CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 57/11
[2012] ZACC 2

In the matter between:

NTOMBIZODWA YVONNE MAPHANGO (NOW MGIDLANA)	First Applicant
ANNAH MKWINDA	Second Applicant
JUDITH HUGO	Third Applicant
P R MUSANDIWA	Fourth Applicant
N SOMPALI	Fifth Applicant
E S MABASO	Sixth Applicant
T MULAUDZI	Seventh Applicant
D MOYO	Eighth Applicant
V M MOLEKO	Ninth Applicant
N B MASEKO	Tenth Applicant
G R MAFORA	Eleventh Applicant
S MABOTJA	Twelfth Applicant
Z Z NODADA	Thirteenth Applicant
B G MOATSHE	Fourteenth Applicant
T E MUTSHINYA	Fifteenth Applicant

and

AENGUS LIFESTYLE PROPERTIES (PTY) LTD Respondent

and

INNER CITY RESOURCES CENTRE Amicus Curiae

Heard on : 3 November 2011

Decided on : 13 March 2012

JUDGMENT

CAMERON J (Moseneke DCJ, Froneman J, Nkabinde J, Skweyiya J, Yacoob J and Van der Westhuizen J concurring):

[1] The narrow question in this case is when a landlord may cancel a lease and evict its tenants. Behind this lies the impact of the protection the Constitution affords against eviction.[1]

[2] The applicants are tenants in Lowliebenhof, a ten-storey block of flats in Braamfontein, in the inner city of Johannesburg. The flats are their homes, and they live there in terms of various leases. The respondent landlord, a property investment company, bought the building, upgraded it, and then wanted to increase the rent. To do

[1] Section 26(3) of the Constitution provides:

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

so, it cancelled the tenants' leases, but offered them new tenancies, on identical terms, though at new and much higher rents. The tenants resisted. The landlord brought eviction proceedings. The tenants lost in the South Gauteng High Court[2] and the Supreme Court of Appeal[3] and now seek leave to appeal to this Court.

[3] Although different leases are at issue, each made provision for an annual rent increase at a stipulated rate. Each also had a clause entitling either party to terminate the lease on written notice. It is the landlord's exercise of this power that gave rise to the dispute. The landlord's case was that, since the existing leases did not allow it to increase the rents unilaterally, it was entitled to use the termination clause to oblige the tenants either to leave or to enter new leases at higher rents. The tenants' case was that the law did not permit the landlord to use the bare power of termination for this purpose. In the High Court and the Supreme Court of Appeal the tenants' argument turned largely on the Constitution, contract law and public policy. But they also said the Rental Housing Act[4] (Act) precluded what the landlord had done. The two courts of previous instance rejected all these arguments, including that based on the Act. The tenants now seek leave to appeal to this Court.

[2] *Aengus Lifestyle Properties (Pty) Ltd v Maphango and Others* Case No 22346/09, 7 May 2010, unreported.

[3] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA), per Brand JA (Lewis, Cachalia, Shongwe JJA and Plasket AJA concurring).

[4] Act 50 of 1999.

[4] This judgment holds that the statutory argument should have prevailed. The Act creates a finely-balanced mechanism to resolve disputes between landlords and tenants. It offers an appropriate and fair mechanism for the resolution of this dispute. There is therefore no need to consider the tenants' common law and contractual arguments.

Constitutional issue and leave to appeal

[5] The statute was enacted to give effect to the constitutional right of access to adequate housing, which includes the right not to be evicted without an order made by a court after taking into account all the relevant circumstances. Hence we have jurisdiction to determine its ambit.[5] This, together with the tenants' strong prospects, points to the grant of leave to appeal.

The parties and their leases

[6] There are fifteen applicants.[6] They have lived at Lowliebenhof for differing periods – the longest since 1994. In that time, the building has belonged to various entities, each of which concluded the leases with the individual tenants. Ten of them – including the first applicant, Ms Ntombizodwa Mgidlana (formerly Maphango) – concluded leases with the landlord's predecessor in title, the Ithemba Property Trust (Pty)

[5] *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 13-4 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25.

[6] There were 19 tenants in the eviction proceedings before the High Court. The landlord conceded there that the leases of two tenants had not been validly terminated. One tenant has since died. Before the Supreme Court of Appeal there were 18 tenants. There are only 15 tenants before this Court. It is not clear from the papers how that tally was reached.

Ltd (Ithemba lease). Two tenants concluded leases with the Technical Workers' Union, a registered trade union (Union lease). One person concluded a lease with the Artisan Staff Association (Artisan lease). Two others concluded a lease with a company called Eagle Creek Investments 128 (Pty) Ltd (Eagle Creek lease).

[7] Each lease was to run for a specified initial period,[7] during which the landlord could terminate the tenancy for breach (these included the usual grounds:[8] non-payment of rent, damage to the premises, contravention of laws or by-laws). After this, the lease would continue on the same terms and conditions, subject to termination by either the landlord or the tenant on a specified period of written notice.[9] The Ithemba lease provided in addition that if the landlord decided after the expiry of the initial period, but while the lease was in force, to demolish or substantially renovate the premises, it would be entitled to suspend or cancel the lease on not less than two months' written notice.

[8] The Ithemba lease, which governs the tenure of most of the applicants, has four unusual stipulations. These reflect the fact that, some years before the landlord acquired the property, the building had been refurbished with Gauteng provincial housing department funds. First, the lease provides that if it was "supported by a Department of Housing subsidy, termination shall be at the discretion of the lessee". Second, apart from

[7] The initial periods were: Ithemba lease, twelve months; Union lease, one month; Artisan lease, six months; and Eagle Creek lease, three months.

[8] The usual grounds for termination are well set out in Lotz "Lease" 14 *LAWSA* 1981 at paras 159, 161-2.

[9] The notice periods were: Ithemba lease, two months; Union lease, 30 days; Artisan lease, one month; and Eagle Creek lease, two months.

the provision for an annual rent escalation, it provides that if a "statutory Rental Body or Act" becomes applicable to it, the landlord "shall be entitled" to apply to the "competent authority" to charge a higher rent than the stipulated annual increase, and to increase the rent to the extent permitted by "the said Act or any amendment or replacement thereof", "subject to the approval of the competent authority whose approval is necessary".[10]

[9] Third, the lease provides that the landlord has the right on written notice to the tenant four years after signing the agreement to "change the nature of [the] tenure" under the lease. The provision stipulates that the changed tenure has to be "one of the options as defined in the Housing Code". The tenant has first option to take up the changed tenure. Fourth, there is a succession clause. If the tenant dies or becomes permanently disabled, then his "wife or dependants" are entitled to continue in occupation of the premises, subject to fulfilling the terms of the lease.

[10] Clause 5.5 of the Ithemba lease provides:

> "Notwithstanding anything to the contrary herein contained and should the provisions of any statutory Rental Body or Act or any amendment or replacement thereof, be or any time during the operation or any renewal or extension of this lease, become applicable to the leased premises, the Lessor shall be entitled;
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> 5.5.1 to apply to any such competent authority having jurisdiction of authority to charge a higher rent for the leased premises than that provided in clause 5 (whether or not it has been adjusted in terms of this clause 5) and if such authority is granted, the Lessee undertakes, and it shall be obliged to pay as rent such amount as the Lessor is authorised to charge with effect from the date fixed by the said competent authority; and
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> 5.5.2 subject to the approval of the competent authority whose approval is necessary, to increase the rent to the extent permitted by the said Act or any amendment or replacement thereof, if any of the amounts referred to and allowable in terms of paragraphs 5.2 suffer any increase in respect of the premises, the Lessee hereby agrees to the increases with effect from the date on which such increases come into force."

[10] The subsidy had long run out by the time of the present dispute and not all the clauses reflecting it applied. But the tenants pointed to the unusual features of the Ithemba lease to underscore their contention that the landlord's invocation of the bare power of termination was contrary to the scheme of the lease.

[11] The landlord acquires run-down inner-city buildings, some of which it strips and refurbishes. Others it upgrades. It says its ventures are aligned with the city's "initiative at refurbishing and upgrading the Johannesburg inner city." It became involved in the management of Lowliebenhof in 2007 through an associated company. It took formal transfer of the property in 2009 and later upgraded the building. After the sale, the landlord concluded that market-related rentals in similar buildings were many times higher than the tenants were paying, and that the rent income was in any event less than the building's overheads.

[12] In September 2008, the then-landlord began giving the tenants written notice to vacate. The termination letter in each case stated that if the tenant wished to remain, he or she would be billed the increased rent. The letter made no reference to any renegotiation of the lease, or to any other change in its terms. The implication was that the landlord was willing to retain the tenant, on identical terms to those in the lease, save only for the increased rent.

[13] The tenants resisted. On 17 September 2008, they lodged a complaint with the Gauteng Rental Housing Tribunal (Tribunal),[11] established under the Act.[12] The Tribunal wrote to the landlord immediately to inform it of the complaint. It later set out the details – "intimidation and victimizing of tenants", "threatening to evict tenants without a court order and issuing of notices while a case lodged against you has not been finalised", and "unfair and exploitative rental and services charges." The Tribunal asked of the landlord: "May you please govern yourself accordingly and know that we are attending to this matter". In the mean time, it requested that the landlord "refrain from issuing eviction notices."

[14] A mediation hearing was convened at the Tribunal on 22 October 2008. The landlord said that about eight tenants attended, apparently as representatives for about 20 tenants. There are 58 flats in the building. The mediation proceeded, but at the end the

[11] Gauteng Unfair Practices Regulations *Provincial Gazette Extraordinary* No 124 Notice 4004 of 2001, 4 July 2001 (Gauteng Unfair Practices Regulations). In the same *Gazette*, the Province promulgated the Rental Housing Tribunal Procedural Regulations Notice 4003 of 2001 (Gauteng Procedural Regulations). Both the Gauteng Unfair Practices Regulations and the Procedural Regulations purport to be issued under section 15 of the Act, which gives the national Minister of Housing power to make regulations. On this seeming anomaly, see below n 73. Other provinces have promulgated regulations substantially similar to those of Gauteng, establishing Rental Housing Tribunals under the Act, and providing for complaints and other procedures: Western Cape Unfair Practices Regulations *Provincial Gazette* No 5822 Notice 22 of 2002, 1 February 2002; Western Cape Rental Housing Tribunal Procedural and Staff Duties Regulations *Provincial Gazette* No 5822 Notice 21 of 2002, 1 February 2002 (Western Cape Procedural Regulations); Free State Unfair Practices Regulations *Provincial Gazette* No 65 Notice 152 of 2003, 25 July 2003 and Mpumalanga Rental Housing Unfair Practices and Procedural Regulations *Provincial Gazette* No 1060 Notice 83 of 2004, 12 March 2004. It does not appear that all provinces have established Tribunals or issued unfair practice regulations. If enacted, the Rental Housing Amendment Bill GN R765 of 2011 GG 34703, 28 October 2011, will render the establishment of a Tribunal in every province mandatory.

[12] The Act provides in section 7 that the Member of the Executive Council (MEC) of a province responsible for housing matters may by notice in the *Gazette* establish a tribunal in the Province to be known as the Rental Housing Tribunal. The Gauteng Rental Housing Tribunal was established in terms of the Premier's Notice *Provincial Gazette* No 127 Notice 4216 of 2001, 18 July 2001.

mediator recorded that the parties could not settle.[13] The Tribunal therefore referred the matter for arbitration. It would appear that a date was eventually set for a hearing, namely 19 June 2009. But before a hearing could take place the landlord went to court to evict the tenants.

