

A CRITICAL ANALYSIS OF THE DECISION OF THE CONSTITUTIONAL COURT*

Maphango v Aengus Lifestyle Properties (Pty) Ltd
2012 (3) SA 531 (CC)

1 Introduction

The pursuit of access to better economic opportunities such as decent jobs has resulted in an astronomic influx of people into the inner city of Johannesburg, South Africa. As a result there is a high demand for rental housing. This presents an opportunity to make profit for those who lease premises in order to generate an income. The demand for rental housing has arguably caused the escalation of rental prices, thereby causing a shortage of affordable rental housing in the city centre. According to Tissington:

“Inner city evictions from private rental accommodation, as well as from so-called ‘bad buildings’, together with exploitation in private rental accommodation are common place in Johannesburg. In part, this situation is due to the huge demand for low-income rental housing ...” (Tissington “A Review of Housing Policy and Development in South Africa since 1994” <http://www.spil.org.za/agentfiles/434/file/Research/Review%20of%20the%20Riht%20to%20Housing.pdf> (accessed 2012-05-15.)

The Rental Housing Act 50 of 1999 (hereinafter “the Rental Housing Act”) was enacted to resolve disputes that may arise from any unfair practice or matters affecting the relationship between the landlord and his tenants in respect of the lease contract. In particular, the Rental Housing Act seeks *inter alia* to “create mechanisms to promote the provision of rental-housing property; promote access to adequate housing through creating mechanisms to ensure the proper functioning of the rental-housing market [and] to lay down general principles governing conflict resolution in the rental-housing sector” (Preamble to the Rental Housing Act). In terms of the Rental Housing Act, the landlord or a tenant may approach the Rental Housing Tribunal (Tribunal) and complain about an unfair practice (s 13 of the Rental Housing Act). The Rental Housing Act defines an unfair practice as “a practice unreasonably prejudicing the rights or interests of a tenant or a landlord” (s 1 of the Rental Housing Act). Where the Tribunal, at the conclusion of the hearing, is of the view that an unfair practice exists, it may rule that the exploitative rental be discontinued (s 13(4)(c)(iii) of the Rental Housing Act). The Tribunal may also make a determination about the amount of rental that must be paid by a tenant taking into account *inter alia*

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“the need for a realistic return on investment for investors in rental housing” (s 13(5)(b) of the Rental Housing Act). If none of the parties has approached the Tribunal, can a court allow a party to raise a new argument at an appellate stage and give a remedy to approach the Tribunal when none of the litigants had asked for this remedy? This question will be addressed by discussing and analyzing the courts’ judgments (majority and minority) in *Maphango v Aengus Lifestyle Properties*, where the majority judgment mistakenly built a case for tenants (*Maphango v Aengus Lifestyle Properties* (Pty) Ltd 2012 (3) SA 531 (CC) (hereinafter “*Maphango CC*”). The argument presented in this case is that the applicants ought to have made up their case in the court of first instance and not at the appellate stage. The paper is divided into nine sections. Section 2 provides an overview of the facts of the case, section 3 discusses the case before the High Court, section 4 discusses the case before the Supreme Court of Appeal (SCA), section 5 discusses the case in the Constitutional Court, the issues, arguments, before the court, the findings and conclusions of the court. Section 6 evaluates the parties’ submissions in light of the Rental Housing Act, the Constitution, the Gauteng Unfair Practices Regulations, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIEA) (19 of 1998). Section 7 discusses the majority judgment. Section 8 discusses the minority judgment. Section 9 is a critique of both the minority and majority judgments. The conclusion made is that the applicants should stand or fall by the arguments contained in the founding documents.

2 Facts of the case

The applicants (tenants) were initially fifteen tenants who are residing at Lowliebenhof flat (the premises) situated in Braamfontein, Johannesburg under various lease agreements (*Maphango CC* par 6). The premises consist of fifty eight flats. Some of the tenants have been living at the premises since 1994 (par 6). The respondent, Aengus Lifestyle Properties (Pty) Ltd (landlord), is a property investment company that bought the premises from ApexHi Properties Limited (ApexHi). The landlord buys property in the inner city of Johannesburg in order to refurbish or upgrade it (par 11). According to the landlord, its business is aligned with the city’s “initiative at refurbishing and upgrading the Johannesburg inner city” (par 11).

The landlord became involved in the management of the premises in 2007 through an associated company. During the course of September 2008, ApexHi gave each tenant a written notice terminating the lease agreements and ordering the tenants to vacate the premises (par 12). The notice terminating the leases allowed the tenants to remain in the premises if they agreed to pay a higher rent (par 12). The tenants challenged the aforesaid notices on the basis that the landlord sought to increase the rent beyond the permissible rates (par 12).

On 17 September 2008, the tenants filed a complaint to the Tribunal, a body established under the Rental Housing Act (par 13). In response to the complaint, the Tribunal wrote to the landlord *inter alia* informing him about the alleged complaint of threatening to evict the tenants without a court order

(par 13). The communiqué further informed the landlord that the threats were done despite the fact that the complaint was still pending (par 13). The Tribunal asked the landlord to refrain from the issuing the threats until the matter had been resolved (par 13).

