ORGANISATION OF CIVIC RIGHTS (OCR)

Est. 1984 011-241 NPO DCRA Trust No. 4656/92 PBO 18/11/13/4867

tenants' rights, sectional titles and social facilitation specialist

Member of Asia Pacific Network for Housing Research (APNHR); International Union of Tenants (IUT) and supporter of Habitatjam

OCR

031 304 6451
Fax 0866 907 651
Intl Code: + 2731
Intl Fax: +2731 3010026

é-mail: civicrights@ocr.org.za
Websites: www.ocr.org.za;
www.iut.nu www.law24.com

Third Floor, Suite 302, Salisbury House, 332 Anton Lembede (Smith) Street, Durban, 4001 *PO Box 4787, Durban, 4000 South Africa*

Date: November 30, 2011

Our Ref: RHAB 113011 / sim
Your Ref.

To fax No.
This transmission: Pages, *inclusive*

Mr. Greg Rhoxo
Committee Secretary
The portfolio committee on human settlements

Dear Mr. Rhoxo

RE: OCR's submission on the Rental Housing Amendment Bill [B21-2011]

Please find enclosed herewith our submission.

We would be willing to give verbal presentation and have nominated Dr. Sayed Iqbal Mohamed to represent the OCR in the event the Committee deems it necessary to extend an invitation.

We thank you in anticipation,

Yours comradely

Angel Paulsen (Ms.)
Secretary General

S/Board : 031-2508500; Direct : 031-2508583; Fax : 031-2508533
email: civicrights@ocr.org.za / direct: paulsena@avusa.co.za

SUBMISSION ON THE RENTAL HOUSING AMENDMENT BILL [B21-2011]

TO THE PORTFOLIO COMMITTEE ON HUMAN SETTLEMENTS

By

The Organisation of Civic Rights (OCR)

November 30, 2011

Contact details

Dr. Sayed Iqbal Mohamed

Organisation of Civic Rights

P. O. Box 4787 Durban 4000

Tel 031 304 6451

civicrights@ocr.org.za

A Brief background of the OCR

OCR's main activity relates to empowering and educating tenants, including refugee/immigrant and migrant tenants to enforce their rights and fulfill their obligations and duties; respond to legal processes; representing tenants in legal proceedings, mediation with landlords and organising tenants' committees.

The OCR has 27 years of expertise in tenant-landlord laws and challenges that face the mainly poor and destitute tenants. It has an 'insiders' perspective of the Rental Housing Tribunals' administrative and quasi-judicial functions, strengths and weaknesses.

The OCR was formed by activists such as Billy Nair, Pravin Gordhan, Sayed Iqbal Mohamed and residents of Warwick Avenue in 1984. Its main focus has been tenant-landlord matters.

It is a community based NGO committed to developing a better and just society by making a significant and distinctive contribution at regional, provincial and national levels through active grassroots involvement in improving

(i) the condition of tenants and the homeless community

(ii) the safety, security and health of residents.

These commitments are expressed through various programmes interventions, advice, research, legal and paralegal intervention and representation, lobbying for positive changes, capacity building, education and empowerment.

OCR continues to engage government and believes partnership between civil society and the government is crucial in realising a better life for all.

Some of OCR's Achievements

- Organising, educating & empowering tenants, the homeless & residents.
- Founding member and co-ordinator of various anti-crime & redevelopment forums.
- Successful representations at rent boards.
- Mediation between landlord and tenants.
- Partnership: on going discussions at central, provincial & local governments.
- Networking with civics and other relevant groups regionally, nationally and internationally.
- A major stakeholder on new legislation for landlords & tenants.
- Various High Court actions resulting in the:
  - reintroduction of rent boards nationally (1986); rent control in Warwick Avenue (1993)
  - reinstatement of displaced tenants
  - reconnection of services

1984–1989: OCR was in the forefront for the abolition of the Group Areas Act and stopped the harassment of "mixed" couples & forced evictions.

