

COMMENTS PRESENTED BY TREVOR BAILEY (CHAIRPERSON OF THE
GAUTENG RENTAL HOUSING TRIBUNAL) ON BEHALF OF THE
GAUTENG DEPARTMENT OF LOCAL GOVERNMENT AND HOUSING
AND THE GAUTENG RENTAL HOUSING TRIBUNAL ON THE RENTAL
HOUSING AMENDMENT BILL, 2011 (THE BILL) TO THE
PORTFOLIO COMMITTEE ON HUMAN SETTLEMENTS AT PARLIAMENT,
CAPE TOWN ON 11 MAY 2012

INTRODUCTION

1. The Gauteng Department of Local Government and Housing and the Gauteng Rental Housing Tribunal have jointly considered the proposals that appear in the Rental Housing Amendment Bill, 2011 (the Bill) and make the following comments.
2. Where it appears from the context, the Gauteng Tribunal's proposed amendments to the Bill appear in bold.

AMENDMENT OF SECTION 1 OF ACT 50 OF 1999

3. The term '**arbitrary eviction**' must be amended by deleting the words "to refers", which is duplicated on the first line of the definition.

AMENDMENT OF SECTION 2 OF ACT 50 OF 1999

4. It is recorded that **Subsection 2 (2)** and not Section 2 of the principal Act is being amended.

AMENDMENT OF SECTION 3 OF ACT 50 OF 1999

Dedicated fund to market the tribunal's and fund training programmes

5. We propose that subsection 5 (5) be amended to read-

*National Government must develop and fund programmes to **market the Tribunals** and train members of the Tribunals and officials appointed in terms of section 14 (2) and must establish a **dedicated fund to market the Tribunals and fund such programmes.***

Dedicated fund to assist provincial governments assist municipalities to establish Rental Housing Information Offices

6. Since the provincial governments will be obliged to incur costs in assisting local municipalities to establish Rental Housing Information Offices, we propose that subsection 5 (5) should be amended to read-

*National Government must financially assist the Provincial Governments to assist local municipalities not yet on a level three accreditation, in establishing Rental Housing Information Offices as contemplated in section 14 and must establish a **dedicated fund to assist the Provincial Governments to***

*assist local municipalities to establish such
Rental Housing Information Offices.*

**AMENDMENT OF SECTION 4 OF ACT 50 OF 1999 AS AMENDED BY
SECTION 2 OF ACT 43 OF 2007**

Insertion of sections 4A and 4B in Act 50 of 1999

7. The insertions 4A and 4B are extensive and in some instances repetitive. Any repetition under 4A and 4B should be deleted. For example, subsection 6 (a) and (b) on page 6 of the Bill is repeated in subsections 5 (a) and (b) on page 8 of the Bill.

**The rights of obligations of landlords and tenants in in the principal Act
and regulations**

8. Subsection 6 of the Bill details the rights and obligations of both landlords and tenants. The Gauteng Unfair Practices Regulations, which are made under section 15 of the principal Act, set out in detail other rights and obligations of both landlords and tenants.
9. Although we do not object to such detail being inserted into the principal Act, the question arises whether other rights and obligations should be set out in the principal Act or be left to regulation.

Time for exit inspection

10. We propose that the proposed subsection 4A (6) be amended to read as

follows-

*At the expiration of the lease is the tenant must make him or herself available to conduct a joint inspection of the dwelling at a time convenient to the landlord and tenant to take place within a period of three days of **the tenant having removed the tenants property from the dwelling** with a view to ascertaining if there was any damage caused to the dwelling during the tenants occupation thereof. Provided that-...*

11. The reason for our proposed amendment arises out of the Gauteng Tribunal's experience that damage caused to the dwelling during the tenant's occupation thereof or as a result of the tenant having vacated the dwelling is best ascertained once the tenant has removed the tenant's goods from the dwelling.

AMENDMENT OF SECTION 5 OF ACT 50 OF 1999 AS AMENDED BY SECTION 3 OF ACT 43 OF 2007

Reduction of the lease to writing

12. We do not support the proposed amendment that a lease agreement be reduced to writing for at least the following reasons-

- 12.1 Notwithstanding the proposed pro forma lease agreement in the Bill,

the common law provides a range of the protections to landlords and tenants, which might otherwise be denied to landlords and tenants;

12.2 Landlords and tenants who cannot read and write may be prejudiced by the proposed amendment; and

12.3 There are many successful (or working) backyard shack landlord tenant relationships that have not been reduced to writing and the proposed amendment may amount to an unnecessary interference in such relationships.

Description of the dwelling

13. We propose that the proposed amendment be amended to read as follows-

*the **full** description of the dwelling which is the subject of the lease **and must include the street address, suburb and municipality in which the dwelling is situated***

14. The reason for our proposed amendment arises out of, amongst other things, the Gauteng Tribunal's experience that the street address, suburb and municipality are often not recorded in the lease, which creates difficulties concerning service of subpoenas that require parties to appear before the Gauteng Tribunal.