On 22 October 2008, mediation took place between the landlord and approximately eight tenants who were representing about twenty other tenants (par 14). However, the parties were unable to resolve their differences and the Tribunal referred the matter for arbitration (par 14). The arbitration was set to take place on 19 June 2009. Before the arbitration hearing could take place, ApexHi instituted eviction proceedings against the tenants in the Johannesburg Magistrates' Court (par 83). This was prior to the transfer of property from ApexHi to the present landlord (Aengus Lifestyle Properties). In defending the application for summary judgment, the tenants raised, amongst others, a defence of *lis pendens* on the basis that they had referred a complaint to the Tribunal (par 83). The minority judgment in the Constitutional Court favourably captured the fact that the tenants were informed that in terms of the law "no proceedings may be instituted in a court of law until such time as determination has been made by the Tribunal in regard to the complaint" (par 84). As a result of the tenants' resistance, ApexHi opted to withdraw the eviction proceedings in the Magistrates' Court (par 84). During the course of the Magistrates' Court proceedings, the transfer of the premises from ApexHi to the landlord took place.

The landlord filed a new application for eviction of tenants in the South Gauteng High Court (High Court) (par 15). The High Court, ruled in favour of the landlord. The tenants then unsuccessfully appealed to the Supreme Court of Appeal (SCA) (*Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA)). Determined to fight their cause, the tenants appealed to the Constitutional Court.

3 The case before the High Court

The landlord told the court about the nature of his business and circumstances that led it to charge a higher rent (*Maphango CC* par 15). The landlord also told the court that it terminated the original lease contracts because they did not allow the landlord to terminate them unilaterally and increase the rent in the manner he sought. According to the landlord, the only way out was to cancel the leases and to invite the tenants to enter into new lease agreements (par 15).

In response to the above, the tenants, through Ms Maphango's affidavit, told the court that the Magistrates' Court proceedings were instituted whilst the Tribunal was still in the process of adjudicating their complaint (par 17). Ms Maphango added that, before the Tribunal could adjudicate their matter on 19 June 2009, they learnt that there was an application in the High Court for their eviction (par 17). As a result Ms Maphango instructed her attorney to withdraw the complaint from the Tribunal so that she could focus on the High Court application (par 17). This was communicated to the landlord through the tenants' legal representative. Despite the tenants' submissions in court, their attorney consented to the eviction order (par 19). The order of

eviction was later rescinded on the basis that the legal representative had no authority to consent to an eviction (par 19).

The High Court found it “difficult to conceive why a property-owner would negotiate a right to terminate a lease by notice if that right could not be used to terminate the lease in order to negotiate a new one with different terms” (par 20). The court further stated that the rental-increase clauses were only applicable during the operation of the lease agreements and not after the leases had been terminated (par 20).

The High Court also found that the termination of the leases was not contrary to public policy “as the power to declare a contract or the exercise of contractual rights contrary to public policy should be used sparingly and only in the clearest cases” (par 20). On 7 May 2010, the court ruled in favor of the landlord and ordered the eviction of ten tenants (par 20). The eviction of seven respondents was postponed as they would have become homeless. They were granted leave to apply to join the City of Johannesburg who was not a party to the proceedings. The tenants appealed their eviction to the Supreme Court of Appeal (SCA).

4 The case before the Supreme Court of Appeal

With regard to the claim of security of tenure by the tenants, the SCA ruled that section 26(1) of the Constitution obliges the state and not a private person to take reasonable measures to provide housing (*Maphango CC* par 21). In particular, it held that, whilst the negative aspect of the right to security of tenure binds private persons from interfering with the rights of others, “a tenant has no security of tenure in perpetuity” (par 21). The SCA further found that “the duration of the tenure is governed by the lease, beyond which there is no security of tenure” (par 21). The SCA thus held that the tenant’s security of tenure was restricted by the leases themselves and that there was no way that the termination could be said to constitute an infringement of tenants’ security of tenure (par 21).

With regard to the contractual argument, the SCA found that reasonableness and fairness were not “freestanding requirements for the exercise of a contractual right” (par 22). The SCA further stated that a court could not decline to implement a contract on the basis that an individual judge regarded it as being unreasonable or unfair (par 22). According to the SCA, the landlord was open about disclosing his motive for terminating the leases even though he was not obliged to do so (par 22). The SCA ruled that there was nothing wrong in the landlord’s conduct that could be justifiably labelled as unreasonable and unfair (par 22).

