassment and intimidation based on false amount as arrears rental and unfair rent increase.

10.2 The Tribunal has jurisdiction to hear the rest of the complaints.

10.3 The matter is therefore postponed to the 24 April 2018 at 09h30, for hearing."

[13.] Thereafter there are further hearings on 24 April 2018 and 15 May 2018. It was argued on behalf of the applicants that at on 15 May 2018 the Tribunal dismissed these complaints. However, counsel for the respondent argues that no determination was made on these complaints.

THE LAW

[14.] The applicants cancelled the lease solely on the basis that the lease has a cancellation clause. The applicants' notice of cancellation does not include any reference to any grounds for termination in the lease. This contravenes section 4(5)(c) of rental Housing Act, 50 of 1999 ("the act") which states that 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. In addition to failing to specify the grounds of its cancellation, the applicants seek the first respondent's eviction on grounds which constitute an unfair practice.

[15.] It was submitted on behalf on behalf of the respondent that the cancellation by the applicant is on grounds which constitute an unfair practice because the true basis for the cancellation of the first respondent's lease is retaliation for her exercising her rights under the Act and the Gauteng Unfair Practice regulations, 2001 ("the Regulations"), and assisting other tenants to do the same.

She lodged in good faith a number of complaints to the Rental Housing Tribunal ("the Tribunal") regarding the applicants' contraventions of the Act and Regulations on a number of occasions since 2013.

[16.] The first of these complaints was adjudicated by the Tribunal in August 2015 where the applicants were found to have committed a number of unfair practices, and were ordered to effect maintenance to the property. The Tribunal also dealt with issues regarding the amount of rental the applicants' sought to charge – which in some cases were an increase of almost 35%.

[18.] The applicants cancelled the first respondent's lease on 26 September 2017. In December 2017, the first respondent, and other tenants, lodged a multi-part complaint with the Tribunal. This complaint included the applicants' cancellation of the first respondent's lease amounts to an unfair practice.

[19.] The applicants have sought to show that these complaints have been determined and dismissed by the Tribunal. In support of this, the applicants have provided a transcript of the 15 May

2018 hearing and an email from one of the members of the panel indicating that the matter has been "finalized". The transcript does not show that any ruling was made at that hearing. At best, the transcript refers to the previous ruling of "Matabane", which it seems is the ruling by Mr Matsobane Ramalatso on7 April 2018. This ruling shows that the first respondents' complaints were not be res *judicata* and that ruling states that:

7.1 "The only complaints that are adjudicated to is, Harassment and intimidation based on false amount as arrears rental and unfair rent increase."

7.2 "The tribunal has jurisdiction to hear the rest of the complaints."

7.2 "The matter is therefore postponed to the 24 April 2018 at 09h30 for hearing."

[20.] I agree with counsel of the respondent that these complaints have been brought in good faith by the first respondent, and the tenants that she has assisted to make such complaints. There is

no evidence that these complaints have been made on any basis than in the legitimate use of the Tribunal system to ensure that tenants are afforded the protections of the Act and Regulations.

21. I am satisfied that the applicants have failed to show that the Tribunal has determined, among other things, that the cancellation of the first respondent's lease was not an unfair practice and that it dismissed the first respondent's complaints. Before this court is able to decide whether it is just and equitable to grant an eviction order, the Tribunal must make this determination. On that basis, the eviction application ought to be dismissed or stayed pending the determination of the first respondent's complaints by the Tribunal, as the Constitutional court in **Maphango and Others v Aegus Lifestyle Properties (Pty) Ltd** 2012 (3) SA 531 (CC) (Maphango) ordered in similar circumstances.

[22.] In its supplementary affidavit of 26 November 2018, the applicants contend that all the complaints have been dismissed, including the cancellation complaint. The applicants attach to this affidavit the transcript of the 15 May 2018 hearing, at SA4.1, and an email from Mr Matsobane Ramalatso, one of the

members of the Tribunal. Notably, the applicants do not refer the court to any specific sections of the transcript in support of the contention.

[23] At page 16 of the transcript (page 674 of the record) of 15 May 2018(lines 16 - 22), the chairperson of the Tribunal states:

> "The matter was postponed, my col, colleague, Matabane, was there at the next hearing. Unfortunately, I was not present. He then did a ruling after reading my ruling, where he indicated that in, in his, he believed the issues are still *res judicata*. The other tribunal members were here. Uh, *res judicata* except for one matter."

