IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 76835/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

DATE: 31-05- 2021

In the matter between:

HOYA INVESTMENT CC (Registration number: […])	**APPLICANT**
and	
LELIAH PHIRI	**FIRST RESPONDENT**
MATLOU D L	**SECOND RESPONDENT**
SHAI N E	**THIRD RESPONDENT**
MAJADIBODU S B	**FOURTH RESPONDENT**
THE CITY OF TSHWANE METROPOLITAN	**FIFTH RESPONDENT**

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 31 May 2021.

INTRODUCTION

[1] This is an opposed application brought by the applicant in terms of the Prevention of illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act) for the eviction of the first to fourth respondents ("the respondents") from the property known as the […] at […] Street, P[…] ("the property").

[2] The specific relief sought by the applicant in its notice of motion is framed as follows:

2.1 That the respondents (and all other persons and/or individuals who occupy and/or claim the property through them) be ordered to vacate Rooms […], […], […] and […] respectively of the property within 20 (twenty) days from date of this order. ALTERNATIVELY, a date as determined by this court, which is just and equitable in the circumstances.

2.2 Should the respondents (and all other persons and/or individuals who occupy and/or claim the property through them) fail to comply with the order referred to in paragraph 1 above, the Sheriff of this court be authorised and/or mandated to take all necessary steps to execute this order to evict the respondents (and all other persons and/or individuals who

occupy and/or claim the property through them) from the property and, if necessary, to obtain assistance of the South African Police Service to assist him/her in this regard.

2.3 In the event of the Sheriff of this court or his/her deputy being required to carry out the order contained in prayer 1 read with 2 *supra*, the respondents who refuse to vacate the property shall be liable for the costs of such removal.

2.4 That the respondents be ordered to pay the costs of this eviction application.

[3] The respondents are opposing the application on the basis that the applicant launched the application in terms of the PIE Act to circumvent the binding and enforceable prescripts of the interim ruling of the Gauteng Rental Housing Tribunal (“the Housing Tribunal), a body established under the Rental Housing Act 50 of 1999 ("the Act") read with the Gauteng Unfair Practices Regulations, 2001 (“the Regulations”).

[4] As such, the respondents raise a point *in limine* that, there are pending proceedings at the Housing Tribunal pertaining to the property in question. The contention is that the respondents have lodged a complaint in respect of the property with the Housing Tribunal. They argue that this court cannot entertain the matter before that complaint is finalised by the Housing Tribunal. They contend, further, that the matter should be remitted to the Housing Tribunal for finalisation of the complaint. According to the respondents, the various rulings already made by the Housing Tribunal in respect of the

respondents' complaint, are only interim in nature and no final ruling has been made. The Housing Tribunal must be given a chance to finalise the complaint before it can be entertained by this court.

[5] In support of this *in limine* point, the respondents referred to a Constitutional Court decision in *Maphango and Others v Aungus Lifesfyle Properties*,[1] wherein, the court granting the applicants therein leave to appeal, held that the statutory (namely, the Act) argument should have prevailed [when the matter was argued in the High Court and in the Supreme Court of Appeal].[2]

[6] No relief is sought against the fifth respondent but it is merely cited herein as an interested party in this matter as required by statute.

[7] This court has directed that the application be determined on the papers filed on Caselines without oral hearing as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

THE ISSUE FOR DETERMINATION

[8] The question that requires determination is whether this matter should be entertained by this court or whether the matter should be remitted to the Housing Tribunal for finalisation.

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[1] 2012 (5) BCLR 449 (CC).

[2] See para 4.

FACTUAL BACKGROUND

[9] The facts of the application are mostly common cause between the parties. The applicant is the owner of a 5-storey building which comprises of flats with approximately 280 rooms, shops and a crèche. The rooms are used as residences and are let out to members of the public on a month-to-month basis. The respondents are tenants of the applicant in terms of the month-to-month lease agreements which entitles them to occupy rooms at the property. Some of the respondents are said to be renting rooms since 2006.

[10] In October 2018, the applicant resolved to increase rental for 2019 by between 4% and 6% depending on the room size, equating to an actual rand and cents increase of either R 50.00, R 100.00 or R 150.00 *per* room *per* month. This decision to increase rental was communicated to the residents of the property, including the respondents, on 1 November 2018 and was meant to take effect from 1 January 2019.