Litigation history

[15] In February 2009, the landlord's predecessor in title applied for the tenants' eviction in the magistrates' court. This was after the three-month moratorium the Act places on evictions had expired.[14] The tenants defended. In resisting summary judgment in the Ithemba and Union lease cases, the tenants objected that the proceedings were incompetent because of their pending complaint before the Tribunal.[15] Their plea that suit was pending in another forum[16] was never adjudicated, because the magistrates'

[13] Regulation 6(1)(b) of the Gauteng Procedural Regulations provides for a mediation process by a Tribunal member, a member of staff, or a nominee of the Tribunal, in which the mediator "merely acts as a facilitator in trying to resolve the dispute" and the mediator must inform the parties that "the decision to be arrived at will be the decision of the parties and not that of the mediator". See also Regulation 6(2)(b) of the Western Cape Procedural Regulations.

[14] Section 13(7) of the Act provides that, from the date a complaint is lodged with the Tribunal, a landlord may not evict a tenant who continues to pay rent until the Tribunal has made a ruling on the matter, or a period of three months has elapsed, whichever is the earlier. Section 13(7) reads:

> "As from the date of any complaint having been lodged with the Tribunal, until the Tribunal has made a ruling on the matter or a period of three months has elapsed, whichever is the earlier—
>
> (a) the landlord may not evict any tenant, subject to paragraph (b);
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> (b) the tenant must continue to pay the rental payable in respect of that dwelling as applicable prior to the complaint or, if there has been an escalation prior to such complaint, the amount payable prior to such escalation; and
>
> (c) the landlord must effect necessary maintenance."

[15] Section 13(9) of the Act provides that from the date of the establishment of a Tribunal, "any dispute in respect of an unfair practice, must be determined by the Tribunal unless proceedings have already been instituted in any other court."

[16] *Lis alibi pendens*.

court proceedings were withdrawn in May 2009. For, in the meanwhile, formal transfer of title had taken place, and the present landlord became the legal owner of the building. The day after the magistrates' court application was withdrawn, the landlord instituted fresh proceedings for eviction in the High Court.

[16] In its founding affidavit, the landlord explained its business mission and the necessity, arising from it, to secure a higher rental return on Lowliebenhof. The landlord also explained why it cancelled the leases. It recounted that it took advice from its attorneys. It was informed that the lease agreements concluded with various tenants "did not allow us to unilaterally increase the rental to the levels that we needed to and that the only way in which this could be achieved, was to cancel the existing leases" and to invite tenants to enter into new lease agreements.

[17] In her opposing affidavit, Ms Maphango noted that the magistrates' court proceedings were launched before the Tribunal had "adjudicated" the tenants' complaint. She added, "[a]gain, before the matter at the Housing Tribunal was dealt with on the 19th of June 2009, it came to light that there is the application issued in the [High Court] for my eviction, which application was yet to be served". She concluded: "Under the circumstances, I had no option but to instruct my attorney to withdraw the complaint lodged with [the] Housing Tribunal so that I can concentrate on this application".

[18] The landlord's replying affidavit confirmed that the High Court application was served before the Tribunal hearing was convened on 19 June 2009. It went on to record that before the hearing of the matter, the tenants' attorney informed the landlord's lawyer "that he intended to withdraw the complaint that had been lodged in terms of the Rental Housing Act in its totality". The deponent stated that he had been advised that "the complaint to the Housing Tribunal, which has been withdrawn, does not constitute an impediment to the hearing of the current eviction application". I return to this later.

[19] The High Court eviction application moved tortuously, for despite the tenants' opposing affidavits, their then-attorney consented to an eviction order, which was granted but later rescinded when they disclaimed his authority to do so. The tenants secured their present legal team, and the matter was argued before Van Der Riet AJ, who in a reserved judgment found in the landlord's favour.

[20] The High Court found that it was 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. The escalation clauses regulated rent increases during the operation of the lease, but did not govern the rental once the lease had been terminated. Nor was the Court persuaded that the termination was contrary to public policy especially since 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 of cases. On 7 May 2010, the Court granted an order of eviction

against ten respondents. It postponed the eviction of seven respondents, who would be rendered homeless, granting them leave to apply to join the City of Johannesburg, which had never been cited in the proceedings.

[21] With leave of the High Court, the tenants appealed to the Supreme Court of Appeal. Their appeal was unavailing. That Court found that the positive component of the section 26(1) right to security of tenure[17] obliges the state to take reasonable measures, but does not bind private persons. While its negative aspect binds private persons, who are forbidden from interfering with the rights of any other person, a tenant has no security of tenure in perpetuity. The duration of the tenure is governed by the terms of the lease, beyond which there is no security of tenure. Hence the Court concluded that the tenants' security of tenure was circumscribed by the leases themselves. It could therefore not be said that termination, in accordance with the leases, constituted an infringement of their security of tenure.

[22] The tenants' contractual argument fared no better. The Supreme Court of Appeal held that since reasonableness and fairness are not freestanding requirements for the exercise of a contractual right, a court cannot refuse implementation of a contract simply

[17] Section 26 of the Constitution provides:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

because the individual judge regards this as unreasonable or unfair. The landlord behaved transparently by disclosing its motive in terminating the leases, which it was not obliged to do. The Court found "nothing wrong in the [landlord's] conduct that can justifiably be described as unreasonable and unfair". Nor did the leases contain a tacit term precluding the landlord's reliance on the bare power of termination.

[23] No doubt because of the focus of the tenants' contentions, the Supreme Court of Appeal dealt very succinctly with their argument on the Act. In fact, the Court observed that it was not clear why the tenants chose a "circuitous route" instead of simply relying on a contravention of the Act. The Court rejected the tenants' contention that the termination of their leases constituted a contravention of the statute's provisions. It gave two reasons:

> "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 eg *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 termination of the leases could in the circumstances be denounced as unreasonable or unfair, let alone oppressive."[18]

[18] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) at para 34.

Submissions in this Court

[24] In this Court, the tenants accepted that the termination clauses are not, on their face, offensive to public policy. Their contention was that the circumstances in which the landlord exercised the power rendered the termination unfair, unreasonable and contrary to public policy. They contended that it is grossly unfair for the landlord to bring their tenure to an end for the sole purpose of imposing a rent increase beyond that permitted by the leases themselves. Their primary submission was that the landlord's act had to be set aside because the termination was to frustrate the rights the tenants had under the leases. This was because the landlord did not primarily wish to bring the leases to an end: it wished to circumvent the rent escalation clauses, and also sought to avoid compliance with the Tribunal clauses.

[25] The landlord was not only entitled but, the tenants submitted, obliged to apply under the Ithemba lease to a "competent authority" for leave to charge a higher rental than that permitted by the escalation clauses. It was not entitled to dispense with that procedure by terminating the leases. Here the tenants relied on the Act's provisions empowering the Tribunal to make "a determination regarding the amount of rental payable by a tenant".[19] The lease provisions read together with the Tribunal's statutory

[19] Section 13(5) of the Act provides:

> "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

authority meant that the landlord was obliged to approach the Tribunal for leave to charge a higher rent than that set out in the escalation clauses.

[26] The landlord urged that the lease agreements do not create any form of security of tenure since a tenant at the inception of a lease by implication accepts that the right of access to adequate housing is not assertable indefinitely. The landlord pointed to the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[20] (PIE), which requires consideration of all a tenant's circumstances before eviction. The landlord warned against creating a perpetual contract for the parties by precluding it from relying on the termination clause. This, it argued, would also sanction a quasi-expropriation of the premises terminable only at the instance of the applicants.

[27] The landlord also disputed the application of the Act, submitting that the statutory framework 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. In addition, the Act is consistent with the unqualified right of a landlord to cancel a lease under a termination clause. Given the landlord's transparency in disclosing its motive, the cancellation here was not an "unfair practice" under the Act. In addition, the landlord supported the meaning the Supreme Court of Appeal ascribed to "practice".

(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)."

[20] Act 19 of 1998.

[28] The Inner City Resource Centre, which was admitted as an amicus curiae, generally supported the tenants' arguments on their section 26(1) constitutional rights, as well as on the termination of their leases as an "unfair practice" under the Act. However it urged that if neither of these arguments prevailed, the Court should develop the common law to include an implied term in the law of lease prohibiting a landlord from cancelling a lease to circumvent protective clauses in the lease, where this would cause disproportionate hardship.

The Rental Housing Act

[29] The critical question is whether the landlord was lawfully entitled to exercise the bare power of termination in the leases solely to secure higher rents. At common law, there can be no doubt that a lessor was entitled with no let or hindrance to terminate a lease on notice.[21] But even before the Constitution, rent control legislation heavily clamped lessors' common law powers.[22] In the wake of accommodation shortages during World War I, the legislature enacted the Tenants Protection (Temporary) Act[23] and the Rents Act.[24] The former statute was an interim measure, but formed "the nucleus" of

[21] See Voet 19.2.9 *The Selective Voet, being the Commentary on the Pandects* translated by Percival Gane, vol 3 at 413. This passage from Voet deals with leases at the will of the landlord, and is so cited in the South African case law and literature; but the principle it invokes, that a lease must have an ending, and that a lease of indefinite duration is terminable at the will of the landlord, was of powerful general force throughout the common law of lease. Compare Lotz "Lease" 14 *LAWSA* 2009 at paras 139 and 186.

[22] The legislation was modelled on English statutes: Cooper *The South African Law of Landlord and Tenant* 1st ed (Juta & Co Ltd, Cape Town 1973) at 348 and Hawthorne "Tenant Protection" 26 *LAWSA* 1986 at para 373 note 3.

[23] Act 7 of 1920.

[24] Act 13 of 1920. Ensuing legislative measures included War Measure 37 of 1943 and the Rents Act 43 of 1950.

later rent control legislation.[25] It provided that as long as a lessee paid the stipulated rent on due date, and performed all other conditions appurtenant to the lease, he or she could not be ejected unless the lessor required the premises for personal accommodation.[26] No distinction was drawn between levels of rent. As long as the lessee paid the rent due, he or she was protected, even if the rent was unreasonably low.[27]

[30] Though later controls were less invasive,[28] they still constituted what the Appellate Division described in 1942 as "a drastic interference with the common law rights of lessors".[29] The legislation was repeatedly extended, in various amended forms, culminating in the Rent Control Act of 1976.[30] Its social rationale was thus explained:

> "In view of the fact that housing is one of the basic necessities of life, the state was forced to interfere in the market-place and to introduce legislation protecting the economically weaker party, the lessee, against exploitation by the lessor. Consequently, legislation controlling the lease of immovable property was enacted in 1920 and has not left the statute book."[31] (Footnote omitted.)

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[25] See Rosenow and Diemont *The Rents Act in South Africa* 2nd ed (Juta & Co Ltd, Cape Town 1950) at 1.

[26] Id.

[27] Id.

[28] For the practical operation of rent control, see Hawthorne "Tenant Protection" in 26 *LAWSA* 1986 at para 373-432; Cooper *The South African Law of Landlord and Tenant* 1st ed (Juta & Co Ltd, Cape Town 1973) part 9 chapters 26-30 at 339-554 and Cooper *The Rent Control Act* (Juta & Co Ltd, Cape Town 1977).