Lastly, the tenants argued that the termination of the leases was contrary to public policy because it constituted an unfair practice in contravention of the Rental Housing Act and its regulations (*Maphango v Aengus Lifestyle Properties (Pty) Ltd supra* (SCA) par 31). The SCA remarked that it was not clear why the tenants chose a “circuitous route” instead of relying on a contravention of the Act” (*Maphango v Aengus Lifestyle Properties (Pty) Ltd supra* (SCA) par 31). It rejected this submission (*Maphango v Aengus Lifestyle Properties (Pty) Ltd supra* (SCA) par 31). To substantiate its

reasons for not entertaining the applicant's contention about the Rental Housing Act and its regulations, Brand J said:

"I do not agree with the appellants' contention that the termination of their leases constituted a contravention of these statutory provisions. First, the provisions of the Act and the regulations relied upon are directed against a 'practice'. That does not contemplate, as I see it, unacceptable conduct by the landlord on an isolated occasion (see e.g. *The Concise Oxford English Dictionary* which defines 'practice' (in this context) as 'the customary or expected procedure or way of doing something'). It envisages incessant and systemic conduct by the landlord which is oppressive or unfair. Termination of a lease would therefore not qualify as a practice. Secondly, for reasons I have already stated, I do not believe that the respondent's terminations of the leases could in the circumstances be denounced as unreasonable or unfair, let alone oppressive" (*Maphango v Aengus Lifestyle Properties (Pty) Ltd supra* (SCA) par 31).

All in all, the SCA ruled in favour of the landlord. The tenants appealed to the Constitutional Court.

5 The case before the Constitutional Court

5.1 Issue/issues before the court

There were a number of issues before the court, including proof of burden where proceedings are brought by notice of motion. From the reading of the majority judgment, it is not easy to ascertain precisely the issue or issues that were before the court. The reason for this is because the court started by indicating that "the narrow question in the case [was] when a landlord may cancel a lease and evict its tenants?" (*Maphango CC* par 1.) Under the heading titled "The Rental Housing Act" the court said "the critical question [was] whether the landlord was lawfully entitled to exercise the bare power of termination in the leases solely to secure higher rents" (*Maphango CC* par 24). In addition, under the heading titled "Applying the Act to the parties' dispute", the court identified the issue as whether the termination of the tenants' leases was capable of constituting an unfair practice as contained in the Rental Housing Act 50 of 1999? (*Maphango CC* par 47.) These issues were not decided as the parties were given an option to approach the Tribunal.

5.2 Burden of proof where proceedings are brought by a notice motion

The general rule is that when proceedings are brought by means of a notice of motion, a judge will look into the contents of the founding affidavit in order to ascertain the precise nature of the applicants' complaint (*Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) 635–636). Put differently, the applicant must stand or fall by the allegations made out at the very onset in his or her founding affidavit in order to determine whether he/she is entitled to the relief claimed in the notice of motion (*Pountas' Trustee v Lahanas* 1924 WLD 67 68). Accordingly, it is not the duty of the court to assist the applicants by accepting new grounds on appeal and make out a case where

the nature of the claim is absent in the founding affidavit. The relevance of this part will become clear when the author discusses the section where the Constitutional Court opted to build a case for the tenants and prejudicing the landlord in the process.

5.3 Arguments presented by the tenants

In an attempt to make their case and persuade the court to rule in their favour, the tenants conceded that the termination clauses were not offensive to public policy by merely looking at them (*Maphango CC* par 24). Instead they contended that the circumstances in which the landlord exercised the power of termination were unfair, unreasonable and contrary to public policy (*Maphango CC* par 24). They further claimed that it was grossly unfair for the landlord to terminate their leases for the sole purpose of imposing a higher rent increase than the one contained in the lease agreements (*Maphango CC* par 24).

Their key argument was that the landlord's conduct had to be set aside because the termination "was to frustrate the rights of the tenants under the leases" (*Maphango CC* par 24). The reason advanced for this was that the landlord's main intention was not to terminate the leases but to circumvent the rent escalation clauses in the lease agreements (*Maphango CC* par 24). According to the tenants, the landlord was not only entitled but obliged to apply under the Ithemba lease agreement to a competent authority for permission to charge a higher rent than the one permitted by the increase clauses contained in the lease agreement (*Maphango CC* par 25).

The tenants raised a new ground for the first time in the Constitutional Court, and argued that the above procedure could not be dealt away by terminating the lease agreements. The basis for this, the tenants argued, was that section 13(5) of the Rental Housing Act empowered the Tribunal to make "a determination regarding the amount of rental payable by a tenant". (The relevant part of s 13(5) of the Rental Housing Act provide: "A ruling contemplated in subsection (4) may include a determination regarding the amount of rental payable by a tenant, but such determination must be made in a manner that is just and equitable to both tenant and landlord and takes due cognisance of – (a) prevailing economic conditions of supply and demand; (b) the need for a realistic return on investment for investors in rental housing; and (c) incentives, mechanisms, norms and standards and other measures introduced by the Minister in terms of the policy framework on rental housing referred to in section 2(3)".) Consequently, the lease provision read together with the Tribunal's statutory authority requires the landlord to ask for permission to charge a higher rent than the one set out in the lease agreements (*Maphango CC* par 26).