[11] On 18 January 2019 the tenants attended a meeting to choose committee members. A committee was elected and appointed to represent the tenants in any informal process, mediation etc. The respondents were appointed as members of the committee.

[12] The respondents, together with other tenants, failed and/or refused to pay the increase in rental and raised concerns about the maintenance required at the property. A meeting was held with the applicant's representatives regarding the concerns raised by the tenants, during which

the applicant undertook to effect maintenance to the property. The respondents ostensibly withheld payment of the increase in rental on the basis that the property was not sufficiently maintained.

[13] The respondents contend that they continued paying the rent but refused to pay the increased rental because maintenance on the building was not done. The building is said to be a safety risk as it caught fire on numerous instances. Windows were broken, the common ablution facilities were in poor and unhygienic conditions. The urine port drain pipes leaked, and there are no doors in the toilets. There are cracks in the walls and floors, with water seeping through to the flats located underneath. There is, also, no wash basin to wash hands after using the toilet.

[14] On 19 February 2019 the applicant purported to cancel the lease agreements it had with each of the respondents. Having received the cancellation notices, the respondents approached the Housing Tribunal on 22 February 2019 and lodged a complaint against the applicant. They raised numerous complaints including, maintenance of the building; rental dispute relating to the billing of their accounts; increased rental; unacceptable living conditions; and the notices received to vacate the premises.

[15] The matter was first heard by the Housing Tribunal on 23 April 2019 and an interim ruling was delivered on 25 April 2019, in the following terms:

> 15.1 The respondent [applicant in these proceedings] is ordered to prepare a maintenance plan with requisite time lines.

15.2 The respondent is ordered to prepare lease agreements for such tenants as he considers appropriate.

15.3 The respondent is afforded the opportunity to file a counterclaim for non-payment of rent which is to be combined with the present complaint.

15.4 The respondent is ordered to prepare a schedule of arrear rental owing by tenants which reflects the names of the tenants, their units, the amount of the arrears and how the arrear is made up.

15.5 The Tribunal is to undertake a rental comparison relevant to this matter.

15.6 The matter is postponed to 13 May 2019 at 09h30.

[16] The matter was heard again on 13 May 2019 and a ruling was delivered on 23 May 2019. The ruling was couched in the following terms:

16.1 The respondent [the applicant in these proceedings] is ordered to implement the maintenance plan within the time frames set out in the plan, failing which remission will be considered.

16.2 The rent owing by the tenants above-mentioned be paid as indicated.

16.3 No rent increase will be effected until such time the maintenance plan is implemented in full.

16.4 The eviction court application postponed sine die.

16.5 Notice to vacate given to the 5 members of the committee are of no force and effect.

[17] The matter was further heard on 20 December 2019 and a ruling was delivered on 6 January 2020. The ruling reads as follows:

17.1 An inspector will be dispatched to the rented dwelling by the Tribunal to verify and confirm that the maintenance plan was executed as per the maintenance plan submitted.

17.2 In the event that the inspector's report confirms that the maintenance to the property was implemented in full as per the maintenance plan, then complainants must enter into lease agreements with the respondent with the proposed rent increase without any further delays.

17.3 the respondent will furnish the complainants with written receipt for all payment of rent forthwith.

17.4 the respondent ordered to cease and desist from Intimidation of complainants as such conduct constitute an unfair practise which if found guilty of the offence, will be liable to a fine or

imprisonment not exceeding two (2) years or both such fine and such imprisonment.

[18] No other ruling has been made since that made on 6 January 2020. The applicant has in the meanwhile sent out fresh cancellation letters to the respondents on the basis that it does no longer want to enter into lease agreements with them. The respondents were also informed to vacate the rooms they are occupying. The respondents failed and/or refused to abide with the cancellation letters and the applicant approached this court for their eviction, hence the proceedings before me.

[19] The applicant contends that it acted in terms of section 13 (7) of the Act when it launched the present application against the respondents, because the respondents failed to continue with the payment of rent though ordered to do so by the Housing Tribunal. In the main, the applicant contends that it does no longer want to lease the rooms to the respondents.