[29] *Herison v South African Mutual Life Assurance Society* 1942 AD 259 at 263 per De Wet CJ (Watermeyer, Tindall, Centlivres and Feetham JJA concurring). See also Lotz "Lease" 14 *LAWSA* 1981 at para 198.

[30] Act 80 of 1976. See Thomas "Rental Housing" 23 *LAWSA* 2009 at para 163.

[31] Hawthorne "Tenant Protection" 26 *LAWSA* 1986 at para 373.

[31] Before 1994 the only clogs inhibiting a lessor's common law power of termination were those expressly legislated. But the Constitution has fundamentally changed the setting within which the rights of both lessors and lessees stand to be evaluated. Constitutionalism has wrought significant changes to private law relationships. In particular, the inclusion in the Constitution of social and economic rights created a right of access to social goods. Amongst these is the right now afforded to everyone to have access to adequate housing. It is true, as the landlord emphasised, that the main burden of fulfilling this right falls upon the state, which section 26(2)[32] obliges to take reasonable measures within available resources to achieve its progressive realisation.

[32] But the impact of the right is not solely on the state. It goes wider in two ways. First, the right of access to adequate housing imports an inhibitory duty not to impede or impair access to housing. This rests not only on public bodies but also on private parties. This Court held in *Grootboom*[33] that the right imports "at the very least, a negative obligation . . . upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing".[34]

[33] Later decisions of this Court have shown how the progressive realisation of the right of access to housing may impinge on private parties. Thus, debt recovery is

[32] The full text of section 26 is set out above in n 17.

[33] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

[34] Id at para 33.

subjected to judicial consideration of the right before creditors may levy execution on a debtor's home.[35] And while a private landowner cannot be expected to house unlawful occupiers indefinitely, its right not to be arbitrarily deprived of property[36] must be interpreted in conjunction with the constitutional requirement[37] that every eviction be made by court order after considering all the relevant circumstances.[38]

[34] The second way in which the right of access to adequate housing ripples out to private rights is when the state itself takes measures to fulfil the right. These may affect private relationships. The Act is a prime instance. It originated in a government White Paper in December 1994[39] that envisioned a policy framework aiming to create market certainty while enabling provincial and local governments to fulfil their constitutional obligations in relation to housing.[40] Since the Constitution provides that housing is a

[35] See *Gundwana v Steko Development and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) and *Jaftha v Schoeman and Other; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

[36] Section 25(1) of the Constitution provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivations of property."

[37] Section 26(3) of the Constitution, quoted above n 1.

[38] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Lawyers for Human Rights as Amicus Curiae)* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC). See also *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* [2011] ZACC 36; Case No CCT 26/11, 7 December 2011, as yet unreported and *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* [2011] ZACC 35; Case No CCT 25/11, 7 December 2011, as yet unreported.

[39] "A New Housing Policy and Strategy for South Africa", released by the National Ministry and Department of Housing. The White Paper itself originated in the National Housing Forum, which was created in 1992 to reach a national consensus on the housing crisis. See Thomas "Rental Housing" 23 *LAWSA* 2009 at para 162.

[40] Thomas id.

functional area of concurrent national and provincial competence,[41] the Act made provision for provincial measures to secure its practical operation.

[35] The statute's heading states that it is enacted "to define the responsibility of Government in respect of rental housing property" and "to promote access to adequate housing through creating mechanisms to ensure the proper functioning of the rental housing market". The Preamble expressly couches the statute's enactment and its objectives within the right of access to adequate housing, and the state's duty to fulfil it. It goes on to note that "rental housing is a key component of the housing sector", and that there is "a need to promote the provision of rental housing". It also notes "a need to balance the rights of tenants and landlords and to create mechanisms to protect both tenants and landlords against unfair practices and exploitation", and to "introduce mechanisms through which conflicts between tenants and landlords can be resolved speedily at minimum cost to the parties".

[36] Rent control was a focus of major public debate before the Act was passed. It was recognised that rent control inhibited market mechanisms that provide an incentive for investors to contribute to the available stock of rental housing.[42] After extensive public

[41] Part A of Schedule 4 to the Constitution.

[42] The Explanatory Memorandum accompanying the Housing Rental Draft Bill GN R2111 GG 19260, 18 September 1998 stated that "Internationally, there appears to be general agreement that rent control curtails investment". See also Hawthorne "Tenant Protection" in 26 *LAWSA* 1986 at para 373 (a concomitant of rent control is that "the housing shortage is aggravated as the permitted return on investment discourages construction of new housing") and Thomas "Rental Housing" 23 *LAWSA* 2009 at para 163.

consultation,[43] the statute's provisions were finalised, placing responsibility on government to "promote a stable and growing market" in rental housing that "progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons". This is to be done "by the introduction of incentives, mechanisms and other measures" that improve conditions in the rental housing market, encourage investment and correct distorted patterns of residential settlement.[44]

[37] Chapter 3 of the Act regulates relations between tenants and landlords. It prohibits unfair discrimination in advertising or negotiating a lease, or during the term of a lease.[45] It confers on a tenant the right to privacy during the lease.[46] It also itemises certain protections encompassed within the right to privacy.[47] It records the landlord's rights against the tenant.[48] These expressly include the right to "terminate the lease in respect

[43] Thomas "Rental Housing" 23 *LAWSA* 2009 at para 163.

[44] Section 2(1)(a).

[45] Section 4(1).

[46] Section 4(2).

[47] Section 4(3) provides:

> "The tenant's rights as against the landlord include his or her right not to have—
>
> (a) his or her person or home searched;
>
> (b) his or her property searched;
>
> (c) his or her possessions seized, except in terms of a law of general application and having first obtained a ruling by a Tribunal or an order of court; or
>
> (d) the privacy of his or her communications infringed."

[48] Section 4(5) provides:

> "The landlord's rights against the tenant include his or her right to—

of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease".[49]

[38] Chapter 3 also contains general provisions pertaining to leases. These permit oral leases,[50] but require the landlord to reduce a lease to writing if the tenant requests it.[51] A lease is deemed to include certain standard provisions, which neither tenant nor landlord may waive.[52] These concern receipts,[53] deposits and how they may be used,[54] inspection of the premises,[55] vacation of the premises before expiration of the lease,[56] and payment of costs shown to have been incurred in relation to the contract.[57] The Chapter regulates

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(a) prompt and regular payment of a rental or any charges that may be payable in terms of a lease;

(b) recover unpaid rental or any other amount that is due and payable after obtaining a ruling by the Tribunal or an order of a court of law;

(c) terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease;

(d) on termination of a lease to—

(i) receive the rental housing property in a good state of repair, save for fair wear and tear; and

(ii) repossess rental housing property having first obtained an order of court; and

(e) claim compensation for damage to the rental housing property or any other improvements on the land on which the dwelling is situated, if any, caused by the tenant, a member of the tenant's household or a visitor of the tenant."

[49] Section 4(5)(c).

[50] Section 5(1).

[51] Section 5(2).

[52] Section 5(3) and (4).

[53] Section 5(3)(a), (b), (h) and (n).

[54] Section 5(3)(c), (d), (g), (i), (l) and (m).

[55] Section 5(3)(e), (f), (j) and (k).

[56] Section 5(3)(o).

[57] Section 5(3)(p).

the position when the tenant remains with the landlord's consent after the lease has expired.[58] And it requires that a lease that is reduced to writing must include certain information.[59] This includes "the amount of rental of the dwelling and [the] reasonable escalation, if any, to be paid in terms of the lease".[60]

[39] Chapter 4 empowers the Member of the Executive Council (MEC) responsible for housing in each province to create a Rental Housing Tribunal.[61] The Tribunal's functions are to fulfil the duties the Chapter imposes on it, and to "do all things necessary to ensure that the objectives of this Chapter are achieved".[62] Tribunal members are appointed by the MEC after a public process[63] and must include persons with expertise in both property management or housing development[64] and consumer matters.[65] The Act provides for meetings of the Tribunal,[66] its staff,[67] funding[68] and reports.[69] The proceedings of the Tribunal may be brought under review.[70]

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[58] Section 5(5).

[59] Section 5(6).

[60] Section 5(6)(c).

[61] Section 7 explained above n 12.

[62] Section 8.

[63] Section 9(2).

[64] Section 9(1)(b)(i).

[65] Section 9(1)(b)(ii).

[66] Section 10.

[67] Section 11.

[68] Section 12(1) and (2).

[69] Section 12(3), (4) and (5).

[70] Section 17.

[40] The Act provides that any tenant, landlord, group of tenants or landlords, or interest group "may in the prescribed manner lodge a complaint with the Tribunal concerning an unfair practice".[71] "Unfair practice" means:[72] (a) any act or omission by a landlord or tenant in contravention of the Act; or (b) a practice "prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord".[73] The Gauteng Unfair Practices Regulations provide that neither a landlord[74] nor a tenant[75] may "engage in oppressive or unreasonable conduct". A landlord must not "conduct any activity which unreasonably interferes with or limits the rights of the tenant or which is expressly prohibited under the lease, these regulations, the Act or any other law".[76] The parallel provision for tenants proscribes "any activity which unreasonably interferes with or limits the rights of other tenants and that of the neighbours, or which is expressly prohibited under the lease, these regulations, the Act or any other law".[77] In addition, the

[71] Section 13(1).

[72] Section 1 "definitions" under "unfair practice". The definition, which previously read "a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord" was amended by the Rental Housing Amendment Act 43 of 2007 to add paragraph (a).

[73] Section 15(1) of the Act provides that the national Minister of Housing must make regulations on specified matters, by notice in the *Gazette*, "after consultation with the standing or portfolio [committee] on housing and every MEC". The ministerial power to regulate includes unfair practices, which the Act stipulates may amongst other things relate to: (i) the changing of locks; (ii) deposits; (iii) damage to property; (iv) demolitions and conversions; (vi) forced entry and obstruction of entry; (vii) House Rules, subject to the Sectional Titles Act 95 of 1986; (viii) intimidation; (ix) issuing of receipts; (x) tenants' committees; (xi) municipal services; (xii) nuisances; (xiii) overcrowding and health matters; (xiv) tenant activities; (xv) maintenance; (xvi) reconstruction or refurbishment work. Sub-paragraph (v), evictions, was deleted by Act 43 of 2007. In addition to the national Minister's regulatory power, the definition of "unfair practice" empowers provincial MECs to promulgate regulations on an "unfair practice". This is because "prescribed" is itself defined as "prescribed by regulation by the MEC, by notice in the *Gazette*". The anomalous position regarding provincial and ministerial regulatory power in the Act is addressed in the Rental Housing Amendment Bill GN R765 of 2011 GG 34703, 28 October 2011.

[74] Regulation 14(1)(d).

[75] Regulation 14(2)(e).

[76] Regulation 14(1)(f).

[77] Regulation 14(2)(g).

regulations provide that a tenant must not "intimidate, discriminate or retaliate against the landlord for exercising any right under these regulations, the Act or any other law".[78]

[41] The Gauteng Unfair Practices Regulations also import an obligation of good faith into the parties' dealings. They stipulate:

> "Every obligation under these regulations, the Act, or any other law, and every act which must be performed as a condition precedent to the exercise of a right or remedy, imposes an obligation of good faith in its performance or enforcement".[79]

[42] The statute sets out the steps the Tribunal must take if "it appears that there is a dispute in respect of a matter which may constitute an unfair practice".[80] These include mediation.[81] Where mediation is not possible, or has failed, it must conduct a hearing, and, subject to the section, "make such a ruling as it may consider just and fair in the circumstances".[82] The Tribunal's powers in relation to hearings are stipulated.[83] Where at the conclusion of a hearing the Tribunal is of the view that an unfair practice exists, it

[78] Regulation 14(2)(c).