[24] The chairperson then states at page 29 of the transcript (page 687 of the record), "... we have come to the conclusion that what are you raising in 2016, is the same thing that we ruled on in 2015."

[25.] While it is not immediately apparently who "Matabane" is that the Chairperson refers to, it seems that she is referring to Mr Matsobane Ramalatso who issued the ruling on 7 April 2018 dealt with in detail above.

[26.] The above statements and the balance of the transcript do not amount to a ruling at all. Further what I set out above shows that in fact the Chairperson was mistaken in the above statements. The 7 April 2018 Ruling was rather that the first respondent's complaints, relating to among other things whether the applicants' cancellation of her lease is an unfair practice, have not been determined by the Tribunal.

[27.] Similarly, the email from Ramalatso, does not amount to a ruling. In that email, Mr Ramalatso states "This matter was finalized by the Chair in the presence of everybody, I am not sure what exactly, are we still discussing."

[28.] In terms of section 13 (13) of the Act, a ruling of the Tribunal is deemed to be an order of a magistrates' court in terms of the Magistrates Court Act, 32 of 1994, and is enforced in terms of that Act. **The Supreme Court of Appeal in Zweni v Minister of Law and Order** 1993 (1) SA 523 at paragraph 532I-533B provided useful guidance on when a decision qualifies as an order or judgement, it held that:

"A judgement or order is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (**Van Streepen & Germs (Pty) Ltd** case supra at 586I – 587B ; **Marsay v Dilley 1992 (3) SA** 944 (A) at 962CF). The second is the same as the often stated requirement that a decision, in order to qualify as a judgement or order, must grant definite and distinct relief (**Willis Faber Enthoven (Pty) Ltd v B Receiver of Revenue and Another 1992 (4) SA 202 (A)** at 214DG)."

[29.] Thus, for a decision of the Tribunal to qualify as such as an order it must grant definite and distinctive relief. The evidence that the applicants have placed before this Court does not meet these criteria.

[30.] I am of the view that the transcript it does not contain any discernible ruling.The applicants have failed to demonstrate that

the Tribunal has determined and dismissed the first respondent's complaint that the cancellation of her lease amounts to an unfair practice. It is required to do so before this Court is able to determine whether it is just and equitable to order an eviction.

THE TRIBUNAL IS THE APPROPRIATE FORUM TO DECIDE WHETHER THE CANCELLATION IS ON THE BASIS OF AN UNFAIR PRACTICE

[31.] The Constitutional Court in Maphango was faced with a similar factual situation in that there the tenants in that case had lodged a complaint against the landlord and then the landlord, after the effluxion of the three month-month moratorium on eviction then instituted eviction proceedings. In that case, the Tribunal had also not adjudicated the tenants' complaint. The Constitutional Court ordered that:

> "[67] Given the strong and balanced framework the Act creates to accommodate the interests of both landlords and tenants, the High Court should in my view have stayed the proceedings before it to enable the tenants to

resuscitate their complaints against the landlord, and to enable the Tribunal to determine whether the termination of their leases was an unfair practice. It is true that the tenants had by that time withdrawn their complaint, but they did so without prejudice to their rights under the Act, whose vindication they continued vociferously to claim. Justice therefore required that the Tribunal adjudicate their complaint....

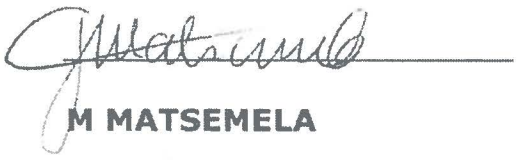
"[68] In my view, given the fuller understanding of the Act set out in this judgement, the proper order is to grant the applicants leave to appeal, but to hold over final determination of the appeal to enable the landlord and tenants, if so advised, to bring suitable proceedings before the Tribunal."

[32.] I am therefore satisfied that, this court should direct the Tribunal to make this determination before it considers whether it is just and equitable to grant an eviction order.

I therefore make the following order:

1 The eviction application must be stayed pending the determination by the Tribunal of whether the applicants' cancellation of the lease is an unfair practice.

2 No order as to costs



M MATSEMELA

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

For the Applicant	:FR McAdam
Instructed by	:Lee and McAdam Attorneys
For the Respondent	:SDJ WILSON
Instructed by	:WEBBER WENTZEL