**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

☎ 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: April 05, 2012

Our Ref: RHAB 040512 / sim
Your Ref.
To fax No.
This transmission: Pages, *inclusive*
Via email kpasiya@parliament.gov.za

**Ms. Koliswa Pasiya**
Committee Secretary
The portfolio committee on human settlements

Dear Ms. Pasiya

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

Please find enclosed herewith our submission.

We would like to make a verbal presentation and have nominated Dr. Sayed Iqbal Mohamed to represent the OCR.

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

OCR office contact person: Gugulethu Pretty-Rose Gumede : 031 304 6451

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

# TO THE PORTFOLIO COMMITTEE ON HUMAN SETTLEMENTS

By

The Organisation of Civic Rights (OCR)

April 05, 2012

**Contact details**

Dr. Sayed Iqbal Mohamed

Organisation of Civic Rights

P. O. Box 4787 Durban 4000

Tel 031 304 6451

civicrights@ocr.org.za

We thank the portfolio committee on human settlements for the opportunity given to submit our comments. We commend the members for taking the bold and giant leap to ensure the protection of the rights of poor[2] tenants while also balancing the rights and obligations of tenants and landlords.

Most tenants experience huge challenges, especially regarding deposits, maintenance issues and unlawful actions. Given that parties are never equal when contracting, tenants are always at the mercy of landlord/ladies. Tenants are faced with the option to take the dwelling with the terms and conditions outside the common law protection. Should a tenant reject the conditions or attempt to negotiate, this would lead to possible homelessness because of the acute rental housing shortage.

At the same time, tenants who act unscrupulously or violate their lease conditions cannot get away by believing that they have rights but do not have to be held accountable for their actions and failing to fulfill their obligations.

As for the introduction of 'habitability', this is a great milestone for South Africa, which would be one of few countries that would make this a statutory requirement. Concern for the poor by giving more substance through the amendments is another victory for members and the government and certainly for the poor, provided that these go beyond the pages of the Rental Housing Act ("Act").

Another commendable step is the seriousness that appears to emerge regarding the training of members.

We respectfully draw your attention to certain provisions in the Bill that we are concerned about or aver that more thought should be given and have presented our views accordingly.

[2] Housing's poverty trap - December 6 2011 http://www.iol.co.za/dailynews/consumer/housing-s-poverty-trap-1.1192927

**Re: Amendment of section 1 of Act 50 of 1999**

'**maintenance**' refers to such repairs and upkeep as may be required to ensure that a dwelling's habitability does not constitute an unfair practice, more specifically that the habitability does not constitute unacceptable living conditions and "maintain" has a corresponding meaning;";

---

Comments

In addition to the definition, it would give the Tribunal and the courts more authority, provide greater protection to tenants and place landlord\ladies on notice if "habitability" is elaborated as a separate section.

Implied Warranty of Habitability is part of our common law and developed by the courts in a few instances.

*Habitability includes: -*

1. *adequate space*
2. *protection from the elements such as cold, damp, heat, rain, wind and other threats to health*
3. *physical safety of occupants must be guaranteed*
4. *building must be structurally sound – e.g.*, faulty roof, damaged ceilings, exterior walls and floors

The following cases make reference to habitability:

In *Cape Town Municipality Appellant v Paine Respondent* 1923 AD 207 : -

*a tenant has a just cause of cancelling the lease if the landlord has not made the necessary repairs to the subject of it to make it habitable*

In *Alexander v Armstrong* (1879) 9 Buch 233 Supreme Court of the Cape of Good Hope 1879. December 11, 12, 16 : -

*That it thereupon became the duty of the defendant to deliver to the plaintiff the said house and premises in a safe and habitable condition, and in a fit and proper state of repair.*

In *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) : -

*The needs of such people could be met by relief short of housing which fulfilled the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the Act.*

*The legislative action pointed out to the Court and the policy documents placed before the Court appeared to be postulated on the need for housing development as defined in the National Housing Act 107 of 1997. "Housing development" was there defined as:*

*"the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have*

*(a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and*

*(b) potable water, adequate sanitary facilities and domestic energy supply . . ."*

In *City of Johannesburg v Rand Properties (Pty) Ltd and others* [2007] 2 All SA 459 (SCA):-

*The international ideal has been described by UNESCO in these terms:6*

*"The right to adequate housing should not be understood narrowly as the right to have a roof over one's head. Rather, it should be seen as the right to live somewhere in security, peace and dignity. This right has a number of components, including the following:*