[79] Regulation 14(3).

[80] Section 13(2).

[81] Section 13(2)(c).

[82] Section 13(2)(d).

[83] Section 13(3).

may oblige any person to comply with the Act;[84] refer the matter for investigation;[85] or "make any other ruling that is just and fair to terminate any unfair practice".[86]

[43] The Act provides that an unfair practice ruling "may include a determination regarding the amount of rental payable by a tenant".[87] But it carefully circumscribes the Tribunal's powers in making the determination. It "must be made in a manner that is just and equitable to both tenant and landlord". In addition, the rent determination must take "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)".[88]

[44] More generally, the Act requires a Tribunal when making a ruling to have regard to specified factors. These include not only regulations in respect of unfair practices,[89]

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[84] Section 13(4)(a).

[85] Section 13(4)(b).

[86] Section 13(4)(c) provides that a just and fair ruling by the Tribunal may include a ruling to discontinue—

> "(i) overcrowding;
> (ii) unacceptable living conditions;
> (iii) exploitative rentals; or
> (iv) lack of maintenance."

[87] Section 13(5).

[88] Section 13(5)(a)-(c). Section 2(3) provides that "National Government must introduce a policy framework, including norms and standards, on rental housing" to give effect to government's responsibilities as set out in sub-section (1).

but also "the common law to the extent that any particular matter is not specifically addressed in the regulations or a lease",[90] the provisions of the lease "to the extent that it does not constitute an unfair practice",[91] as well as "the need to resolve matters in a practicable and equitable manner".[92] A Tribunal ruling is deemed to be an order of a magistrates' court,[93] enforceable in terms of the Magistrates' Courts Act.[94] A section added in 2007 expressly provides that the Tribunal does not have jurisdiction to hear applications for eviction.[95]

Applying the Act to the parties' dispute

[45] The lessor is a landlord under the Act.[96] Its tenants were therefore entitled to lodge an unfair practice complaint against it with the Tribunal. They did so. The landlord instituted eviction proceedings against them first in the magistrates' court. The tenants did not withdraw their complaint. After those proceedings in the magistrates' court had been withdrawn, the landlord instituted eviction proceedings in the High Court. It was only then that the tenants withdrew their complaint before the Tribunal. It is not difficult

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[89] Section 13(6)(a).

[90] Section 13(6)(b).

[91] Section 13(6)(c).

[92] Section 13(6)(e). Section 13(6)(d) requires the Tribunal in addition to have regard to "national housing policy and national housing programmes".

[93] Section 13(13).

[94] Act 32 of 1944.

[95] Section 13(14), added by the Rental Housing Amendment Act 43 of 2007. The same legislation deleted the provision empowering the national Minister of Housing to make regulations on unfair practices relating to evictions: see above n 73.

[96] Section 1 defines "landlord" very broadly to mean "the owner of a dwelling which is leased and includes his or her duly authorised agent or person who is in lawful possession of a dwelling and has the right to lease or sub-lease it".

to infer that they lacked resources and energy to litigate in both forums, thus deciding to "concentrate" on fighting the eviction proceedings.[97]

[46] It has not been suggested, nor could it be, that by withdrawing their complaint the tenants abandoned it or waived their right to pursue it under the Act. On the contrary, they have consistently contended that the landlord did not validly terminate their lease agreements, whether under the leases themselves, the law of contract as they say it should be constitutionally developed, or the Act. And, without objection from the landlord, they contended in this Court and in the courts of previous instance that the landlord's action in terminating the leases was unlawful because it was an "unfair practice" under the Act.

[47] As I see it, the question before us is not whether the Act prohibited the landlord from terminating the tenants' leases in order to secure higher rents, but whether the termination was capable of constituting an unfair practice.[98] Whether it was an unfair practice, and what a just and fair ruling would be if it was an unfair practice, lies within the Tribunal's power to decide. If the termination is capable of constituting an unfair practice, I must consider what order this Court should make.

[97] See [17] above (Ms Maphango's statement that she decided to "concentrate" on the eviction).

[98] Whether conduct constitutes an unfair practice is a question of both fact and law. In *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 798E-I the Appellate Division held that "the definition of an unfair practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects." The consideration of fairness or unfairness, it held, was "implicit in the very concept of an unfair labour practice." Accordingly, the Court held that "a decision of the Court pursuant to [whether the conduct is an unfair labour practice] is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinion." It follows that, since this question is not purely a question of fact, it also embodies elements of law, and may be introduced and determined at appellate stage.

[48] In my view, neither the landlord nor the tenant fully appreciated the force of the Act's provisions in litigating their dispute. But it would be wrong for this Court to take a narrow view of the matter that ignores the importance and impact of the statute. That would imply that this Court could allow litigants to ignore legislation that applies to an agreement between them. Rule of law considerations militate against this.

[49] The Act abolished rent control legislation, but in its stead it enacted a more complex, nuanced and potentially powerful system for managing disputes between landlords and tenants. That system expressly takes account of market forces[99] as well as the need to protect both tenants and landlords.[100] Even-handedly, it imposes obligations on both. It is in particular sensitive to the need to afford investors in rental housing a realistic return on their capital.[101] The statutory scheme is therefore acutely sensitive to the need to balance the social cost of managing and expanding rental housing stock without imposing it solely on landlords. Far from ignoring the interests of investors like Lowliebenhof's landlord, the Act seeks to create a framework for resolving disputes with tenants that accommodates landlords' requirements.

[99] Section 13(5)(a) ("prevailing conditions of supply and demand").

[100] Preamble ("a need to balance the rights of tenants and landlords and to create mechanisms to protect both tenants and landlords against unfair practices and exploitation"); definition of "unfair practice" ("a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord") and section 13(5) (rent determinations must be "just and equitable to both tenant and landlord").

[101] Section 13(5)(b) ("the need for a realistic return on investment for investors in rental housing").

[50] At the same time, the Act does not ignore the need to protect tenants. Its most potent provisions are those at the centre of the dispute in this case, namely termination of a lease and rental determinations that are just and equitable. The Act expressly provides that a landlord's rights against the tenant include the right to "terminate the lease . . . on grounds that do not constitute an unfair practice and are specified in the lease".[102] "And" is not disjunctive. It is conjunctive. It means the Act recognises the landlord's power to terminate a lease, provided the ground of termination is specified in it, but, in addition, does not constitute an unfair practice. Differently put, the Act demands that a ground of 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.

[51] In this way, the Act superimposes its unfair practice regime on the contractual arrangement the individual parties negotiate. That the statute considers its unfair practice regime to be super-ordinate emerges not only from the requirement that a lease-based termination must not constitute an unfair practice, but also from what the Act enjoins the Tribunal to take into consideration when issuing its rulings: these include "the provisions of any lease", but only "to the extent that it does not constitute an unfair practice".[103] 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.

[102] Section 4(5)(c).

[103] Section 13(5)(c).

[52] It follows that where a tenant lodges a complaint about a termination based on a provision in a lease, the Tribunal has the power to rule that the landlord's action constitutes an unfair practice, even though the termination may be permitted by the lease and the common law. Whether a termination in these circumstances could be characterised as "lawful" need not be decided now. "Unfair practice" is an act or omission in contravention of the Act, or a practice the MEC prescribes as "unreasonably prejudicing the rights or interests of a tenant or a landlord". This formulation is significant. It poses "interests" in contradistinction to "rights". This embraces more than legal rights. So used, "interests" includes all factors bearing upon the well-being of tenants and landlords. It encompasses the benefits, advantages and security accruing to them.[104]

[53] This greatly enlarges the compass of unfairness under the Act. It means that unfair practices are not determined by taking into account only the common law legal rights of a tenant or landlord, but by considering also their statutory interests. This makes it even clearer that the statutory scheme does not stop at contractually agreed provisions, and conduct in reliance on them. It goes beyond them. It subjects lease contracts and the exercise of contractual rights to scrutiny for unfairness in the light of both parties' rights and interests.

[104] See Concise Oxford Dictionary under "interest", "3. the advantage or benefit of someone".

[54] The Gauteng Unfair Practices Regulations provide that a landlord must not "engage in oppressive or unreasonable conduct".[105] This must be read in the light of the power to prescribe as unfair a practice that unreasonably prejudices a landlord's or tenant's rights or interests. It means that "oppressive" conduct might be held to entail an exercise of a landlord's legal entitlements under a lease that oppresses or unreasonably prejudices a tenant's interests.

[55] I therefore respectfully consider that the Supreme Court of Appeal 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. This approach in my view applied an unduly constricted approach to the question, which focused solely on the landlord's common law entitlement to cancel the leases. Since in my view this dispute is best approached through the generous and powerful mechanisms the Act offers both sides to the dispute, I express no view on whether the landlord was entitled at common law to cancel the leases, nor on whether, if it was so entitled, the common law should be constitutionally developed to inhibit that power.

[56] It is enough to say that in my respectful view the High Court and the Supreme Court of Appeal under-assessed the power of the statute. In particular, they overlooked the history and setting of the statute, its broad definition of "unfair practice", its clear intimation that invocation of lease terms may constitute an unfair practice and the

[105] Regulation 14(1)(d).

carefully balanced powers that are conferred on the Tribunal. These show that the statute sought to create a just and practicable means of resolving landlord/tenant disputes. This encompasses a ruling by the Tribunal that a termination of a lease in the exercise of a right conferred by the terms of the lease constitutes an unfair practice. Since the tenants never abandoned their reliance on the provisions of the Act, this Court should in my view afford a remedy that enables the tenants to seek a ruling from the Tribunal.[106]

[57] I also respectfully differ from the Supreme Court of Appeal's conclusion that "practice" envisages only "incessant and systemic conduct by the landlord which is oppressive or unfair"[107] and cannot consist in unacceptable conduct on an isolated occasion. It has long been established in our law that a "practice" may consist in a single act. This accords with one of the ordinary meanings of the word.[108] Thus, it was decided early under the unfair labour practice jurisdiction in employment law[109] that a single dismissal may constitute a labour "practice".[110] That authority has never been doubted.[111]

[106] An appellate court is not bound to consider only those issues the parties themselves have previously identified or formulated or adhered to. This Court has held that "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" (*Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 43). See also above n 98.

[107] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) at para 34.

[108] Shorter Oxford Dictionary under "practice", "the action of doing something; . . . an action, a deed", quoted in Brassey et al *The New Labour Law* (Juta & Co Ltd, Cape Town 1987) at 49.

[109] Labour Relations Act 28 of 1956. The substantive content of the definition of "unfair labour practice" was inserted into the statute by the Industrial Conciliation Amendment Act 95 of 1980, and jurisdiction to determine unfair labour practices was transferred to the Industrial Court by the Labour Relations Amendment Act 51 of 1982. See Brassey id at 49-53.

