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09 December 2013

The Honourable Chairperson
Portfolio Committee on Human settlements
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Attention: Ms Koliswa Pasiya, Committee Secretary
Per email: kpasiya@parliament.gov.za

Dear Madam

Rental Housing Amendment Bill [B56-2013] as published in Government Gazette No.37050 of 19 November 2013

Background

The Banking Association South Africa (BASA) is the official trade association for all private sector commercial banks registered in terms of the Banks Act (no.94 of 1990, together with Amendments thereto and Regulations in respect of this Act). BASA therefore represents the views of its membership.

Introduction

BASA welcomes the opportunity to be able to provide public commentary in respect of the Rental Housing Amendment Bill.

BASA supports Government's initiative to clearly define the rights and obligations of tenants and landlords, to strengthen and expand the role of Rental Housing Tribunals and to require Municipalities to establish Rental Housing Information Offices.

Comments

1. Section 4B

Whilst clauses (1)(*b*),(*c*) and (*d*) from a generic perspective require the deposit to be placed into an interest bearing account for the duration of the lease and the account should not form of the estate of the deceased/insolvent, we are of the view that these clauses within the Bill need to be more specific if they are to provide definitive guidance to financial institutions, tenants and the legal fraternity alike e.g. more information is needed on what the expectations/requirements are of a financial institution, a curator, the rights of a tenant and the obligations of a mortgagee. We further submit that in addressing these areas, that specific reference to parts of the legislation that affect insolvent and deceased estates be made and that at the same time Amendments to these Acts also be made so as to align them to this Bill.

Recommendation
As per the above comments.

2. Section 9.

We note the attempt within the Bill to balance Tribunal representation to members with expertise in rental matters, consumer matters and legal expertise. The way in which this section is written provides such balance for a Tribunal consisting of three members, but it does not do so for Tribunals where there are more than three members as section 9.(*b*)(i),(ii) and (iii) state "at least one but not more than two shall be persons …"

Recommendation

If the Committee wishes to create a balance between rental matters, consumer matters and legal expertise (which we believe is crucial), we recommend that section 9.(*b*)(i),(ii) and (iii) be amended to read "... one third shall be persons…".

3. Section 15.

We are of the view that a number of clauses within section 15 require address, namely:

1. In terms of the proposed amendment to this section (sub-section (a) (1)), "the Minister may make regulations…" This contradicts sub-section (g) (3) of this section, as this sub-section compels the Minister to issue regulations within 12 months of the commencement of the Amendment Act.

   Recommendation

   The wording for sub-section (g) (3) should read "the Minister may make regulations…"

2. In terms of sub-section (a) (1), we also note that there is no compulsion for the Minister to invite and consider commentary from the public in respect of proposed regulations and that he/she is simply required to publish these in the Gazette "after consultation with the relevant parliamentary committees." We hold the view that this is untenable as such regulations have the potential to have a substantial impact on the operations of the market, including the attractiveness of property as an asset class from an investor perspective. Further, it has become the norm (a practice established through other regulatory frameworks over the past number of years) that prior to Gazetting regulations, the Minister invites public engagement with key public stakeholders by publishing draft regulations for public commentary/ consultation for a period of 30 days.

   Recommendation

   Sub-section (a) to read "The Minister may make regulations after consultation with the relevant parliamentary committees and every MEC, together with inviting public commentary/consultation, by publishing draft regulations for commentary for a 30 day notice period. Thereafter the regulations will be promulgated by notice in the Gazette…"

3. In terms of sub-section *f*(A) "norms and standards may be set per geographical area to avoid unfair practices particular to that area." We are of the view that if norms and standards are to be introduced, these should be generic enough to be able to be introduced throughout the country as geographical based norms

and standards will lead to "patchy rental frameworks", where landlords will invest in rental stock in areas where such norms and standards are less onerous and that they will steer away from areas which places untoward demands on them. Our sense is that Municipalities will seek to impose more onerous norms and standards in areas where socio-economic development is the most pressing, such as areas which require regeneration e.g. an inner city. This would frustrate the State's objective/s in introducing geographical nuanced norms and standards.

Recommendation

This sentence should be deleted from the Bill.