1995–1999: Brought about changes in the composition of rent boards: gender & ethnicity

1995–1999: OCR made substantial contribution to landlord-tenant law (the Rental Housing Act 50 of 1999) and the provincial Rental Housing tribunals; served on the national task team to advise the Minister of Housing.

1998-1999 had the apartheid surcharge or levy imposed on Durban market traders abolished; exposed corruption by market master

2000–2006: Contributed to protecting the rights of sectional title owners (Local Government Property Rates Bill)

2003–2011: Social facilitation – multi-million rand upgrade of municipal housing; community sales facilitation.

1984 -2011: Various research papers, books, more than 400 articles, local and international journal articles, largely tenant-landlord related and on the Rental Housing Act and Tribunals

It is against this brief background of extensive experience and grassroots insight that the OCR comments on the Rental Housing Amendment Bill, hoping to highlight the challenges of the proposed amendments, existing legislation and the ineffectiveness of the Tribunals' rulings due to enforcement issues.

B The Rental Housing Amendment Bill [B21-2011]

The proposed amendments focus on: -

- The substitution of definitions
- The granting of power to consider evictions
- Mandatory requirement for each province to have a Rental Housing Tribunal;
- Optional requirement for municipalities to establish Rental Housing Information offices, and
- Granting Rental Housing Tribunals powers to rescind its rulings

Amendment of section 1 of Act 50 of 1999
Substitution of Definitions

COMMENTS:

The definitions appear to be straight forward and necessary.

Amendment of section 4 of Act 50 of 1999

2. Section 4 of the principal Act is hereby amended by the substitution in subsection (5)*(d)* for subparagraph (ii) of the following subparagraph:

"(ii) repossess rental housing property having first obtained a ruling by the Tribunal or an order of court; and".

COMMENTS:

There are constitutional, procedural and substantive legal constraints that would not allow the Tribunal to deal with the repossession of a dwelling.

Jurisdiction:

The proposed amendment read with Section 13 (14) of the Rental Housing Act ('the RHA'):

> The Tribunal does not have jurisdiction to hear applications for eviction orders.

and read with Section 26 (3) of the Constitution:

> No one may be evicted from their home without an order of court made after considering all the relevant circumstances.

precludes the Tribunal from having jurisdiction to deal with repossession of a dwelling even on a valid cancellation or termination of a lease. Its powers to deal with eviction matters are specifically excluded in terms of Section 13 (14) of the RHA.

The proposed amendment of Section 13 by inserting "(10A) The Tribunal must refer any matter that relates to evictions to a competent court."; and

is further evidence of the intention of keeping eviction out of the Tribunal.

Courts:

More importantly, the Constitutional provisions require an order to be obtained from a court (26 (3)[2]). If the tenant refuses to vacate after an order of an eviction is granted by a court, in terms of court rules and the Sheriff's Act, such an order is only executed on a warrant of ejectment entitling the sheriff to act.

Section 166 of the Constitution lists the courts, which are vested with judicial authority (s165). The Tribunals are excluded.

[2] s 26 (3) 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.

Procedural issues:

Then there is the matter of procedure. In terms of section 171 of the Constitution: "All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation." The Tribunals do not have rules and procedures even though the honourable minister is obliged to do so (s15 of the RHA), without which, the Tribunals would be conducting its functions outside its powers.

Judicial officers – Tribunal members:

Judicial officers have training, expertise and are required to have knowledge of the various laws, substantive and procedural, when hearing a case. A cursory reference to the rulings of the Tribunals over the 11 year period shows that the rulings fall short of even a modicum of the minimum standard to ensure justice and equity, even where a Tribunal is dominated by legal practitioners.

Jurisprudential development:

The Prevention of Illegal Eviction from & Unlawful Occupation of Land Act 19 of 1998 (PIE)

PIE regulates residential evictions with the exception of holiday homes (*Barnet v Minister of Land Aff*airs 2007 (6) SA 313 (SCA)). Occupation for occasional visits based on mere convenience does not constitute a home (*Beck v Scholz* [1953] 1 QB 570 (CA) 575-6).