[110] *Marievale Consolidated Mines Ltd v President of the Industrial Court and Others* 1986 (2) SA 485 (T) (*Marievale*) at 491H-I and 498B-D per Goldstone J (a practice "does not in any way relate to habitual or repetitious

It forms the interpretive backdrop for understanding the use of the word "practice" in the Act.[112] More importantly, the broader interpretation accords with the Constitution.[113] The Act is a post-constitutional enactment adopted expressly to give effect to the right of access to adequate housing. A cramped interpretation of "practice" would thwart its good ends.

[58] There can thus be no doubt that the Tribunal had jurisdiction to rule that the landlord's termination of the tenants' leases was an unfair practice, and that the Tribunal had the power to issue a ruling granting the tenants appropriate relief. That may include a ruling setting aside the landlord's termination of their leases.

[59] Here, it bears especial emphasis that the tenants' right to seek a ruling setting aside the termination of their leases has a mirror counterpart in remedies the Act affords the landlord. It too can lodge an unfair practice complaint with the Tribunal. It can thereby seek an increase in the rents it says have become uneconomic and unsustainable. The

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conduct") and *Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court and Others* 1985 (3) SA 150 (N) at 154-5.

[111] Compare *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 798G (citing the interpretation of "unfair labour practice" in *Marievale* id without questioning that "practice" can be a single act); *National Union of Metalworkers of South Africa and Others v Macsteel (Pty) Ltd* 1992 (3) SA 809 (A) at 814C-D and *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A) at 734G.

[112] The legislature is presumed to be aware of existing judicial interpretations of comparable concepts in legislation: *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 732A-B; *S v Marais* 1982 (3) SA 988 (A) at 1017E-G, per Botha AJA, concurring in the majority judgment; *Cooper and Others v Trustee in Insolvent Estate of Pretorius and Another* 1967 (3) SA 602 (O) at 610-1; De Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants Pty Ltd, Cape Town 2000) at 216-7; Devenish *Interpretation of Statutes* (Juta & Co Ltd, Cape Town 1992) at 135 and Du Plessis *The Interpretation of Statutes* (Butterworths, Durban 1986) at 70.

[113] See De Ville id at 64-8.

Tribunal is empowered to issue a determination regarding the amount of rent payable by the tenants.

[60] The rent it determines must be just and equitable to both landlord and tenant.[114] And it must take cognisance of exactly the concerns that speak loudly in the landlord's depositions in this case – the unsustainability of the building and of its business model at present rents, and the fading of lustre of its investment in Lowliebenhof. It seeks "a realistic return"[115] on its investment – not unjustly so. The statute demands that the Tribunal in determining rent take due cognisance of precisely that. If it fails to do so, the landlord may bring its proceedings under review.[116]

[61] At the same time, the Tribunal's determination whether the landlord's termination of the tenants' leases, solely to get higher rents, was an unfair practice, would be material to any subsequent decision on whether to grant an eviction order. The Constitution requires that an eviction order be granted only "after considering all the relevant circumstances".[117] A Tribunal's determination that the landlord's termination of the tenants' leases was an unfair practice would be most pertinent to that.

[114] Section 13(5).

[115] Section 13(5)(b).

[116] Section 17.

[117] Section 26(3).

[62] It follows that the High Court ought to have postponed the eviction application to enable proceedings before the Tribunal to determine whether the termination of the leases was an unfair practice. Remitting the matter to the High Court would unduly protract what has already been a long-fought case. Hence the remedy I propose will ensure that this Court can itself issue a just and expeditious order, after enabling the parties to approach the Tribunal. I turn to that now.

Remedy

[63] The conclusion that the Tribunal had jurisdiction to determine the tenants' grievance against the landlord, including its cancellation of their leases, brings the question of remedy to the fore. Once a tenant has lodged a complaint with the Tribunal, the Act imposes a three-month moratorium on evictions.[118] In this case, the landlord waited out the three-month period before instituting eviction proceedings. That it was entitled to do so had no effect on the validity or otherwise of the tenants' complaint that the termination of the leases constituted an unfair practice under the Act. Nor did it deprive the Tribunal of jurisdiction to rule that it was, and to grant the tenants appropriate relief. In other words, while the Act imposes only a limited moratorium on evictions, it does not follow that a court from which an eviction order is sought may not stay the proceedings before it in order to give the Tribunal a chance to make a ruling.

[118] The full text of section 13(7) is set out above in n 14.

[64] Indeed, the Act itself provides that any dispute in respect of an unfair practice "must be determined by the Tribunal" unless proceedings "have already been instituted in any other court",[119] that is, before a complaint has been brought before the Tribunal. This means the Tribunal was under an obligation to determine the tenants' complaint, notwithstanding the effluxion of the three-month moratorium, and notwithstanding the landlord's later institution of eviction proceedings.

[65] The Act further provides that any person may approach a court for urgent relief in circumstances where he or she would have been able to do so were it not for the Act, or to institute proceedings for the normal recovery of arrear rental, or for eviction "in the absence of a dispute regarding an unfair practice".[120] The authority to apply urgently for eviction only "in the absence of a dispute regarding an unfair practice" seems to preclude at least some eviction proceedings entirely. However, the provision must be interpreted alongside the moratorium. The moratorium appears to license all eviction proceedings after it has expired. The two provisions are best understood as licensing eviction applications in other forums, while nevertheless preserving the Tribunal's power, and maintaining its duty, to make a ruling on any unfair practice complaint before it.

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[119] Section 13(9) provides:

> "As from the date of the establishment of a Tribunal as contemplated in section 7, any dispute in respect of an unfair practice, must be determined by the Tribunal unless proceedings have already been instituted in any other court."

[120] Section 13(10) provides:

> "Nothing herein contained precludes any person from approaching a competent court for urgent relief under circumstances where he or she would have been able to do so were it not for this Act, or to institute proceedings for the normal recovery of arrear rental, or for eviction in the absence of a dispute regarding an unfair practice."

[66] Here, the unfair practice complaint the tenants lodged against the landlord was triggered by the termination letters. Their complaint cited "intimidation and victimizing of tenants", "threatening to evict tenants without a court order and issuing of notices while a case lodged against you has not been finalised", and "unfair and exploitative rental and services charges" – the latter plainly directed at the new, post-cancellation, rents the landlord sought to exact. It follows from this that the tenants' complaint encompassed a grievance against the termination of their leases. That complaint the Tribunal was bound to adjudicate.

[67] Given the strong and balanced framework the Act creates to accommodate the interests of both landlords and tenants, the High Court should in my view have stayed the proceedings before it to enable the tenants to resuscitate their complaints against the landlord, and to enable the Tribunal to determine whether the termination of their leases was an unfair practice. It is true that the tenants had by that time withdrawn their complaint, but they did so without prejudice to their rights under the Act, whose vindication they continued vociferously to claim. Justice therefore required that the Tribunal adjudicate their complaint. That should be done together with any counter-complaint the landlord might choose to lodge about the inadequate rentals it says Lowliebenhof is yielding.

[68] In my view, given the fuller understanding of the Act set out in this judgment, the proper order is to grant the applicants leave to appeal, but to hold over final determination of the appeal to enable the landlord and tenants, if so advised, to bring suitable proceedings before the Tribunal.[121] If the Tribunal should hold that the termination of the tenants' leases was an unfair practice, and should the relief it grants include an order setting aside the termination, the eviction order granted against the applicants may have to be set aside. The parties must be granted leave to set the matter down in this Court for finalisation of the appeal on papers supplemented as they think fit.

[69] The question of costs, in the event that a complaint is lodged with the Tribunal, must stand over for later determination.

Order

[70] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is postponed.

[121] In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC), this Court provided a novel remedy even though the parties had not expressly sought it. The Court held that "[t]he need for meaningful engagement between the city and the occupiers was not directly raised by the parties before this court. It was however in some sense foreshadowed by their contention that the city was obliged to give the occupiers a hearing before taking the decision to evict on the basis that the decision was an administrative one" (para 9). The Court concluded: "It follows that the Supreme Court of Appeal should not have granted the order of ejectment in the circumstances of this case, in the absence of meaningful engagement" (para 23).

3. Any of the parties may, if so advised, lodge a complaint in terms of section 13 of the Rental Housing Act 50 of 1999 with the Gauteng Rental Housing Tribunal on or before Wednesday 2 May 2012.
4. If a complaint is lodged on or before that date, the parties are granted leave to apply to the Court within fifteen court days of the ruling by the Gauteng Rental Housing Tribunal, or other disposition of the matter, for further directions.
5. If no complaint is lodged on or before that date, the appeal is dismissed with costs.

ZONDO AJ (Mogoeng CJ and Jafta J concurring):

[71] This matter concerns a dispute between the applicants and the respondent about whether the leases between the applicants and the respondent were validly terminated. In applications that were brought in the South Gauteng High Court (High Court) by the respondent for the eviction of the applicants, Van der Riet AJ found that the leases were validly terminated. In an appeal, the Supreme Court of Appeal upheld the finding and dismissed the appeal. The applicants applied to this Court for leave to appeal against that decision.

[72] Cameron J has prepared a judgment to which I refer to as the main judgment. Cameron J has come to the conclusion that the High Court "ought to have postponed the eviction application to enable proceedings before the Tribunal to determine whether the termination of the leases was an unfair practice."[1] For reasons that appear later in this judgment, although I agree that the applicants be granted leave to appeal to this Court against the decision of the Supreme Court of Appeal, I am unable to agree with the conclusion reached by Cameron J and with the order in the main judgment.[2]

The facts

[73] The facts are comprehensively set out in the main judgment. It is not necessary to repeat them, save for highlighting only those aspects that I consider essential for a proper understanding of this judgment.

[74] The applicants occupy certain flats in a building called Lowliebenhof, in Braamfontein, Johannesburg. The building is owned by the respondent. When the respondent purchased it, the applicants were already tenants by virtue of leases concluded at different times with different previous owners of the building. The applicants' occupation of the flats was governed by four different leases. These were the Ithemba lease, the Technical Workers Union lease, the Artisan Staff Association lease and the Eagle Creek lease.

[1] See [62] above.

[2] The details of our differences are set out in paragraphs [134] to [147] below.

[75] Except for the Artisan Staff Association lease, the leases contained termination clauses which provided that they could be terminated on notice. Some required two months' written notice of termination while others required one month's written notice. The Artisan Staff Association lease did not contain any provision for its termination on notice but it was common cause between the parties that it could be terminated on reasonable notice.

[76] The Ithemba lease contained a provision that, if the lease was supported by a Department of Housing subsidy, the lease could only be terminated at the discretion of the lessee. In terms of that lease the annual rent increase was predetermined at 10%. It also provided that, if certain of the landlord's expenses or charges connected with the property increased, the lessor would be entitled to increase the rent proportionately in order to take account of increased expenses the landlord had to pay. It also provided that "should the provisions of any statutory Rental Body or Act or any amendment or replacement thereof, be or anytime during the operation or any renewal or extension of this lease, become applicable to the leased premises", the lessor was entitled to apply for a higher rent than the fixed increase.

[77] The Technical Workers Union lease contained a clause providing for the escalation of rent by 15% per year. It had no provision relating to a statutory rental body. The Eagle Creek lease provided for the annual escalation of the monthly rent by "not less than

10% and [was] further subject to such increases in rental from time to time in terms of the Agreement." The Eagle Creek lease did not contain a clause making any reference to the Rental Housing Tribunal or to a statutory rental body.