5.4 Arguments presented by the landlord

In disputing the tenant's claims, the landlord told the court that the lease agreements did not create any form of security of tenure whatsoever (*Maphango CC* par 26). The reason put forward for this proposition by the landlord was that at the time of entering into the lease agreements, by

implication, the tenant accepted that the right of access to adequate housing is not given eternally (par 26). In bolstering the argument, the landlord relied on the provisions of the Prevention of Illegal Eviction from Unlawful Occupation Act (19 of 1998) which requires the courts to take into consideration all the tenant's circumstances before an eviction order is granted (par 26). The landlord further "warned against creating a perpetual contract for the parties by preventing" it from ending the leases through the termination clauses (par 26). According to the landlord, this would promote expropriation of property wherein lease agreements could only be terminated at the instance of the tenants (par 26).

In response to the tenant's argument regarding the applicability of the Rental Housing Act, the landlord disputed this claim and contended that the Rental Housing Act was inapplicable (par 27). To clarify this point, the argument went further and claimed that the statutory framework of the Rental Housing Act "empowers the Tribunal to determine neither whether a party's motives for cancelling a lease are reasonable nor the amount of rent or the rates of escalation under a lease" (par 27). According to the landlord, the Rental Housing Act was consistent with the unqualified right of a landlord to cancel a lease under a termination clause as and when he/she wished to do so (par 27).

The landlord further alleged that the act of terminating the leases did not amount to an unfair practice under the Rental Housing Act because the motive for termination was communicated to the tenants. In support of this, the landlord relied on the Supreme Court of Appeal judgment's meaning of "practice" (par 27).

6 Evaluation of submissions in light of the Rental Housing Act, the Gauteng Unfair Practices Regulations and the Constitution

6.1 History of rent-control legislation

The court focused most of its attention on the history of previous legislation and common law that controlled rent increase. It noted that under the common law, the landlord was at liberty to cancel the lease agreement without any limitations (*Maphango CC* par 29). However, as time went on, there was legislation introduced to lessen the landlord's common-law powers and introduce rent-control measures (legislation such as the Tenants Protection Act 13 of 1920 and Rents Act 43 of 1950). Prior to the Constitution, it was only legislation that limited the landlord's common-law powers of terminating a lease (*Maphango CC* par 31). However, this is no longer the position under the new constitutional dispensation.

6.2 The Constitution

The Constitution regulates both the rights of the landlord and tenants. For example, the right to adequate housing under the Constitution applies both to the state and a private person. The right to adequate housing does not

only require the state to take positive measures for its realization but it also places a negative obligation on other persons to refrain from preventing others from enjoying their right to access adequate housing (*Grootboom v Government of the Republic of South Africa* 2001 (1) SA 46 (CC) par 3).

6.3 *The Rental Housing Act*

The court looked at the history of the legislation and its objectives. This is captured in the preamble of the Rental Housing Act as follows:

“To define the responsibility of Government in respect of rental housing property; to create mechanisms to promote the provision of rental housing property; to promote access to adequate housing through creating mechanisms to ensure the proper functioning of the rental housing market; to make provision for the establishment of Rental Housing Tribunals; to define the functions, powers and duties of such Tribunals; to lay down general principles governing conflict resolution in the rental housing sector; to provide for the facilitation of sound relations between tenants and landlords and for this purpose to lay down general requirements relating to leases ...”

There can be no doubt that the Rental Housing Act provides an overall mechanism for the regulation of rental-housing property and to regulate relationships between landlords and tenants falling within the ambit of the Rental Housing Act. (See Chapter 3 of the Act for a more detailed information regarding the tenants' rights, landlords' rights against the tenant, regulations of leases, inspection of premises, vacation of premises, reducing leases into writing, amount of rental, reasonable escalation, termination of lease on grounds that do not constitute an unfair practice, etc.) In this way, the Rental Housing Act introduces the Tribunal whose functions are to do all the necessary things to achieve the objectives set out in Chapter 4 of the Rental Housing Act.

In terms of section 13(1) of the Rental Housing Act, “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”. The Rental Housing Act further provides that a ruling by the Tribunal “may include a determination regarding the amount of rental payable by a tenant, but such determination must be made in a manner that is just and equitable to both tenant and landlord and takes due cognisance” of *inter alia* prevailing economic conditions and the need for a realistic return on investment for investors in rental housing (s 13(5)). The Tribunal's rulings are deemed to be an order of a Magistrates' Court (s 13(13) in full provides: “A ruling by the Tribunal is deemed to be an order of a Magistrate's Court in terms of the Magistrates' Court Act, 1944 (Act No. 32 of 1944)”.

6.4 *Regulations*

The court also looked into the Gauteng Unfair Practices Regulations (regulations) which prohibit both the landlord and tenant from engaging in an “oppressive or unreasonable conduct” (*Maphango CC* par 40). In other words, the landlord is prohibited from any conduct that may result in the interference of the tenants' rights under the Rental Housing Act such as the

right to enjoy the use of leased premises. The tenant may also not disturb the landlord or intimidate the landlord with regard to the leased premises or infringe the landlord's rights under the Rental Housing Act. The court also took into account that the regulations placed a duty on the tenant and landlord to act in good faith in their dealings relating to the premises (par 42).