[20] Section 13 (7) of the Act provides as follows:

"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."

[21] Conversely, the respondents' argue that the Housing Tribunal has not finally dealt with their complaint and that the applicant seeks the cancellation of the respondents' lease agreements and their eviction on grounds which constitute unfair practice, in terms of the Act. According to the respondents, the true basis for the cancellation of their lease agreements are retaliation for exercising their rights under the Act and the Regulations, and assisting other tenants to do the same. This they proclaim is so because only the committee members' lease agreements were cancelled and subsequent eviction applications issued only against them. The respondents contend that only after the committee was established were they threatened with eviction. It is on this basis that the respondents submit that the application be dismissed with costs.

DISCUSSION

[22] In *Maphango,* a judgment which the respondents referred to in their argument, the Constitutional Court granted the applicants therein, leave to appeal in a matter based on similar facts. In that judgment, the landlord

instituted eviction proceedings against the tenants, first in the magistrates' court and after the proceedings in the magistrates' court had been withdrawn, the landlord instituted eviction proceedings in the High Court. Like in the current application, the landlord used its bare power of termination to cancel the lease agreements and the tenants had, likewise, lodged a complaint with the Housing Tribunal. The majority judges held that the High Court erred in granting an eviction order against the tenants, as it should have referred the matter to the Housing Tribunal because the Housing Tribunal was better suited to determine the complaint of the tenants. The court held that whether the termination of the tenants' lease agreements was an unfair practice, and what a just and fair ruling would be if it was an unfair practice, lies within the Tribunal's power to decide.[3]

[23] In its reasoning the court expressed itself as follows:

> "47. As I see it, the question before us is not whether the Act prohibited the landlord from terminating the tenants' leases in order to secure higher rents, but whether the termination was capable of constituting an unfair practice. Whether it was an unfair practice, and what a just and fair ruling would be if it was an unfair practice, lies within the Tribunal's power to decide. If the termination is capable of constituting an unfair practice, I must consider what order this Court should make.

[3] See para 47.

48. In my view, neither the landlord nor the tenant fully appreciated the force of the Act's provisions in litigating their dispute. But it would be wrong for this Court to take a narrow view of the matter that ignores the importance and impact of the statute. That would imply that this Court could allow litigants to ignore legislation that applies to an agreement between them. Rule of law considerations militate against this.

49. The Act abolished rent control legislation, but in its stead it enacted a more complex, nuanced and potentially powerful system for managing disputes between landlords and tenants. That system expressly takes account of market force as well as the need to protect both tenants and landlords. Even-handedly, it imposes obligations on both. It is in particular sensitive to the need to afford investors in rental housing a realistic return on their capital. The statutory scheme is therefore acutely sensitive to the need to balance the social cost of managing and expanding rental housing stock without imposing it solely on landlords. Far from ignoring the interests of investors like Lowliebenhof's landlord, the Act seeks to create a framework for resolving disputes with tenants that accommodates landlords' requirements.

50. At the same time, the Act does not ignore the need to protect tenants. Its most potent provisions are those at the centre of

the dispute in this case, namely termination of a lease and rental determinations that are just and equitable. The Act expressly provides that a landlord's rights against the tenant include the right to "terminate the lease . . . on grounds that do not constitute an unfair practice and are specified in the lease". "And" is not disjunctive. It is conjunctive. It means the Act recognises the landlord's power to terminate a lease, provided the ground of termination is specified in it, but, in addition, does not constitute an unfair practice. Differently put, the Act demands that a ground of termination must always be specified in the lease, but even where it is specified, the Act requires that the ground of termination must not constitute an unfair practice.

51. In this way, the Act superimposes its unfair practice regime on the contractual arrangement the individual parties negotiate. That the statute considers its unfair practice regime to be super-ordinate emerges not only from the requirement that a lease-based termination must not constitute an unfair practice, but also from what the Act enjoins the Tribunal to take into consideration when issuing its rulings: these include "the provisions of any lease", but only "to the extent that it does not constitute an unfair practice". The effect of these provisions is

that contractually negotiated lease provisions are subordinate to the Tribunal's power to deal with them as unfair practices.