[78] To purchase the building bond finance was used. According to Mr Seinker, a director of the respondent who deposed to the founding affidavit in the various applications against the applicants, a financial analysis was conducted after the sale of the properties to the respondent to compare the financial overhead costs with the overall rent return that was being received from the tenants. Mr Seinker says that the amount of rent charged was also compared to market-related rents in comparable buildings in the area. He says that it was found that the then current market-related rents in the Aengus Portfolio were three times higher than the rents being paid by the tenants in the Lowliebenhof Building. It was also established that the rent for the building was lower by some margin than the overhead costs and finance charges relating to the building. Accordingly, said Mr Seinker, the building was being run at a loss.

[79] On 1 August 2008 and on other subsequent dates, Aengus Property Management (Pty) Ltd (APM), in its capacity as manager of the building, sent a letter to tenants including some of the applicants which bore the heading: "NOTICE TO VACATE". The tenants were given notice to vacate their flats by specified dates but were offered leases on the same terms as existed at the time if they were prepared to pay higher rent. The suggested new rent seems to have been more than double the rent the tenants were paying

at the time. The notice to vacate that was sent to the first applicant, Ms Maphango, was dated 8 September 2008. Notices on identical terms were offered to other tenants. It was pointed out in the notice that, if a tenant was not prepared to sign the new lease, he or she would have to vacate the flat on the date given in the notice. The applicants neither accepted the new leases nor vacated the flats.

[80] The tenants, including the first applicant, then referred to the Rental Housing Tribunal of Gauteng[3] (Tribunal) a complaint against the respondent or its predecessor or APM. A copy of the tenants' complaint was not included in the papers. However, copies of the two letters that were written by the Tribunal about the complaint were included. It is reflected in one of those letters that the tenants' complaint was acknowledged by the Tribunal on 17 September 2008. According to the correspondence from the Tribunal, the tenants' complaint against the respondent or its predecessor or its predecessor's property managers was that—

(a) there was intimidation and victimisation of tenants at the Lowliebenhof Building;

(b) the tenants were being threatened with eviction without a court order; and

(c) there were unfair and exploitative rent and service charges at the Lowliebenhof Building.

[3] Section 7 of the Rental Housing Act 50 of 1999 provides for a Rental Housing Tribunal to be established in every province by the MEC of that province.

[81] In their letter dated 17 September 2008, the Secretariat to the Tribunal informed APM that the tenants of Lowliebenhof Building had lodged a complaint against it regarding: unfair rent charges, intimidation, and eviction threats. The Secretariat also wrote that the complaint had been lodged in terms of the Rental Housing Act[4] (RHA) and the Unfair Practices Regulations of the Gauteng Provincial Government[5] (RHA Regulations). The Secretariat stated that, in terms of section 13(2) of the RHA, a mediation meeting/tribunal hearing would be held regarding the complaint. In subsequent correspondence, after informing APM of the nature of the complaint, the Secretariat requested APM to "refrain from issuing eviction notices". They also informed APM that a mediation meeting would be held in due course and advised that—

> "[i]n terms of section 13(9) of the Act 'any dispute in respect of an unfair practice must be determined by the Tribunal, unless proceedings have already been instituted in any other court'."[6]

[82] The mediation meeting was held on 22 October 2008. The tenants' then attorney and APM's attorney, who is the respondent's current attorney, were both present at the

[4] 50 of 1999.

[5] Gauteng Unfair Practices Regulations *Provincial Gazette Extraordinary* No 124 Notice 4004 of 2001, 4 July 2001.

[6] An unfair practice is defined in the RHA as:

> "(a) any act or omission by a landlord or tenant in contravention of this Act; or
>
> (b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord."

mediation. The mediation was unsuccessful and the mediator issued a certificate of outcome to the effect that the matter was unresolved.[7]

[83] In February 2009 ApexHi Properties Limited (ApexHi), which was still the owner of the building, began to act against the applicants. It issued summonses in the Johannesburg Magistrates' Court for their eviction. In those actions the applicants were represented by one and the same attorney. In resisting summary judgment the applicants raised, among others, the defence of *lis pendens*. The applicants asserted that they had referred a complaint to the Tribunal relating to rent increases and that that matter was still pending before the Tribunal. In her affidavit, Ms Maphango said:

> "The Tribunal held mediation proceedings between ourselves and the property managers which were eventually unsuccessful. The Tribunal then issued a certificate of outcome which is annexed hereto and marked annexure "D". Basically the matter was referred to arbitration and the tribunal duly informed us that we will receive notification for a date of arbitration. We are still awaiting the said date and notification from the Tribunal."[8]

[7] It would seem that drafters of the RHA modelled the RHA along the same lines as the Labour Relations Act 66 of 1995 (LRA) and borrowed processes employed in that Act for the resolution of disputes. First, the LRA includes the concept of an unfair labour practice and the RHA provides for an unfair practice. The dispute resolution system of the LRA is based on subjecting unfair labour practices and unfair dismissal disputes initially to the process of conciliation or mediation and, subsequently, to arbitration if conciliation or mediation fails. In respect of complaints concerning unfair practices the RHA does exactly the same. In terms of the LRA, a tribunal called the Commission for Conciliation, Mediation and Arbitration (CCMA) conducts most of the mediations and arbitrations. The RHA establishes the Rental Housing Tribunal which is responsible for the mediation and arbitration of unfair practice complaints.

[8] Section 13 of the RHA provides for the Tribunal to subject a complaint to mediation if it is of the opinion that it may be resolved through mediation. If mediation is attempted but fails or if the Tribunal is not of the view that mediation may result in the resolution of the complaint, it refers the complaint to arbitration in terms of section 13(2)(d) of the RHA.

[84] Ms Maphango also stated that they (the tenants) were duly 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 this complaint." In her affidavit she also submitted that the Tribunal had not yet made a determination in the complaint referred to it which included impermissible evictions. ApexHi aborted the summary judgment application and withdrew the actions.

[85] Meanwhile the Tribunal notified the applicants that the arbitration hearing was set down for 19 June 2009. Before the date of hearing, applications for evictions were instituted in the High Court on 29 May 2009. This time the applicants did not raise the defence of *lis pendens*. In the affidavit of the fifteenth applicant, their stance is captured as follows:

> "Under the circumstances I had no option but to instruct my attorney to withdraw the complaint lodged with [the] Housing Tribunal so that I can concentrate on this application."

Indeed, all the applicants withdrew the complaint from the Tribunal before it could be arbitrated. The explanation given is that they wanted to "concentrate" on the High Court proceedings.

Proceedings in the High Court

[86] The respondent instituted applications for eviction. In the applications the respondent maintained that it was entitled to cancel the leases, that the cancellation was valid, and that, therefore, the applicants had no right to continue to occupy the flats. It pointed out that there were prospective tenants who were willing to pay the increased rent.

[87] The bases upon which the applicants opposed the respondent's applications were the same and the opposing affidavits were almost identical. Later the applicants authorised Ms Maphango to depose to a supplementary affidavit the contents of which they adopted as their own for purposes of resisting the respondent's claim. The applicants disputed the validity of the termination of their leases. They contended that the respondent's motive for cancellation was to circumvent clauses that did not permit the respondent to increase the rent beyond 10% in some cases and 15% in others. The applicants contended that there was a tacit term in their leases that precluded the respondent from terminating the leases in order to circumvent those clauses.

[88] The applicants also contended that their eviction from the flats would constitute an infringement of their right of access to adequate housing as provided for in section 26(1)[9]

[9] Section 26(1) of the Constitution reads:

> "Everyone has the right to have access to adequate housing."

of the Constitution and of their protection from arbitrary eviction.[10] The applicants further contended that the termination of their leases was contrary to public policy as embodied in the Bill of Rights. In this regard the applicants submitted that the use of the termination clause to effect an increase in rent of more than 100% or 150% in the circumstances of this case was contrary to public policy. They contended that public policy imported "the notions of fairness, justice and reasonableness to the contract." They submitted that it was neither fair, just nor reasonable for the respondent to terminate their contracts to achieve a 150% rent increase "when it was agreed that the rental increase would be between 10% and 15%, depending on which contract was entered into". Although they accepted that on its own a clause providing for the termination of a contract could never be unreasonable, they argued that the purpose for which the respondent sought to implement the termination clause was unfair, unjust, unreasonable and, therefore, contrary to public policy.

[89] In the alternative, the applicants contended that, if the termination was found to have been valid, the Court should not order their eviction because in terms of section 4(7)[11] of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act[12]

[10] Section 26(3) of the Constitution provides:

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[11] Section 4(7) of PIE provides:

> "If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been

(PIE), it would not be just and equitable to do so. They pointed out that some of them would be homeless if evicted and that others would be forced into a lower standard of living than the one they enjoyed at Lowliebenhof Building because alternative suitable accommodation at the price they could afford was not available near the area where the building is situated.

Judgment of the High Court

[90] In the High Court the matter came before Van der Riet AJ. He found that the termination of the leases of two of the applicants before him were invalid because they were recipients of housing subsidies from the Department of Housing.[13] It was common cause that the leases of tenants who fell into that category could only be terminated at the discretion of the lessee. Accordingly, the respondent's applications against those two applicants were dismissed.[14] The Court found that the leases of the present applicants were validly terminated.[15] The Court then considered whether it would be just and equitable to order the eviction of the respondents before it. It made certain orders with

made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[12] Act 19 of 1998.

[13] *Aengus Lifestyle Properties (Pty) Ltd v Maphango and Others* Case No 09/22346, 7 May 2010, unreported at para 13.

[14] Id.

[15] Id at para 34.

regard to eviction against which the applicants did not appeal.[16] Accordingly, it is not necessary to say more about them.

Appeal to the Supreme Court of Appeal

[91] With the leave of the High Court, the applicants appealed to the Supreme Court of Appeal. Their grounds of appeal were set out in the application for leave to appeal. It was not one of the applicants' complaints against the judgment of the High Court that it erred in not staying the proceedings and affording the applicants an opportunity to resuscitate their complaint which they had withdrawn from the Tribunal in 2009. The relevance of this point will become clear later in this judgment, when I deal with the difficulties I have with the main judgment. The Supreme Court of Appeal dismissed the appeal with no order as to costs.

[92] Brand JA, who wrote for a unanimous Court, recorded that the appeal against the judgment of the High Court was in essence aimed at two findings of the High Court. One finding was that the leases had been validly terminated.[17] This was the only finding that the present applicants challenged in the Supreme Court of Appeal. The other finding of the High Court against which there was an appeal did not relate to the present applicants but to the two tenants who were successful in the High Court. From this, it is clear that

[16] Id at paras 35-40.

[17] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) at para 3.

the whole appeal of the present applicants in the Supreme Court of Appeal was about whether or not their leases had been validly cancelled.

[93] The Supreme Court of Appeal pointed out that there were two arguments that were advanced on behalf of the present applicants as to why the leases had not been validly terminated. It listed the two arguments as having been that:[18]

(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.

[18] Id at para 12.