**AMENDMENT OF SECTION 9 OF ACT 50 OF 1999 AS AMENDED BY
SECTION 3 OF ACT 43 OF 2007**

Composition of Tribunals

15. Subject to the outcome of the Portfolio Committee's deliberations regarding the appeal of tribunal rulings, we do not object to the proposed composition requirements of the Tribunal.

Reference to meeting or meetings

16. However, we propose that any reference to *Meeting* or *meetings* of the Tribunal in the principal Act be deleted and replaced with the word **Hearing** or **hearings** (or **Sitting** or **sittings**) of the Tribunal, as the case may be.

Reference to committees

17. We propose that any reference to the Tribunal functioning as a *committee* or *committees* be deleted and the relevant sections be amended to refer to **hearings** (or **sittings**) of the Tribunal.

Rotation by the chairperson and the deputy chairperson

18. We propose that the requirement that the chairperson and the deputy chairperson rotate on a regular basis between the two *committees* (**hearings**) be deleted. In our view, this requirement is overly prescriptive, rotation will occur naturally and should be left for

determination by the chairperson of the Tribunal in accordance with the requirements of the principal Act.

Terms of Tribunal members

19. We propose that the proposed amendment, as adapted from the Competition Act, 1998, concerning the terms of Tribunal members be amended to reflect the following intention-

(1) Subject to subsection (2), the Chairperson and each member of the Tribunal serve for a term of five years.

(2) The MEC may reappoint a member of the Tribunal at the expiry of that member's term of office, but no person may be appointed to the office of the Chairperson of the Tribunal for more than two consecutive terms, provided that the Chairperson may be reappointed as a member or alternate member of the Tribunal.

20. Some of the advantages of our proposed amendment are-

- 20.1 The current term of three years is considered too short for the purposes of the advertising the positions and members settling into the positions;

- 20.2 The extension of the terms brings the principal Act into line with other specialist tribunals;
- 20.3 The limitation of the Chairperson's term as Chairperson ensures that the Chairperson is not appointed as Chairperson indefinitely;
- 20.4 The MEC has a wide discretion to appoint members that suit the differing needs of the different provinces while ensuring that the appointment process is conducted in accordance with the requirements of the principal Act;
- 20.5 There is a discretion to retain skills, if needed; and
- 20.6 The unintended consequences of the proposed amendment in the Bill are avoided (for example a person may only end up being appointed for one and a half terms and not two).

AMENDMENT OF SECTION 10 OF ACT 50 OF 1999 AS AMENDED BY SECTION 5 OF ACT 43 OF 2007

Referral of a complaint that relates to evictions to a competent court

21. We propose that the proposed amendment that the Tribunal must within 30 days of receipt of a complaint, refer any matter that relates to evictions to a competent court, be deleted in its entirety.

22. The principal Act, as amended by Act 43 of 2007 empowers the Tribunal to issue spoliation and attachment orders and to grant interdicts.
23. Spoliation is any illicit deprivation of another of the right of possession which a person has concerning movable or immovable property or a legal right. A person who has suffered the spoliation has a speedy and summary remedy in a *mandamenten van spolie*, usually referred to as a spoliation order. The object of the order is merely to restore the status quo prior to the legal action. The reason behind the practice of granting spoliation orders is that no person is allowed to take the law into his/her own hands and dispossess another unlawfully of possession of property. If he/she does, a court will summarily restore the status quo as a preliminary to an enquiry into the merits of the dispute (See Jones and Buckle, *The Civil Practice of the Magistrates 'Courts in South Africa*, Volume 1 Seventh Edition p84).
24. In accordance with the powers given to it, the Gauteng Tribunal issues spoliation orders when called upon to do so by aggrieved tenants who have been evicted from order locked out of their dwellings without orders of court.
25. The landlords almost always comply with the Gauteng Tribunal's spoliation orders and the matters are almost always never taken further.
26. It is therefore unnecessary to introduce the proposed amendment, which will have the unintended consequences of-

26.1 Having to refer a matter to a competent court once the unlawful eviction complained of has been resolved; and

26.2 Causing landlords and tenants to incur unnecessary legal costs.

27. Moreover, landlords and tenants are entitled as of right to approach a competent court in matters relating to lawful and/or unlawful evictions or lockouts.

Incorporation of the Tribunal's right to make damages awards

28. We propose that the proposed subsection 12 (e) be amended to read as follows-

*in respect of any matter over which it has jurisdiction,
make any order that is necessary to give effect to this
Act, **which may include an award for damages
arising out of a breach of the lease agreement
between the parties.***

29. In the Gauteng Tribunal's experience-

29.1 Tenants' food is damaged as a result of the electricity having been unlawfully disconnected and they are entitled to recover the costs thereof; and

29.2 Tenants' goods are damaged as a result of having been unlawfully locked out and/or evicted from their dwellings and they are entitled to

recover the damages they have suffered as a result of the landlords unlawful actions.