52. It follows that where a tenant lodges a complaint about a termination based on a provision in a lease, the Tribunal has the power to rule that the landlord's action constitutes an unfair practice, even though the termination may be permitted by the lease and the common law. Whether a termination in these circumstances could be characterised as "lawful" need not be decided now. "Unfair practice" is an act or omission in contravention of the Act, or a practice the MEC prescribes as "unreasonably prejudicing the rights or interests of a tenant or a landlord". This formulation is significant. It poses "interests" in contradistinction to "rights". This embraces more than legal rights. So used, "interests" includes all factors bearing upon the well-being of tenants and landlords. It encompasses the benefits, advantages and security accruing to them.

53. This greatly enlarges the compass of unfairness under the Act. It means that unfair practices are not determined by taking into account only the common law legal rights of a tenant or landlord, but by considering also their statutory interests. This makes it even clearer that the statutory scheme does not stop at contractually agreed provisions, and conduct in reliance on them. It goes beyond them. It subjects lease contracts and the

exercise of contractual rights to scrutiny for unfairness in the light of both parties' rights and interests.

54. The Gauteng Unfair Practices Regulations provide that a landlord must not "engage in oppressive or unreasonable conduct". This must be read in the light of the power to prescribe as unfair a practice that unreasonably prejudices a landlord's or tenant's rights or interests. It means that "oppressive" conduct might be held to entail an exercise of a landlord's legal entitlements under a lease that oppresses or unreasonably prejudices a tenant's interests.

55. I therefore respectfully consider that the Supreme Court of Appeal erred in concluding without more that the landlord's termination of the leases could in the circumstances not be denounced as unreasonable or unfair, let alone oppressive. This approach in my view applied an unduly constricted approach to the question, which focused solely on the landlord's common law entitlement to cancel the leases. Since in my view this dispute is best approached through the generous and powerful mechanisms the Act offers both sides to the dispute, I express no view on whether the landlord was entitled at common law to cancel the leases, nor on whether, if it was so entitled, the common law should be constitutionally developed to inhibit that power.

56. It is enough to say that in my respectful view the High Court and the Supreme Court of Appeal under-assessed the power of the statute. In particular, they overlooked the history and setting of the statute, its broad definition of “unfair practice”, its clear intimation that invocation of lease terms may constitute an unfair practice and the carefully balanced powers that are conferred on the Tribunal. These show that the statute sought to create a just and practicable means of resolving landlord/tenant disputes. This encompasses a ruling by the Tribunal that a termination of a lease in the exercise of a right conferred by the terms of the lease constitutes an unfair practice. Since the tenants never abandoned their reliance on the provisions of the Act, this Court should in my view afford a remedy that enables the tenants to seek a ruling from the Tribunal.

57. I also respectfully differ from the Supreme Court of Appeal’s conclusion that “practice” envisages only “incessant and systemic conduct by the landlord which is oppressive or unfair” and cannot consist in unacceptable conduct on an isolated occasion. It has long been established in our law that a “practice” may consist in a single act. This accords with one of the ordinary meanings of the word. Thus, it was decided early under the unfair labour practice jurisdiction in employment

law that a single dismissal may constitute a labour "practice". That authority has never been doubted. It forms the interpretive backdrop for understanding the use of the word "practice" in the Act. More importantly, the broader interpretation accords with the Constitution. The Act is a post-constitutional enactment adopted expressly to give effect to the right of access to adequate housing. A cramped interpretation of "practice" would thwart its good ends.

58. There can thus be no doubt that the Tribunal had jurisdiction to rule that the landlord's termination of the tenants' leases was an unfair practice, and that the Tribunal had the power to issue a ruling granting the tenants appropriate relief. That may include a ruling setting aside the landlord's termination of their leases.

59. Here, it bears especial emphasis that the tenants' right to seek a ruling setting aside the termination of their leases has a mirror counterpart in remedies the Act affords the landlord. It too can lodge an unfair practice complaint with the Tribunal. It can thereby seek an increase in the rents it says have become uneconomic and unsustainable. The Tribunal is empowered to issue a determination regarding the amount of rent payable by the tenants.