[94] In its judgment, the Supreme Court of Appeal rejected the contention that each one of the leases contained the tacit term contended for on behalf of the present applicants. The Supreme Court of Appeal referred to Corbett AJA's well-known judgment on the issue of a tacit term in a contract, namely, *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration*[19] and Nienaber JA's judgment in *Wilkens NO v Voges*[20] which lays down the test for the determination of a tacit term. In *Alfred McAlpine* Corbett AJA explained that a tacit term is an unexpressed provision of a contract inferred by a court from the express terms of the contract and the surrounding circumstances. In that case, the Appellate Division said that an inference that there is a tacit term in a contract would only be drawn if the court was satisfied that the inference was necessary.[21]

[95] The Supreme Court of Appeal stated that, "[o]nce there is difficulty and doubt as to how the term should be formulated or how far it should go, it could hardly be said that the parties clearly intended the proposed term to be part of their agreement."[22] The Supreme Court of Appeal further referred to the test as formulated by Nienaber JA in *Wilkens NO v Voges*. There, Nienaber JA had this to say about tacit terms:

> "The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to

[19] 1974 (3) SA 506 (A) (*Alfred McAlpine*).

[20] 1994 (3) SA 130 (A).

[21] Above n 19 at para 13.

[22] Above n 17.

> a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional".[23]

[96] Applying this test to the present facts, the Supreme Court of Appeal concluded that there were many difficulties that stood in the way of the incorporation of the tacit term for which the applicants contended.[24] These included whether the landlord would have to justify its motive for termination in every case and whether the lessee would be required also to have a valid motive to terminate the lease.[25] The Supreme Court of Appeal held that acceptance of the applicants' contention would mean that the landlord had entered into a lease of infinite duration.[26]

[97] The Supreme Court of Appeal also addressed the contention that the termination was contrary to public policy. The Court considered whether what rendered the termination of the leases to be contrary to public policy was that it was unreasonable and unfair.[27] The Supreme Court of Appeal recorded that the applicants had relied upon the decision of this Court in *Barkhuizen v Napier*.[28] The Supreme Court of Appeal took the view that the applicants' argument in this regard was fundamentally flawed because the

[23] Above n 20 at 137A-C.

[24] Above n 17 at para 20.

[25] Id.

[26] Id at para 21.

[27] Id at para 22.

[28] [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*).

proposition upon which it relied was not supported by *Barkhuizen*.[29] In this regard the Supreme Court of Appeal pointed out that reasonableness and fairness were not freestanding requirements for the exercise of a contractual right.[30] Accordingly, the Court rejected this contention.

[98] With regard to the argument that the termination of the leases was contrary to public policy because it infringed their rights of access to adequate housing, the Supreme Court of Appeal held that the applicants' section 26(1) rights, including the right to security of tenure to one's home, were not implicated by the termination. This is so, said the Court, because "a lessee of property has no security of tenure in perpetuity".[31] The duration of the lessee's tenure, the Court reasoned, is governed by the terms of the lease and consequently the lessee has no security of tenure that endures beyond the currency of the lease.[32]

[99] The Supreme Court of Appeal also dealt with the contention of the applicants that was based on the provisions of the RHA.[33] The Court recorded the applicants' argument in this regard as having been that the termination of the leases was contrary to public policy because it constituted an unfair practice in contravention of the RHA. The Court

[29] Above n 17 at para 23.

[30] Id.

[31] Id at para 28.

[32] Id at paras 28-9.

[33] Id at para 31.

said that it was not clear why the applicants had chosen "this circuitous route instead of simply relying on a contravention of the Act".[34] It stated that the applicants' focus was the provision of section 4(5)(c)[35] of the RHA to the effect that the landlord may "terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease".[36] The Court rejected the applicants' contention on the basis that the termination of the leases was a single act which could not constitute a practice.[37] The Court reasoned that a practice contemplated in the relevant section was "incessant and systemic conduct."[38] It needs to be pointed out that the Court dealt with this contention without first determining whether it was part of the applicants' case on the papers. In conclusion the Supreme Court of Appeal upheld the finding of the High Court that the leases had been validly terminated and dismissed the appeal.[39]

Application for leave to appeal to this Court

[100] In Ms Maphango's affidavit she records that the applicants contend that, in the circumstances of this case, the respondent's purported termination of their leases was

[34] Id.

[35] Section 4(5)(c) of the RHA provides:

> "(5) The landlord's rights against the tenant include his or her right to—
>
> . . .
>
> (c) terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease".

[36] Above n 17 at para 32.

[37] Id at para 34.

[38] Id.

[39] Id at para 38.

unlawful. She then says that this is "for three separate and independent reasons". She gives the following reasons:

(a) each of the applicants' leases contained a tacit term that the termination clause could not be employed to effect a rent increase in excess of the rent increase prescribed in the leases themselves;

(b) the termination of the leases in the circumstances of this case was an unjustifiable infringement of the applicants' rights of access to adequate housing in terms of section 26(1) of the Constitution. In elaboration of this reason Ms Maphango says that in *Jaftha v Schoeman*[40] this Court held that security of tenure is a constituent of the right of access to adequate housing. She says that the termination of the applicants' leases put an end to the applicants' security of tenure. Ms Maphango also adds that, following upon the decision of this Court in *Barkhuizen*, the applicants submit that the enforcement of the termination clause, on the facts of this case, and "the consequent extinction of [the applicants'] security of tenure" would be contrary to public policy; and

(c) the termination of the applicants' leases, in the circumstances of this case, constituted an unfair practice in terms of section 4(5)(c) of the RHA because it amounts to "oppressive or unreasonable conduct" in terms of the RHA Regulations.

[40] *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (*Jaftha*).

[101] This matter raises important constitutional issues relating to the right of access to adequate housing as provided for in section 26 of the Constitution, as well as the effect of public policy on the exercise of contractual rights. The case relates to whether the applicants have a right to continue to occupy the flats in the building of the respondent. It also affects a large number of people. With regard to the prospects of success, I think that the applicants' case has reasonable prospects of success. It seems to me that it is in the interests of justice that the applicants should be granted leave to appeal.

The appeal

[102] It is convenient to start with the applicants' contention that the respondent's conduct in terminating their leases constituted an unfair practice as contemplated in the RHA and the RHA Regulations. The applicants' counsel submitted that in the light of the provisions of section 4(5)(c) of the RHA the respondent was not entitled to terminate the leases of the applicants. Section 4(5)(c) reads:

> "The landlord's rights against the tenant include his or her right to—
>
> . . .
>
> (c) terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease".

[103] In the Supreme Court of Appeal this contention was rejected on the basis that the termination of a lease does not constitute a "practice". That was an incorrect reason for rejecting the applicants' contention. In this regard I am in agreement with the main

judgment in its rejection of the Supreme Court of Appeal's finding. When I say that I agree with the main judgment on this, I do not mean that I agree that the contention of the applicants relating to section 4(5)(c) of the RHA should have been considered or entertained by the Supreme Court of Appeal. I mean no more than simply that as a matter of law, based on the authority of the Supreme Court of Appeal itself, the conclusion that a single act cannot be a practice was not justified. I agree that the applicants' contention should have been rejected but for different reasons. 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.

[104] In my view, 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.[41] 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.

[105] In the concurring judgment the applicants' contention that the termination of the leases constituted an unfair practice and was in breach of section 4(5)(c) of the RHA is given consideration on the basis that it is a question of law which a party is free to raise at anytime. I am unable to agree that the determination of whether conduct constitutes an unfair practice is a question of law. In my view it is the passing of a value judgement.

[106] In labour law, which gave rise to the concept of an unfair labour practice from which the drafters of the RHA may have derived the concept of an unfair practice, it was

[41] The rule of practice is that in motion proceedings a party stands or falls by its papers. This rule has been followed in our courts for probably more than a century. See for instance *Pountas' Trustee v Lahanas* 1924 WLD 67 where Krause J stated:

> "I think it has been laid down in this Court repeatedly, that an applicant must stand or fall by his petition and the facts alleged therein, and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny."

This extract has been repeatedly cited with approval. See for instance *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635-6; *Langeberg Ko-operasie Beperk v Folscher and Another* 1950 (2) SA 618 (C) at 621; and *Shell Company of South Africa v Vivier Motors (Pty) Ltd* 1959 (3) SA 971 (W) at 972.

decided a long time ago by the Appellate Division that the determination of whether conduct is an unfair labour practice or is unfair is not a question of law but involves the passing of a value judgment. In *Media Workers Association of SA and Others v The Press Corporation of South Africa Ltd*[42] the Appellate Division held, in relation to the determination of an unfair labour practice, that the determination of what is an unfair labour practice "is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions."[43] A contention had been advanced that the question whether or not a dismissal constituted an unfair labour practice or is unfair was a question of law in which the assessors who sat with a chairman who was a High Court Judge in the Labour Appeal Court under the Labour Relations Act[44] had no role to play. After carefully considering the contention and the distinctions between questions of law, questions of fact and questions of value judgment, the Appellate Division unanimously rejected the proposition that the determination of the fairness or otherwise of conduct is a question of law and held that it is a question of passing a value judgment on findings of fact and opinion. There is no basis to depart from the decision of the Appellate Division on this issue. That approach was followed in a number of decisions.[45] Indeed even this Court has, in a unanimous

[42] (1992) 13 ILJ 1391 (A) (*MWASA*).

[43] Id at 1400.

[44] Act 28 of 1956 as amended.

[45] *Benicon Group v National Union of Metalworkers of SA and Others* (1999) 20 ILJ 2777 (SCA) at 2779H-J; *National Union of Metalworkers of SA v G M Vincent Metal Sections (Pty) Ltd* 1999 (4) SA 304 (SCA); *Boardman Brothers (Natal) (Pty) Ltd v Chemical Workers' Industrial Union* 1998 (3) SA 53 (SCA) at 58B-C; *Betha and Others v BTR SARMCOL, a Division of BTR DUNLOP Ltd* 1998 (3) SA 349 (SCA) see Olivier JA's judgment (Zulman JA concurring) at 369I-370B, Streicher JA's judgment at 380G-H, Scott JA's judgment at 406A-C, Smalberger JA's judgment at 387C-D; *Dube and Others v Nasionale Sweisware (Pty) Ltd* 1998 (3) SA 956 (SCA) at

judgment in *National Education Health and Allied Workers Union v University of Cape Town and Others*,[46] approved the approach that the determination of what is fair involves a value judgment.[47] In that case, Ngcobo J, writing for a unanimous Court, said: "Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgement."[48] In *Sidumo and Another v Rustenburg Platium Mines Ltd and Others*[49] (*Sidumo*) this Court quoted with apparent approval the statement from *MWASA* that the determination of what is fair "is not a decision on a question of law in the strict sense of the term" but "[i]t is the passing of a moral judgement on a combination of findings of fact and opinions." I agree. Since this point is not a question of law, the rule that a party may raise a point of law at any time does not apply.

[107] There is a suggestion that whether conduct constitutes an unfair practice is a question of fact and law. This proposition is not supported by our jurisprudence as dealt with above. It is also stated that that question has elements of law and that, for that reason, it may be introduced and determined at appellate stage. In my view this proposition does not reflect our law. There is also a suggestion that whether or not the termination of the leases constitutes an unfair practice is a constitutional issue. It seems

960D-I; *Wubbeling Engineering (Pty) Ltd and Another v National Union of Metalworkers of SA* (1997) 18 ILJ 935 (SCA) at 937E-938D; *National Union of Mineworkers and Others v Free State Consolidated Gold Mines Ltd* 1996 (1) SA 422 (A) at 446C-I;*National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* (1996) 17 ILJ 455 (A) at 476B-F; *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) at 1257A-B.

[46] [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

[47] Id at para 33.

[48] Id.