Shelters for overnight accommodation and 'lodgings', on the other hand, would fall within the definition of habitable dwelling or home. (in *Morning Tide Investments 227 (PTY) Limited v Durban Beach Shelter & Ethekwini Municipality* (case no. 9409/2010, Kwazulu-Natal High Court 3rd May 2011).

Eviction at common law was simple before PIE and the Rental Housing Act. The owner/landlord/lady merely had to show that there was a valid termination of the lease and had the right to be restored possession. PIE brought about changes whereby courts orders and judgments grant evictions that are just and equitable to do so, after considering:-

- all the relevant circumstances

- the rights and needs of the elderly, children, disabled persons and households headed by women

PIE requires a landlord to establish and disclose the circumstances of the tenant to be evicted. The summons or application seeking to evict must have a separate part to it in which such a disclosure is made and served on the tenant. The court has to grant the PIE application first before the landlord can proceed with the main summons or application for eviction. PIE and the main application for eviction must also be served on the municipality where the tenant resides.

Courts have on several occasions expanded the conditions of PIE so that the constitutional obligations of finding alternate accommodation is placed where it belongs, on the government when a municipality acts against a private landlord even in urban localities.

Courts have also granted structural interdicts, whereby the application by a private landlord for eviction is adjourned when destitute tenants are involved. The municipality has to provide a comprehensive plan to the court under oath within a specific period, detailing how it will make resources, financial and accommodation available to house the poor tenants.

The growing jurisprudential demands on government have ensured that local municipalities in particular are the points of service delivery. They are required to: -

- Provide suitable alternative accommodation to evictees
- Engage meaningfully with occupants facing evictions
- Present courts with detailed plans for relocation

As the court challenges to evictions are steadily growing, so are the courts' responses to the changing dynamics of a society in transformation. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 237, Sachs J succinctly expresses the concerns for the poor:-

"Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good

neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves."

In *Modderfontein Squatters'case*[3], the court held that the local authority had a duty to protect the owner's right and consequently the right to eviction. At the same time, the local authority was also under obligation to find alternative accommodation to those facing eviction. The municipality was therefore ordered to come up with a comprehensive plan and to submit it to the court detailing how the owner and the occupiers would be assisted.

Similar 'theme' resonates in other cases to prevent the homelessness of those facing eviction by private property owners. The courts require organs of state to adopt a proactive and meaningful engagement process with the intended evictees and presenting a comprehensive plan to accommodate them. Meaningful engagement was first introduced in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

In *Blue Mountain Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W), it was held that the city of Johannesburg as a local authority was in breach of its constitutional and statutory obligations by presenting an inadequate report on the provisioning of emergency shelter or other housing in the event of the occupiers' eviction.

The city of Johannesburg was ordered to provide short-term accommodation in *Property Lodging Investments (Pty) Ltd v the Unlawful Occupiers of Erf 705, Halfway Gardens and Others* (unreported Case No. 6292/06 ZAGPHC –judgment: 30 November 2006). In *Lingwood and Schon v The Unlawful Occupiers of Erf 9, Highlands* (case no 2006/16243, 16 October 2007) and in *Sailing Queen Investments* v *the Occupiers La Colleen Court* 2008 (6) BCLR 666 (W); the courts held that municipalities are obliged to ensure access to alternative accommodation and must be joined as a party where the poor occupiers faced eviction.

We respectfully submit the proposed amendment would not fit within the ambit of the Rental Housing Act.

[3] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae) ; President of the Republic of South Africa and Legal Resources Centre, amici curiae)* 2004(6) SA 40(SCA)

Amendment of section 6 of Act 50 of 1999

3. The following section is hereby substituted for section 6 of the principal Act:

"**Application of Chapter**

6. This Chapter applies to all provinces in the Republic of South Africa."

Amendment of section 7 of Act 50 of 1999

4. The following section is hereby substituted for section 7 of the principal Act:

"**Establishment of Rental Housing Tribunals**

7. [The] Every MEC **[may]** must by notice in the *Gazette* establish a tribunal in the Province to be known as the Rental Housing Tribunal."