6.5 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

Under section 4(7) of PIEA, a court may grant an order of eviction if it is of the view that it is just and equitable to do so and after having considered all the relevant circumstances such as alternative accommodation for those facing eviction (see *inter alia Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC)). The question was therefore whether it was just and equitable to issue an eviction order where the landlord may have committed an unfair practice. According to the court, the proper order was to "grant the applicants leave to appeal, to hold over final determination of the appeal to enable the landlord and tenants, if so advised, to bring suitable proceedings before the Tribunal" (*Maphango CC* par 68). It went further and held that, should the Tribunal rule that the termination of the tenants' leases was an unfair practice, the eviction order might have to be set aside. The order postponing the eviction of the applicants granted by the Constitutional Court appears to be just and equitable as some of the applicants would have been rendered homeless (par 89).

7 Majority judgment

After consideration of the relevant legislation and introducing new arguments on appeal, the majority judgment came to the conclusion that both the landlord and the tenant did not fully appreciate the "force of the Act's provisions in litigating their dispute" (*Maphango CC* par 48). The court went on to say that "it would be wrong for [it] to take a narrow view of the matter that ignores the importance and impact of the statute" (par 48). According to the court, "that would imply that [the] court could allow litigants to ignore legislation that applies to an agreement between them" (par 48). The rule of law did not allow ignorance of the legislation, said the court.

The court recalled that the Rental Housing Act introduced measures of solving disputes between landlords and tenants. The court also pointed out that the Rental Housing Act recognized in its Preamble the need to afford investors in rental housing a realistic return on their capital (par 48). At the same time, the court said, the Rental Housing Act also protected tenants in cases, such as the then present case, where the dispute involved termination of lease and a determination on whether rentals were just and equitable (par 50). According to the court, "a ground for 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" (par 50).

In light of the above, the Rental Housing Act places the unfair practice regime into contracts that the landlord and tenant conclude. According to the court, “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” (par 51). Consequently, where a tenant files a complaint with the Tribunal about the termination of a lease based on a provision in a lease, the Tribunal has the power to adjudicate whether or not the landlord’s actions amount to an unfair practice (par 52). The court, however, cautioned that “whether a termination in these circumstances could be characterized as lawful need not be decided at that stage” (par 52).

After taking into account all the above consideration, the court came to the conclusion that the SCA “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” (par 55). According to the court, the SCA’s main focus was based largely on the common-law power of the landlord to cancel the leases. As the dispute, according to the court, would have been handled better through the mechanism provided for in the Rental Housing Act, there was no need for it to entertain whether the landlord was entitled to cancel the leases under the common law or that the common law could have been brought in line with the Constitution in order to minimize such powers under the common law (par 55).

The court further said that both the High Court and SCA “under-assessed” the power of the Rental Housing Act as they over-looked the history, setting of the Statue and its broad definition of unfair practice (par 56). The court emphasized that the Rental Housing Act was specially designed to cater for disputes between landlords and tenants through its mechanisms such as the Tribunal. Therefore, as the tenants did not abandon their reliance on the Rental Housing Act, the court said that it had to provide a remedy that would enable the tenants to seek a ruling from the Tribunal (par 56). It went on to state that “an appellate court is not bound to consider only those issues the parties themselves have previously identified or formulated or adhered to” (par 56). In support of this, the court relied in an *obiter* in *Alexkor Ltd v Richtersveld Community* ((12) BCLR 1301 (CC) par 43 (hereinafter “the *Alexkor* case”), where it said:

“the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty ...”

The court also differed with the SCA conclusion that “practice” only includes “incessant and systematic conduct by the landlord which is oppressive or unfair” and does not consist in unacceptable conduct or an isolated occasion. (*Maphango CC* par 57; and see also *Maphango v Aengus Lifestyle Properties (Pty) Ltd supra* (SCA) par 34.) The court correctly substantiated its stance that “it has long been established in our law that a practice may consist in a single act” (*Maphango CC* par 57). It concluded that the Tribunal had jurisdiction over this case and that its ruling may include a ruling setting aside the landlord’s notices terminating the leases (par 58). The court highlighted the fact that the landlord also had an option to

approach the Tribunal raising an unfair practice and to seek an order enabling it to increase rent as the current one has become “uneconomic and unsustainable” (par 58). This proposition by the court is problematic in two ways. Firstly, the Rental Housing Act does not contain any provision stating that an uneconomic rental is an unfair practice. Secondly, the court has now broadened the scope of the Rental Housing Act to include uneconomic rental that was never part of the provisions of the legislation. This should not be condoned as the court unnecessarily took a legislative role by introducing a new ground of a complaint into the Rental Housing Act. The landlord also had an option of taking the matter on review if the relief sought was not granted by the Tribunal. It accordingly held that the High Court “ought to have postponed the eviction proceedings to enable proceedings before the Tribunal to determine whether the termination of the leases was an unfair practice” (par 62). Ultimately, the court granted the application for leave to appeal (par 69). It then postponed the appeal (par 69). It further advised that any of the parties may lodge a complaint in terms of section 13 of the Rental Housing Act with the Tribunal on or before 2 May 2012 (par 69). The court warned that, if a complaint to the Tribunal was lodged on or before the 2 May 2012, the parties were granted leave to apply to the court within fifteen court days of the ruling by the Tribunal, or other disposition of the matter, for further directions (par 69). However, if no complaint was lodged on or before the 2 May 2012, the appeal would be dismissed with costs (par 69).