*(i) Legal security of tenure: everyone should enjoy legal protection from forced eviction, harassment and other threats;*

*(ii) Habitability: housing must provide inhabitants with adequate space and protection from the elements and other threats to health;*

*(iii) Location: housing must be in a safe and healthy location which allows access to opportunities to earn an adequate livelihood, as well as access to schools, health care, transport and other services;*

*(iv) Economic accessibility: personal or household costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not compromised;*

*(v) Physical accessibility: housing must be accessible to everyone, especially vulnerable groups such as the elderly, persons with physical disabilities and the mentally ill;*

*(vi) Cultural acceptability: housing must be culturally acceptable to the inhabitants, for example reflective of their cultural preferences in relation to design, site organisation and other features;*

(vii) *Availability of services, materials, facilities and infrastructure that are essential for health, security, comfort and nutrition, such as safe drinking water, sanitation and washing facilities."*

Habitability and human dignity

In *Mpange & others v Sithole* [2007] JOL 20479 (W) : -

*In fleshing out the nature of the duties imposed by section 26(1) of the Constitution, it is valuable to consider the comments of the United Nations Committee on Economic, Social and Cultural Rights ("the Committee") on the right to adequate housing (see Jaftha v Schoeman & others; Van Rooyen v Stoltz & others 2005 (2) SA 140 (CC) [also reported as 2005 (1) BCLR 78 (CC) – Ed] at paragraph [23]). The Committee has dealt with the meaning of "adequate housing" in General Comment 4. There, the Committee has emphasised 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 (Article 11(1)) UNCESCR General Comment 4 (1991) 13 December 1991 E/1992/23 at paragraph [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."31*

*Section 10: dignity*

*Human dignity is the central value of the objective normative value system established by the Constitution.32 As the former Chief Justice has written:*

*"As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution" (Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order" (2000) 16 SAJHR 193, at 196).*

*The Constitutional Court has repeatedly emphasised the link between the socio-economic rights in the Constitution and the right to dignity.33 Limited access to electrical, water and toilet facilities, the absence of regular refuse removal and broken windows creates squalid conditions which affect applicants' dignity. In addition, society as a whole is demeaned if the State, through its judicial arm, cannot come to their assistance.34*

Recommendation

An insertion at s 5(3) of the principal Act before (a) to the effect:-

*the landlord must provide a tenant a dwelling that is in a safe and habitable condition, and one which is in a fit and proper state of repair at the beginning of the lease.*

**Re: Insertion of sections 4A and 4B in Act 50 of 1999**

5. The following sections are hereby inserted in the principal Act, after section 4—

"**4A. Rights and obligations of tenants.**

(3) On the expiration of the lease, tenants have the right to receive payment of the deposit and interest without any deduction or set-off, within seven days of expiration of the lease: Provided that where the tenant –

---

Comments

Deposit is usually required before the tenant takes occupation as well as rental in advance. This is the general practice or norm. It is difficult for most tenants who may be further burdened by paying deposits that exceeds one month's rental.

Why should the deposit not be refunded on the day the tenant moves out / the lease ended. Often, deposit has to be paid at the new dwelling and the whole cycle is repeated for the poor and struggling tenants. Then there is the usual case of landlord\ladies not refunding promptly or at all.

Recommendation

We recommend that the deposit -

- be restricted to an equivalent to one month's rental. (**4B.(a))**
- should be refunded on the last day or the day the tenant vacates the dwelling, having duly and properly fulfilled her/his part of the lease. ("**4A.(3))**

**Re:** **7.** Section 5 of the principal Act is hereby amended—

**Leases to be in writing**

---

Comments

Nothing precludes a landlord from having a long, complicated and one sided lease in spite of the guidelines. There is therefore a need to prevent the circumventing of the guidelines.

The common law duties and obligations of the landlord are usually passed onto the tenant through a lease contract and our highest courts have confirmed this position, that is, the right to take over the landlord's obligations through a written contract. The landlord includes a clause or section in a lease that states that the tenant will carry out internal repairs and maintenance, which falls on the landlord's common law obligations. In many instances, tenants also sign leases that require them to take over external maintenance and repairs.