60. The rent it determines must be just and equitable to both landlord and tenant. And it must take cognisance of exactly the concerns that speak loudly in the landlord's depositions in this case – the unsustainability of the building and of its business model at present rents, and the fading of lustre of its investment in Lowliebenhof. It seeks "a realistic return" on its investment – not unjustly so. The statute demands that the Tribunal in determining rent take due cognisance of precisely that. If it fails to do so, the landlord may bring its proceedings under review.

61. At the same time, the Tribunal's determination whether the landlord's termination of the tenants' leases, solely to get higher rents, was an unfair practice, would be material to any subsequent decision on whether to grant an eviction order. The Constitution requires that an eviction order be granted only "after considering all the relevant circumstances". A Tribunal's determination that the landlord's termination of the tenants' leases was an unfair practice would be most pertinent to that.

62. It follows that the High Court ought to have postponed the eviction application to enable proceedings before the Tribunal to determine whether the termination of the leases was an unfair practice. Remitting the matter to the High Court would unduly protract what has already been a long-fought case.

> Hence the remedy I propose will ensure that this Court can itself issue a just and expeditious order, after enabling the parties to approach the Tribunal. I turn to that now." (footnotes removed)

[24] The Act, it has been held, creates a finely-balanced mechanism to resolve disputes between landlords and tenants. It offers an appropriate and fair mechanism for the resolution of disputes that constitute unfair practice.[4]

[25] The Act provides that any tenant, landlord, group of tenants or landlords, or interest group "may in the prescribed manner lodge a complaint with the Tribunal concerning an unfair practice".[5] "Unfair practice" means:

(a) any act or omission by a landlord or tenant in contravention of the Act; or

(b) a practice "prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord".

[26] The Gauteng Unfair Practices Regulations provide that neither a landlord nor a tenant may "engage in oppressive or unreasonable conduct".[6] A landlord must not "conduct any activity which unreasonably interferes with or limits the rights of the tenant or which is expressly prohibited under the

[4] See para 40 of *Maphango.*
[5] See section 1 of the Act.
[6] See Regulations 14 (1) (d) and 14 (2) (e).

lease, these regulations, the Act or any other law".[7] The parallel provision for tenants proscribes "any activity which unreasonably interferes with or limits the rights of other tenants and that of the neighbours, or which is expressly prohibited under the lease, these regulations, the Act or any other law".[8]

[27] In addition, the regulations provide that a tenant must not "intimidate, discriminate or retaliate against the landlord for exercising any right under these regulations, the Act or any other law".[9] The Regulations also import an obligation of good faith into the parties' dealings. They stipulate that 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.[10]

[28] The Constitutional Court has spoken, and I am bound by its decision. I have, on the basis of the decision in *Maphango*, to refer this matter to the Housing Tribunal for it to determine whether the termination of the lease by the applicant, in this instance, was a fair practice.

[29] It is evident from the rulings of the Housing Tribunal referred to in the body of this judgment that the consideration of the respondents' complaint lodged with the Housing Tribunal has not been finalised. The report of the Housing Tribunal's inspector in respect of the maintenance of the building

[7] See Regulation 14 (1) (f).
[8] See Regulation 14 (2) (g).
[9] See Regulation 14 (2) (c).
[10] See Regulation 14 (3).

has not been delivered and the Housing Tribunal can only make a final ruling once the inspector's report has been made available to it. A final ruling need to be made by the Housing Tribunal, in particular, as to whether the cancellation of the lease agreements of the respondents, is a fair practice.

ORDER

[30] Similarly, as in *Maphongo*, I make the following order:

1. The application is postponed *sine die*.

2. The matter is remitted to the Gauteng Rental Housing Tribunal to determine whether the cancellation of the lease agreements of the first, second, third and fourth respondents by the applicant, is a fair practice.

3. The parties are granted leave to apply to this court within fifteen (15) days after the ruling of the Gauteng Rental Housing Tribunal, or other disposition of the matter, for any further determination by this court.

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E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearance:

Applicant's Counsel	: **ADV G R EGAN**
Applicant's Attorneys	: CHRIS GREYVENSTEIN ATTORNEYS
Respondents' Counsel	: **ADV MARYNA STEENEKAMP**
Respondents' Attorneys	: LEGAL AID SA, THE PRETORIA OFFICE
Date of hearing	: 20 April 2021
Date of judgment	: 31 May 2021