8 Minority judgment

The minority judgment only agreed with the majority judgment to the extent that the tenant’s application for leave to appeal should be granted. The minority judgment took a different view when it came to the rest of the order given in the majority judgment. The minority judgment emphasized the fact that the Tribunal informed the tenants that the arbitration was to take place on 19 June 2009. However, prior to this date, the landlord brought eviction orders to the High Court (*Maphango CC* par 85). According to the minority judgment, “this time the applicants [tenants] did not raise the defence of *lis pendens*” (par 85). The tenants through their attorney voluntarily withdrew the complaint from the Tribunal in order to concentrate on the High Court application (par 85).

The minority judgment also invoked the grounds upon which the tenants based their appeal to the SCA. Again, the minority judgment points out that:

“It was not one of the applicants’ [tenants’] complaints against the judgment of the High Court that it erred in not staying the proceedings and affording the applicants [tenants] an opportunity to resuscitate their complaint which they had withdrawn from the Tribunal in 2009” (*Maphango CC* par 91).

According to the minority judgment, the SCA “recorded that the appeal against the judgment of the High Court was in essence aimed at two findings of the High Court” (par 91). One of the said finding was that the leases had been terminated validly (par 91). This, said the minority judgment, was the only finding that the tenants challenged in the SCA as the other finding related to two tenants who were successful in the High Court (par 91). As a

result, the minority judgment was convinced that the entire appeal of the tenants in the SCA was about “whether or not their leases had been validly cancelled” (par 92).

To rationalize its findings, the minority judgment cited two arguments that were unsuccessfully advanced on behalf of the tenants in the SCA. These appear in the Constitutional Court judgments (par 93) and were presented as follows: “(a) each of the leases contained a tacit term which forbade the use of the termination clause to effect increases in rent beyond the increases provided for in the leases; (b) the termination of the leases for the sole purpose of allowing the respondent to implement a rent increase in excess of the maximum rent increase provided for in the lease was contrary to public policy. In support of this argument, said the Supreme Court of Appeal, the present applicants had relied upon three grounds, namely: (i) that the termination would be unreasonable and unjust; (ii) the termination of the leases constituted an infringement of the applicants’ constitutional right to have access to adequate housing in terms of section 26(1) of the Constitution; (iii) the termination of the leases constituted an ‘unfair practice’ as contemplated in the RHA read with the RHA Regulations.” The minority judgment agreed with the majority judgment that the termination of lease constituted an unfair practice. However, it noted that:

“A reading of the affidavits put up by the applicants in the High Court does not reveal that it was their case that the termination of their leases was invalid because it constituted an unfair practice. The bases upon which the applicants contended that the termination of their leases was invalid was that the respondent sought to effect a rent increase that was in excess of the maximum rent increase permitted by the leases and that the termination of the leases was an infringement of their constitutional right of access to adequate housing. Their case was not that the termination constituted an unfair practice. In fact on their papers the applicants first said that there had been no termination and that the leases remained valid (par 103).

... a case that the termination of the lease was invalid because it was resorted to in order to effect a rent increase precluded by the terms of the lease is different from a case that says that the termination was invalid because it constituted an unfair practice and was precluded by section 4(5)(c) of the RHA. In this case if, in their affidavits, the applicants had put up a case to the effect that the termination of the leases constituted an unfair practice and was in breach of section 4(5)(c) of the RHA, then they would have had to state the grounds upon which they contended that the termination was unfair and to show that those grounds were specified in the leases. The respondent would have had to address those grounds in its replying affidavit and would have set out facts on which it would have contended that the termination of the leases did not constitute an unfair practice. Since the applicants never put up that case, the respondent has never had the opportunity of dealing with it (par 104).

The minority judgment appears to be relying largely on the above extract because the tenants’ new argument (that the termination of the leases constituted an unfair practice and was in breach of section 4(5)(c) of the Rental Housing Act is entertained on the grounds that “it is a question of law which a party is free to raise at anytime” (par 105). The minority judgment differs with this and holds that the determination of whether a conduct constitutes an unfair practice “is the passing of a value judgment” (par 105). It emphasizes that a court would only permit a party to raise a point of law

subject to conditions such as that it would not prejudice the other party (par 109). According to the minority judgment, this ensures that there is a fair hearing to both parties in the dispute.

The minority judgment further notes that the majority judgment said that the landlord did not object to the tenants' contention that the termination of the leases was unlawful because it constituted an unfair practice (par 110). The minority judgment disputed that in the following words:

"That the respondent has not objected to this is not correct. In its answering affidavit to the applicants' application for leave to appeal to this Court, the respondent took the point that, in their papers in the High Court, the applicants' case did not include any reliance upon the provisions of the RHA and that what has happened is the applicants have sought to expand their case from the bar. The respondent pointed out that this was inappropriate. It is true that, in the applicants' answering and supplementary affidavits in the High Court, the applicants did not anywhere state that the respondent's conduct in seeking to increase the rent in the manner in which the respondent sought to do constituted an unfair practice or was in breach of section 4(5)(c) of the RHA. Nor was it said in the applicants' affidavits that the termination of their leases constituted an unfair practice. The applicants bore the onus to prove that the termination fell within the ambit of section 4(5)(c) of the RHA."