Recommendation

A clear set of mandatory requirements in the Act or, alternatively, in the prescribed guidelines (which will obviously have to be promulgated with the Act) that should include: -

- Implied warranty of habitability: (*the landlord must provide a tenant a dwelling that is in a safe and habitable condition, and one which is in a fit and proper state of repair at the beginning of the lease)*
- Landlord would be responsible for all maintenance and repairs, both internal and external
- The jurisdiction in the event of an unfair practice dispute would be the Tribunal
- Breach (late payment, non payment, overcrowding, failure to maintain or repair, etc.) allows for cancellation provided proper notice is given to remedy the breach within 14 days

- Proper contact details of parties[3] – particularly the landlord's details even if the lease is entered into by the landlord's agent. (There are many instances where the agent stops acting for a landlord during the lease period or where the agent has 'disappeared' or where the landlord cannot be traced because the tenant was given a lease with the only contact details being a non-existent cell number. Tribunals and other bodies such as legal aid are unable to take action against landlords who fail to provide contact details.)

- The role or specific mandate of the agent must be clearly stated in the lease (e.g., agent will collect rentals[4] but not be responsible for accepting maintenance complaints)

*Re: (g)* by the insertion of the following subsection after subsection (6):

. "(6A) The Minister must prescribe a pro-forma lease agreement, in all 11 official languages, containing minimum requirements for a lease agreement which may be used as a guideline by the tenants and landlords.".

- 
- Comments
- "which may be used as a guideline by the tenants and landlords" will allow tenants and landlords to disregard the prescribed pro-forma lease agreement.

Recommendation

- "which may … should be "which must..

- 

[3] Out of pocket – and a flat, http://www.iol.co.za/dailynews/consumer/out-of-pocket-and-a-flat-1.1249997 ; Agent playing double game http://www.iol.co.za/dailynews/consumer

[4] Who has power to collect rent? http://www.iol.co.za/dailynews/consumer/who-has-power-to-collect-rent-1.1178000

**Re: 14. Section 15 of the principal Act is hereby amended —**

**Regulations**

---

Comments

This section relating to enacting regulations needs 'tidying up' because the Minister will be given discretionary powers as it were ("may make regulations,") but the "Minister must issue regulations as contemplated in section 1(b), (f), (fA) and (fB) within 12 months of the commencement of the Rental Housing Amendment Act, 2012.")

Can the Tribunal function without regulations? The Act it seems would be valid without Regulations but can it be considered operational?

In any event, there is compelling reasons within the Act that the Minister must make regulations and these ought to be done to make the Act operational, the absence of which would render the RHTs non-functional. One could argue that the RHTs would be acting ultra vires if there are no unfair practice and procedural regulations. Examining the Act one would notice the reasons for regulations to be in place at the inception of a RHT.

Definitions (in the Act)
**(bold - our emphasis)**

It would appear that the word **"prescribed"** used in the Act is related to "**regulations"** by the MEC.

Under definitions (Chapter 1 of the Act)
**(i) "prescribed"**
**"prescribed"** means prescribed by regulation by the MEC*, by notice in the Gazette;

**"Unfair practice"** means a practice **prescribed** as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord

*** [– should read: by the Minister…]**

s10 (12) Any person **may**, in the **prescribed** manner, obtain copies of minutes contemplated in subsection (10) against payment of a **prescribed** fee.

s13. (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.

(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**.

**(ii) "Regulations"**

References to regulations in the Act includes: -

13 (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 the **regulations** relating to unfair practices;

(6) When acting in terms of subsection (4), the Tribunal **must have** regard to -

(a) the **regulations** in respect of unfair practices;

Van Der Horst judgment [S v Van Der Horst 1991 (1) SA 552] deals with regulations purporting to regulate matters provided for in the Road Traffic Act 29 0f 1989 but not yet brought into operation. In this judgment reference is made to Section 14 of the Interpretation Act 33 of 1957. The latter provides as follows:

"14. Exercise of conferred powers between passing and commencement of a law.— Where a law confers a power—

a) to make any appointment; or
b) to make, grant or issue any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws; or
c) to give notices; or
d) to prescribe forms; or
e) to do any other act or thing for the purpose of the law, that power may, unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof: Provided that any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws made, granted or issued under such power shall not, unless the contrary intention appears in the law or the contrary is necessary for bringing the law into operation, come into operation until the law comes into operation."