COMMENTS:

We welcome these amendments and hope that the two remaining provinces would have Tribunals established soon.

However, we believe that the mandatory requirement for each province to have a Rental Housing Tribunal should be vested with the honourable Minister. We provide the following reasons: -

1. The Rental Housing Act is a national legislation.
2. The Minister's direct authority to establish Tribunals leave MECs with no choice.
3. The Minister's direct involvement will prevent incompetency, nepotism, and appointments of members who are unsuitable.
4. MECs will take the Tribunals seriously and be more accountable. At present, annual reports are more concerned with numbers (increased in case load).
5. The rationale for MECs to establish Tribunals was due to Gauteng's tenant-landlord tribunal at the time the Rental Housing Bill was being developed in 1998. On hindsight, the minister should have had the authority to establish Tribunals at the outset.

Amendment of section 13 of Act 50 of 1999

(c) by the insertion after subsection (12) of the following subsection:

"(12A) The Tribunal may, acting on its own accord or on application by any affected person, rescind any of its rulings if such rulings—

(a) were erroneously sought or granted in the absence of the person affected by it;

(b) contain an ambiguity or patent error or omission, but only to the extent of clarifying that ambiguity or correcting that error or omission; or

(c) were granted as a result of a mistake common to all parties to the proceedings.".

COMMENTS:

The Tribunal should not be given the powers to rescind its ruling since there is no appeal procedure to the high court. Also, allowing members to act "on its own accord" to rescind its decision tantamount to unfettered powers and subject to abuse. Rescission applications of court orders and judgments are managed by many established rules and procedures.

The seriousness of the Tribunal ruling and the importance of its role will be undermined. More importantly, there is adequate safeguard in the RHA and the pending Procedural Regulations.

Section 13 (b) of the RHA requires a preliminary investigation to establish if a complaint does relate to an unfair practice. Such investigations will invariably determine whether the complaint is legitimate or frivolous. The following section of the pending Procedural Regulations provides adequate pre-emptive remedy regarding the concerns raised in the proposed amendments: -

- 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.

- Once a ruling is made and communicated to the parties, the Tribunal cannot review it or consider new information to re-examine the evidence or re-evaluate the case.

- Once the Tribunal gives its ruling, it becomes ***functus officio*** like the lower and higher courts. See S v Mpopo 1978 (2) SA 424 (A) at 428-429; 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).

- In terms of the ***res judicata*** rule, parties are prevented from having the same matter adjudicated that was already finalised. See Pothier (Vol 1:2000); *Janse van Rensburg and Others NNO v Myburgh and Two Other Cases* 2007 (6) SA 287 (T). Where the parties are not the same and the relief sought is different, it was held that the defence of res judicata is not available (*Laeveld Trust 2001 (Pty) Ltd & others v Blue Fire Properties* 115 (Pty) Ltd [2011] JOL 28053 (SCA).

- Granting such powers may lead to abuse by any of the relevant stakeholders.

- Simple grammatical or arithmetical corrections can be made. The authority to effect such corrections can be achieved through the Procedural Regulations.

The unambiguous and concise view of Ngcobo J (in Zondi v Mec, Traditional and

Local Government Affairs, and Others 2006 (3) SA 1 (CC) at 11-13.) sums up the reason for not allowing self-amendments / review or rescission: -

> "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."

There are more pressing matters that need to be addressed, such as enforcement of the Tribunal's decision. All the amendments and the law as it stands are meaningless if a party refuses to abide by the Tribunal's ruling or 'orders'. Since its inception, the Tribunals have no enforcement powers. Its ruling being a magistrate's court judgment needs a nexus in the relevant legislation. Refer to attachment in PDF (Enforcement Orders RHTs).

We respectfully submit that our concerns raised above strongly indicate that the amendments in its present form would be counter-productive to the sprit and purpose of the Rental Housing Act.