The minority judgment noted that it would be unfair to adjudicate a new issue that was not established by the facts, and the landlord had no opportunity to deal with it in the pleadings. In support of this, the minority judgment relied on a number of persuasive decided cases such as the *Bel Porto School Governing body v Premier, Western Cape* (BCLR 891 (CC) par 119), where it was held that "the parties must make out a case in their founding papers and will not ordinarily be allowed to supplement and make their case on appeal". Similarly in *Santosh Hazari v Purushottam Tiwari* (2001 3 SCC 179 par 11), it was held that a "completely new point cannot be raised before the High Court for the first time; the question that is involved in the case must have its foundation in the pleadings". This has been ignored by the majority judgment.

The minority judgment agreed with the SCA that, during the operation of the lease, all the parties would be bound by its terms and conditions. However, once the lease was terminated, the clauses would not apply simply because there was no lease.

With regard to the violation of the constitutional right to housing, the minority judgment found that cancellation of the leases did not in any way violate the tenants' right of access to adequate housing but that it terminated their right to occupy the flats (*Maphango CC* par 120). On the submission that the enforcement of the termination clause was *inter alia* contrary to public policy as the landlord increased the rent beyond the permissible prescription set forth in the lease, the minority judgment ruled that the tenants and the landlord voluntarily concluded the leases with clauses that allowed either party to terminate the leased on notice (par 126). The minority judgment went further to state that the leases "did not say the termination would not be permissible when effected for a certain purposes or when effected with a certain motive" (par 126).

The minority judgment said that, although the order was presented as a postponement order, it was an order staying the appeal (par 134). This was not a relief sought by the tenants. Further, the order purports to give both the tenants and the landlord an opportunity to approach the Tribunal; it in actual fact gave that option to the applicant and not the respondent. The basis advanced for this was that both the rulings in the previous courts favoured the landlord and it would thus make no sense for the favoured landlord to approach the Tribunal before the tenants could do so. In summation, the order simply gave the tenants the second bite of the cherry to approach the Tribunal again. According to the minority judgment, it would have dismissed the appeal.

9 Analyzing the judgments

The duty of the court is to assess the evidence presented by the parties to a dispute before it and not to make a case for any of the litigants. The majority judgment seems to have ignored this principle as it allowed the tenants to raise new arguments on appeal that were never part of the tenants' case both before the High Court and the SCA. This has caused a grave financial injustice to the landlord and presumably raises expectations to future litigants who have not stated their case sufficiently that the court will also assist them (potential litigants) to build their cases. The resources spent through litigation by both the tenants and landlord in various courts did not resolve the dispute. In addition, the landlord continues to receive a lower rent despite the renovations made by a loan from the bank. The Constitutional Court's jurisprudence is that a party has to plead its case before the lower courts and not to raise new arguments in at the appellate stage. However, this judgment shows a new direction on the part of the Constitutional Court in that it will presumably assist litigants to bring in new grounds at an appellate stage.

It is imperative to recall that the landlord instituted eviction proceedings in the Magistrates' Court for the eviction of tenants. The tenants challenged their eviction and *inter alia* raised a *lis pendens* defence on the grounds that they had filed a complaint against the landlord in the Tribunal, and their matter was still pending. The Tribunal cautioned the landlord to refrain from intimidating tenants. The Tribunal had also informed the tenants that their matter would be arbitrated on 29 June 2009. The landlord, for unknown reasons and before the arbitration date, withdrew the proceedings from the Magistrates' Court and instituted proceedings in the High Court. The tenants, through their attorney, withdrew their complaint from the Tribunal so that they could concentrate on the High Court proceedings. The withdrawal was done through an attorney who was arguably in a better position to understand the consequences of such removal (*Maphango CC* par 17). The defence of *lis pendens*, as correctly noted by the majority judgment, was "never adjudicated because the magistrates' proceedings were withdrawn in May 2009".

The majority judgment seemed to have ignored the fact that the tenants had a legal representative who played a role in the withdrawal of the complaint from the Tribunal. It was thus irrelevant for the majority judgment

to say that “it has not been suggested, nor could it be, that by withdrawing their complainant the tenants abandoned it or waived their right to pursue it under the Act”. The fact is that the tenants did not raise the defence of *lis pendens* both in the High Court and the SCA so that their complaint could be heard and finalized in the Tribunal prior the courts being called upon to adjudicate their dispute. Therefore, it was unwise for the court to give the parties, in particular the tenants, a second bite of the cherry to approach the Tribunal when they in the first instance and through a legal representative voluntarily withdrew their complaint. The court appeared to be justifying the tenant’s reasons for withdrawing the complaint when it said “it is not difficult to infer that they lacked resources and energy to litigate in both forums, thus deciding to concentrate on fighting the eviction proceedings”. It was never the tenants’ case nor did they suggest that they lacked resources. They clearly indicated that they wanted to focus on the eviction proceedings. Even if the landlord withdrew the Magistrates’ Court evictions, there was nothing that prevented the tenants from raising the *lis pendens* defence both in the High Court and SCA as they had rightfully raised it in the Magistrates’ Court.