It would appear from the above and the problems the Tribunals face, such as giving effect to its ruling, issuing of subpoenas and other related matters, that it is necessary for the Minister to do whatever is necessary to make the Act effective and operational so that it achieves what was intended by Parliament. It would also appear that while the Act is valid, it comes into operation through regulations, especially since the central concept is "unfair practice" which the Tribunal **must have** regard to in the **regulations** [s 13 (6) (a)].

It therefore follows that since "unfair practice" is central to the Act for the Tribunal to adjudicate, the Tribunal cannot function without regulations. Regulations will have to stipulate or list what constitutes "unfair practice" and could include illegal lockouts, illegal disconnection of utilities. It would allow the Tribunal to define or stipulate

complaint forms, subpoena, witnesses, penalties, fees, etc., have these annexed.

Regulations provide specific details about the procedure and rules to be followed. Procedural regulations provide standardised rules, processes and procedures so that Tribunal members and staff as well as the public know what is expected of them. In addition, there is a need for details/categories of what comprises an unfair practice.

Legislation like the Rental Housing Act cannot become operational before regulations are established (*Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC); *Pharmaceutical Manufacturers Association of SA: In re President of RSA* 1999 4 SA 788 (TPD); *In re constitutionality of the Mpumalanga Petitions Bill* 2002 1 SA 447 (CC) at 449D)

Recommendation

It is our respectful submission that there *must* be regulations, which the Minister *must* make and which ought to be in place with the amended Act. The regulations are a pre-requisite for the effective administration and implementation of the Act.

**Re: Insertion of section 17A in Act 50 of 1999**

**18.** The following section is hereby inserted in the principal Act after section 17—

**Appeal**

---

Comments

The MEC entering the fray of a ruling would seriously compromise the independence of the Tribunal. It will also render the Tribunal as an appendage of the department of human settlement such as a housing board / administrative functionary.

The department is also a party before the Tribunal either as a complainant or respondent, this would be another reason the MEC should not get involved.

As for an advocate or attorney who can 'review' or provide advice regarding a ruling of at least three members who have the qualifications from the different sectors begs the question why one person should not be conducting the hearings in the first place.

However, the right to appeal the merits of a ruling directly to the high court[5] should still be available because the ruling is deemed to be a magistrate's court judgment. Granted that the Tribunal is not a court yet its ruling is (not similar to but) that of a magistrate's court order.

Given the unique power (of "exclusive jurisdiction[6]") of the Tribunal that prevents courts from hearing an unfair practice complaint, the merits of the rulings should be appealable to the courts (on the facts and on the law) while the review would still apply to the procedural issues (such as irregularity)[7].

---

[5] Mohamed, S. I. 'Rental Housing Tribunal regulations.' In *LexisNexis Property Law Digest,* 10(3): 7-9 September 2006. Durban, South Africa. Mohamed S. I. (2008). Challenges and changes for Tribunals: Amended Rental Housing Act. *Daily News 3.6. 2008*

[6] Mohamed, S. I. 'The judicial functions of the provincial Rental Housing Tribunals.' In *LexisNexis Butterworths Property Law Digest* 9(4): 2-4. , December 2005. Durban, South Africa. Philip Stoop (2008). The law of lease. Annual Survey of SA Law, 891–901; *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* (CCT 57/11) [2012] ZACC 2 (13 March 2012)

[7] "Hitherto, our courts have not permitted a review solely on the basis of a material mistake of fact on the part of the person who made the decision. Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter." In *Pepkor Retirement Fund v Financial Services Board* 2003 (6) SA 38 the Supreme Court of Appeal; Mohamed, S. I. (2012) Good faith and ending a lease http://www.iol.co.za/dailynews/money/good-faith-and-ending-a-lease-1.1269510

The appeals procedure is well established in our judicial system. A court order/judgment is appealed to the next higher court with the composition of the panels having more judges than the lower courts on each leg of an appeal.

Recommendation

**An Appeal's Tribunal** with at least three members with specific qualifications (at least one experienced advocate) to which appeals can be lodged from any provincial Tribunal is an alternative to ensure access to a just and fair procedure. This Tribunal ought to be the competent body to vary or rescind a ruling as well.

The more appropriate forum would be a **Rental Housing Appeal's Court** having the jurisdiction of a court. In this way, the legal debate falls away - that a Tribunal not being a court or as a quasi-judicial body, notwithstanding performing a judicial function, can have its decision taken on review only.