Changes to Tribunal rulings

30. We propose that the proposed subsection 12B be amended to read more clearly and that any change made to a ruling must be made within 14 days of the ruling having been made.

31. Moreover, further research is required whether or not substantive changes may be lawfully made under the proposed subsection 12B.

AMENDMENT OF SECTION 15 OF ACT 50 OF 1999 AS AMENDED BY SECTION 7 OF ACT 43 OF 2007

The making of the minister's power to make regulations discretionary

32. The principal Act as amended by Act 43 of 2007 removed the discretionary power of MECs to make regulations and made the power of the Minister to make regulations peremptory in order to establish a single standard throughout the Republic of South Africa.

33. In the absence of having been furnished reasons for the proposed amendment, we support the establishment of a single regulatory standard throughout the Republic of South Africa.

Regulations relating to the circumstances and processes for submitting an appeal

34. We do not support the proposed amendment that the procedures and manner in which the proceedings of the tribunal must be conducted must be amended to include the circumstances and processes for submitting an appeal because we do not support, for the reasons which will become apparent in these comments, the insertion of the right to appeal under the proposed section 17A in the principal Act.

INSERTION OF SECTION 17A IN ACT 50 OF 1999

Appeal

35. We do not support the insertion of the right to appeal into the principal Act and propose that the insertion of the proposed section 17A be deleted in its entirety for the following reasons-
- 35.1 Section 17 of the principal Act provides that the proceedings of a Tribunal may be brought under review before the High Court;
- 35.2 The Gauteng Tribunal is the busiest Tribunal in the Republic and has since its inception in 2001 received over 13084 complaints. Only 16% of those complaints are not resolved informally or through mediation and fall to be decided by the tribunal. None of the Gauteng Tribunal's rulings have been reviewed in the High Court;
- 35.3 By virtue of the inquisitorial 'conversational' procedure adopted by the

Gauteng Tribunal (as opposed to the more adversarial accusatorial procedure used in our courts), well over 90% of the Gauteng Tribunal rulings are reached with the consent of the parties. Accordingly, the proposed appeal procedure is unnecessary;

- 35.4 To the best of our knowledge, none of the rulings of the other Tribunal's in the Republic have been brought under review in the High Court;
- 35.5 The composition of the Tribunal will comprise three persons, being a person with legal qualifications and legal expertise, a person with expertise in property management or housing development matters and a person with expertise in consumer matters pertaining to rental housing or housing development matters;
- 35.6 However, the proposed appeal will comprise only a single person, who is either an advocate or attorney of the High Court, who will not have the benefit of persons with expertise in property management, housing development, consumer or housing development matters;
- 35.7 Appeal hearings in the normal course comprise more persons than made up the initial hearing. The proposed amendment works the other way round;
- 35.8 The single advocate or attorney hearing the appeal will only have the

right to make a recommendation to the MEC, who must then make a decision to either refer the original decision back to the Tribunal, or confirm, set aside or amend the decision;

- 35.9 Section 13 (13) of the principal Act provides that rulings of the Tribunal are deemed to be orders of a magistrate's court in terms of the Magistrates' Court Act, 1944 and are enforced in terms of that Act. The MEC, who appoints the members of the Tribunal, is inadvertently being placed in a position where any decision he may make will have the effect of violating the separation of powers principle provided for in the Constitution of the Republic of South Africa, Act 1996;
- 35.10 Section 13 (7) of the principal Act has the effect of requiring the Tribunal to resolve and/or make a ruling within a period of three months of a complaint having been lodged with the Tribunal;
- 35.11 The principal Act and more specifically Section 13 (7) aims to ensure that landlords and tenants may obtain justice expeditiously at no cost.
- 35.12 The proposed amendment will render the Gauteng Tribunal incapable of complying with section 13 (7) of the principal Act. Consequently, justice will be delayed and may even be denied;
- 35.13 The proposed amendment also opens the door to abuse by recalcitrant landlords and tenants to delay complying with rulings of the tribunal;

and

35.14 The proposed amendment will also have the unintended consequence of inviting decisions to be brought under review in the High Court.

PROPOSED AMENDMENT: AMENDMENT OF SECTION 9 (2) OF THE PRINCIPAL ACT

36. In order to enhance transparency and provide for more informed appointments, we propose that section 9 (2) of the principal Act be amended to include a provision that the chairperson and members of the Tribunal be appointed after the short-listed candidates have been interviewed.

THE PRINCIPAL ACT AND THE CONSUMER PROTECTION ACT

37. There has been much debate in the press and among the legal fraternity whether or not the Consumer Protection Act overrides the provisions of the principal Act.

38. The Bill provides an opportunity to clarify the matter. In our view and subject to the legal efficacy thereof, Parliament should legislate that in the event of a dispute between the two pieces of legislation the principal Act overrides the Consumer Protection Act.

CONCLUSION

39. These comments will be orally supplemented at the Portfolio Committee meeting on 11 May 2012.

40. We are happy to discuss any issues arising out of these comments with you upon request.

41. Thank you.