In helping the tenants to introduce a new ground on appeal, the majority judgment relied on its earlier decision and said “the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty ...” (the *Alexkor* case par 43). This was correct but was subject to conditions. The conditions, which were not reflected in the majority judgment, were clearly stated in the very same judgment relied upon by the majority decision where the court said:

“The legal contention must, in other words, raise no new factual issues. The rule is the same as that which governs the raising of a new point of law on appeal. In terms of that rule ‘it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness ... and raises no new factual issues’” (par 44).

The court ignored this by allowing and assisting the tenants to introduce a new issue that was not pleaded. The minority judgment, which was herein supported, had indicated this and relied on a number of persuasive legal authorities that an appellant should clearly state his case from the onset in order to give the respondent sufficient time to reflect on the allegations raised and advance his/her defence. As stated earlier, the applicant had to stand or fall by the allegations made out at the very onset in his or her founding affidavit. The court had to look at the case brought before it as laid out in the founding affidavit. As was correctly found in *Director of Hospital Services v Ministry* (1979 (1) SA 626 (A) 635–636) the court said “when, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is”.

The majority judgment appeared to have given little weight to the interests of the landlord. The tenants had seen that the leased premises were renovated. Therefore, any reasonable person would have at least anticipated that there might be a rent increase. The tenants have in my view

correctly contended that the proposed increase was beyond that allowed by the leases. The landlord was aware of this fact as the advice of an attorney was sought and it became apparent that the only way out was to terminate the leases and propose new terms of the new leases. The landlord had terminated the leases and the tenants lodged their complaint after the termination of the leases. I am thus in agreement with the High Court; the SCA and the minority judgment that the tenants could not seek to enforce the terms of non-existing or cancelled leases. They entered into the leases at their own will and agreed to terms of the lease particularly the clauses giving either party the right to cancel the lease.

I agree with the majority judgment that the Rental Housing Act was applicable in this case but both the tenants and landlord overlooked it. However, I am not in agreement that the parties should have been given an opportunity to exhaust the remedies provided by the Rental Housing Act. They were both represented by their attorneys. There was thus no need for the court to invoke the application of the Rental Housing Act when the parties to the dispute had ignored it. The normal route of dismissing the appeal when there was no proper case that had been made by the litigants would have sufficed. This prejudiced the landlord because, should the matter go to the Tribunal, it would further drag whilst its business suffers a financial loss. Although I differ to a large extent with the articulation of the issues and findings in *Emfuleni Local Municipality v Builders Advancement Services CC* (2010 (4) SA 133 (GSJ) 28 April 2010 (unreported)) by Willis J, I find the following remark relevant in this case:

“Why buy or build housing to let to tenants, if the fundamental link between tenancy and the payment of rentals to landlords is undermined? Why invest in property if there is a serious risk that the ‘investment’ will be worthless?” (par 19.)

I agree with the judgments that the right to access to adequate housing demands a positive action from the Government and also places a negative obligation on private persons not to interfere with this right. The negative aspect of this right should not be abused as was done by the tenants in this case. A landlord who receives his income from renting property should not find his or herself running a business at a loss because of false entitlements. This is tantamount to tenants’ requesting the courts to order the landlords not to increase the rent because they cannot afford it. At the same time, I am mindful of the significant gap between the rich and the poor in South Africa. There is also a demand for housing within the city centre for low income earners. If the rent is too excessive, the poor would be forced to live outside the city and this would contribute further to their hardships, because they will now have to *inter alia* pay transport costs to get to their work places. There is thus a need for the Government to provide housing within the city centre to cater for this segment of society. Otherwise, the city will be for the rich only.

Ultimately, the minority judgment has clearly pointed out that “a reading of the affidavits put up by the applicants in the High Court does not reveal that it was their case that the termination of their leases was invalid because it constituted an unfair practice ...” The majority judgment seems to have

overlooked the precise nature of the tenants' case both in the High Court and the SCA. Had this not occurred, the majority judgment would have considered the nature of the appeal before it and decided the case based on what the tenants claimed and not build a case for them.

10 Conclusion

This case involved one of the most contested constitutional rights, to have access to adequate housing, and the right of a landlord to charge rent in order to keep his business running. Unfortunately, this decision was decided after the court had allowed new grounds to be introduced on appeal. This should not be permissible where the introduction of new grounds would be unfair to the other party who had not had an opportunity to deal with the new issues raised. It is hoped that the judgment will not raise expectations of potential litigants who have not pleaded their case from the start that the court will assist them by accepting new arguments on appeal as it did in this case.

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