4. Sub-section *f*(B) suggests that the Minister may seek to introduce rent control as the regulations will provide for "the calculation method for escalation of rental amounts and the maximum rate of deposits which may be payable in respect of a dwelling." Whilst we are supportive of the need for the poor, the aged and the vulnerable to enjoy a level of state protection, this should not be at the expense of the private rental sector. Behavioural economics dictates that unless a clear distinction is made between "social housing tenants" and "other private sector classes of tenants", that the private sector will simply move away from providing any form of rental accommodation which may prejudice their ease of being able to effect swift and cost effective legal processes to remove and replace errant tenants and/or to enjoy market related rental escalations.

   The Department of Human Settlements has recognised the importance of rental as an alternative tenure option and hence it seeks to promote the need for the private sector to increase quality rental stock levels, particularly within the "gap" housing market segment. It is our view that this Amendment Bill should support this drive, as rental introduces choice for consumers as well as ensuring wider access to homes. Regrettably, this Amendment Bill whilst it seeks to strengthen the rights of tenants, it also weakens the rights of landlords operating within all market segments, for example:

   - By making such leases not being subject to the provisions of the Formalities in Respect of Leases of Land Act (section 6.(a)(1)), by implication this aligns such leases to the Consumer Protection Act. This creates a biased position as a tenant may withdraw from a lease agreement by providing the landlord with 20 working days' notice of his/her intention to vacate a property, but the landlord is required to honour the lease agreement, which agreement may run into years. Further, where an owner/landlord is to:
     - seek mortgage finance to support the purchase of a rental property and he/she is required to place reliance on rent as a source of income to repay the loan, mortgagees will be reluctant to support this as the regular source of such an income stream may be problematic;
     - invest in a rental property as an asset class, as compared to other forms of asset classes, which classes are able to guarantee a regular income stream. This disadvantages rental property as an investment option.
   - The creation of Rental Tribunals simply lengthens the timeline and cost that landlords will incur should they wish to take legal action against an errant tenant.

Not only is tenant biased legislation unaligned to international lease norms but our prediction is that unless a clear distinction is made between "social housing tenants" and "other classes of private sector tenants", that current private sector rental companies, particularly within urban inner cities, will convert their substantive rental stock holdings to home ownership, thereby realizing their capital investment and placing such properties out of the reach of certain segments of the population. In the unlikely event that this does not occur, one can expect private sector financiers to implement more expensive and stricter lending criteria for private sector rental companies and/or landlords who purchase an investment property/ies for rental purposes, given the increased risk profile of such properties. This in turn will impact negatively on the efficient functioning of the property market, as well as promoting financial exclusion (landlords will simply pass this additional financing cost onto tenants). Further, we are of the view that the looseness of the wording in this section will permit unscrupulous tenants whom the State does not wish to protect to abuse this section of the proposed legislation to frustrate landlords (the Prevention of Illegal Eviction of Unlawful Occupation of Land Act 108 of 1996 (PIE) is a case in point where unscrupulous tenants have taken advantage of PIE to frustrate a landlords ability to enforce default evictions and/or to prevent building hijackings).

Moreover, we draw to the attention of the Portfolio Committee the 2012 Constitutional Court ruling in the case *Maphango vs. Avenus Lifestyle Properties (Pty) Limited.* The court was faced with the question of when a landlord may cancel a lease and evict tenants. A group of tenants, including Malango, of an apartment block in Johannesburg inner city, faced eviction following the termination of their leases by the landlord who had done so with the sole purpose of entering new tenancies at substantially higher rentals. The court ruled in favour of Avenus Lifestyle Properties. It therefore follows that efforts by the Minister to introduce rental control for "private sector classes of tenants" would result in the State having to defend itself in the courts where the highest court in the land has already set precedence.

Recommendation

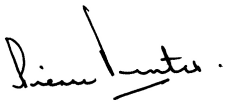
We submit that all tenant biased sub-sections be removed from the draft Rental Housing Amendment Bill, but that these important principles should rather be effected through amendments to the Social Housing Act 16 of 2008.

Conclusion

Given the unintended consequences that the draft Rental Housing Amendment Bill will introduce, BASA would like to make a presentation to the Portfolio Committee in January when the Committee is to entertain public presentations in respect of this draft Bill.

We trust that the Portfolio Committee will view these comments in the positive vein in which they are intended.

Yours faithfully



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