[49] [2007] ZACC 22; 2008 (2) SA 24 (CC); [2007] 12 BCLR 1097 (CC) at para 63.

to me that, if that were so, there would be no warrant for that issue to be left to the Tribunal to decide as this Court could just as well decide it.

[108] The concurring judgment sets much store on the fact that *MWASA* was decided before the Constitution came into force. While this is true, the principle it lays down was followed by the Supreme Court of Appeal in a long list of cases after the Constitution had come into operation.[50] The reason is that the Constitution has not changed the principle. The principle has nothing to do with interpreting a statute in accordance with section 39(2) of the Constitution.[51] What the principle does is to define the process of determining whether what has occurred constitutes an unfair labour practice or is unfair. This indisputably involves a consideration of facts and passing a value judgement on the facts, based not on the questions of legality but on one's sense of justice and fairness. The values invoked to pass judgment are now entrenched in the Constitution.[52] The passing of a value judgment is quite different from raising a point of law.

[109] The rule in terms of which a court permits a party to raise a point of law is subject to well-known conditions. These conditions ensure fairness to all parties. First, the point sought to be raised must be a point of law in the true sense of the word. Second, if not

[50] Above n 45.

[51] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[52] Id.

foreshadowed in the pleadings, it must be supported by the established facts in the record. Third, the entertainment of the point must not prejudice the other parties. Consistent with these requirements, in *Barkhuizen* this Court made it clear that a party will not be permitted to raise a point not covered in the pleadings if its consideration will result in unfairness to the other party.[53] The purpose of this rule is to give a fair hearing to all parties. Therefore, the rule promotes the right to a fair hearing which is entrenched in section 34 of the Constitution.

[110] The main judgment states that the respondent has not objected to the applicants' contention that its conduct in terminating the leases was unlawful because it constituted an unfair practice. 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

[53] *Barkhuizen* above n 28 at para 39.

practice. The applicants bore the onus to prove that the termination fell within the ambit of section 4(5)(c) of the RHA.

[111] It would be very unfair to the respondent to decide the question whether or not the termination of the leases was valid on this point, when it was not established by the facts and the respondent did not get a chance to deal with it in the papers. In the majority judgment in *Barkhuizen*, Ngcobo J said that this Court may consider a law point that is raised for the first time on appeal if the point is covered by the pleadings and its consideration on appeal involves no unfairness to the other party.[54] He said that it would be unfair to the other party if this Court were to consider the point where "the law point and all its ramifications were not canvassed and investigated at trial."[55]

[112] Ngcobo J was speaking of a matter that had been brought to court by way of action. There can be no doubt that the same principle applies to a case brought to court by way of motion proceedings. There, one would say, in paraphrasing the last point made by Ngcobo J, that it would be unfair to the other party if this Court were to consider the point in circumstances where "the point and all its ramifications were not canvassed and investigated" in the affidavits.[56] The contention by the applicants that the

[54] See *Barkhuizen* above n 28 at para 39; see also; *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 43; *Carmichele v Minister of Safety and Security (Center for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 at para 31; *Kannenberg v Gird* 1966 (4) SA 173 (C) at 182A and *Cole v Government of the Union of South Africa* 1910 AD 263 at 272.

[55] *Barkhuizen* above n 28 at para 39.

[56] Id para 41.

termination of the leases constituted an unfair practice can be compared in the field of labour law to a contention that the termination of a contract of employment constitutes an unfair labour practice. I do not think that, in that field, a contention that the termination of a contract of employment constituted an unfair labour practice would be entertained when that was never alleged in the papers, and the employer never had a chance to deal with that case in the papers. I would dismiss the applicants' contention on this basis as well.

[113] The concurring judgment also suggests that a case may be decided by invoking relevant legislation even if in the pleadings no reliance was placed on that legislation. I am unable to agree. This approach relegates pleadings to an insignificant role. In every case pleadings play a vital role. They promote fairness in court proceedings by defining the issues for determination so that the court and the other party are informed of the nature of the case brought. The approach suggested in the concurring judgment is inconsistent with a number of decisions of this Court.[57] In *Bel Porto* Chaskalson CJ, writing for the majority said:

> "In *Prince's* case it was made clear the parties must make out their case in their founding papers and will not ordinarily be allowed to supplement and make their case on appeal."[58] (Footnote omitted.)

[57] *Prince v President, Cape Law Society, and Others* [2000] ZACC 1; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22; *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) (*Bel Porto*) and *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) (*Phillips*).

[58] *Bel Porto* id at para 119.

[114] Later in *Phillips* this Court once again underscored the importance of the pleadings in constitutional litigation. In the clearest language Skweyiya J, writing for a unanimous Court, declared:

> "It is impermissible for a party to rely on a constitutional complaint that was not pleaded."[59]

And later the Court said:

> "Accuracy in pleadings in matters where parties place reliance on the Constitution in asserting their rights is of the utmost importance."[60]

Tacit term

[115] It was argued on behalf of the applicants, as it had been argued both in the High Court and in the Supreme Court of Appeal, that each one of the leases contained a tacit term to the effect that the respondent could not terminate them for the purpose of effecting a rent increase in excess of the increases permitted by the leases. Both the High Court and the Supreme Court of Appeal dealt thoroughly with the applicants' submission in this regard. I cannot fault the Supreme Court of Appeal in rejecting this argument for the reasons it gave. The Court emphasised that during the currency of the lease the parties would be bound by all the terms including clauses that govern the maximum

[59] *Phillips* above n 57 at para 39.

[60] Id at para 40.

annual increases in rent but, once the lease had been terminated, these clauses would not apply.

[116] In my view it cannot be said that, if, at the time that the parties were negotiating their leases, a bystander had asked whether the landlord would be able to terminate the lease on notice if circumstances made it too financially burdensome to continue to run the building on the basis of the rent increases prescribed by the leases, both the landlord and the tenant would have said: "of course, the landlord will not be able to terminate the lease on notice and get out of it: we just did not bother to specify that!" I think that the landlord would surely have said that the termination clause was there to enable him or her to get out of the situation. Indeed, I am certain that if, at the same time the question had been asked whether the tenant would be able to terminate the lease on notice if his or her financial position changed for the worse and he or she could no longer afford the annual rent increases prescribed by the lease, the tenant would have said: "of course, yes! I will be able to do that! I cannot be forced to continue with a lease whose rent I cannot afford!"

[117] Accordingly, I hold that the applicants have failed to prove the tacit term for which they contended.

Does the termination of the leases constitute an infringement of the right to adequate housing?

[118] It was argued on behalf of the applicants that the termination of their leases constituted an unfair and unreasonable infringement of their right of access to adequate housing, provided for in section 26(1) of the Constitution. The applicants were referring to the negative aspect of their right of access to adequate housing. Section 26(1) provides that everyone has the right to have access to adequate housing.

[119] The applicants referred to *Jaftha*[61] and submitted that in that case this Court explained the concept of security of tenure of the right of access to adequate housing. Counsel for the applicants referred to Mokgoro J's statement that "any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1)".[62] It was submitted on behalf of the applicants that it was not their case that no lease that is for an indefinite period may ever be terminated for fear that the termination will offend constitutional rights. Their counsel submitted in their written argument that "[t]he question in each case will be whether the infringement is reasonable and fair in the circumstances."

[120] I am unable to uphold the proposition that the termination of the leases constitutes a limitation of the applicants' right of access to adequate housing, let alone its

[61] Above n 40.

[62] Id at para 34.

infringement. In my view the cancellation terminated the applicants' legal entitlement to occupy the flats and no more. It did not, of itself, result in the loss of access to housing. What would have implicated the applicants' housing right is the eviction. The view that the cancellation of the leases did not limit the applicants' rights is buttressed by the fact that section 26(3)[63] affords people in the applicants' position protection against an eviction from their homes without a court order. In this regard, the protection against eviction which is provided for in section 4(7) of PIE is relevant. As a general proposition section 4(7) precludes any court from making an order of eviction where it would be unjust and inequitable to do so.[64]

[121] The point may be explained better by an illustration. If the respondent did not seek the applicants' eviction after the termination, their access to accommodation would not have been affected at all. Under the common law the applicants would have been regarded as tenants on a month to month basis for as long as they remained in occupation.

[122] The further argument advanced by the applicants was that the enforcement of the termination clause was unfair, unreasonable and as a result contrary to public policy. Reliance for this submission was placed on *Barkhuizen*.

[63] Above n 10.

[64] Above n 11.

[123] The submissions advanced in support of the contention that the enforcement of the termination clause was contrary to public policy was that the respondent did so in order to increase the rent to levels that exceeded those prescribed by the leases. This, it was submitted, the respondent did in order to circumvent the clauses that precluded the high rent increases the respondent sought to effect. Counsel for the applicants also submitted that the termination clause was invoked so as to avoid the clause which required the respondent first to seek the authority of the Tribunal before it could increase rent as high as it sought to do in this case. It was further submitted that in considering the issue of fairness the parties' respective bargaining positions were relevant.

[124] I accept, that in the determination of fairness in the context of the enquiry whether or not the enforcement of a contractual term is contrary to public policy and, therefore, invalid and unenforceable, the bargaining power of the parties is a relevant factor.[65] As the majority said in *Barkhuizen*, if it is found that the objective terms of the contract are not inconsistent with public policy, the further question will be whether the terms are contrary to public policy in the light of the relative situation of the contracting parties.[66] Ngcobo J said that this was "an important principle in a society as unequal as ours."[67] Also to be taken into account is the freedom of contract[68] although courts will not let blind reliance on the principle of freedom of contract override the need to ensure that

[65] Above n 28 at para 59.

[66] Id.

[67] Id.

[68] Id at para 55.

contracting parties respect the constitutional values enshrined in our Bill of Rights.[69] Public policy also requires that, in general, parties to contracts should honour their obligations that have been voluntarily and freely undertaken.[70] I would add that public policy also requires that parties to contracts that have been freely and voluntarily agreed to should respect the exercise by other parties to their contracts of their rights provided for in them.

[125] It is not the applicants' case that they did not enter into their leases freely and voluntarily. It is also not their case that, if they had been given a longer period of notice, the termination of their leases or the enforcement of the termination clauses would have been in accordance with public policy. Their case is simply that the fact that the respondent used the termination to achieve the high rent increases that were precluded by the leases, or, for which it required the authorisation of the Tribunal, made the termination of the leases or the enforcement of the termination clauses unfair.

[126] I am unable to uphold the applicants' submission. The parties freely and voluntarily entered into leases with clauses that allowed either party to terminate them on notice and which did not say that the termination would not be permissible when effected for a certain purpose or when effected with a certain motive. In this regard I point out that some of the leases to which some of the applicants were party did contain unusual

[69] Id at para 30.

[70] Id at para 60.

terms. For example the leases that were subsidized by the Department of Housing contained provisions that the leases could only be terminated at the discretion of the lessee. As a result of those clauses, two of the tenants whose leases the respondent had purported to terminate were successful in the High Court in opposing the respondent's application to evict them. This is an indication that the applicants may also have insisted on clauses that excluded certain reasons or motives for the termination of their leases. They did not do so and they have not put up any case to suggest that their bargaining position did not allow them to do so. The matter must then be decided upon the basis that, like the two tenants who included the unusual clauses that their leases could only be terminated at their discretion, the applicants, too, could have included a clause to the effect that their leases could not be terminated to enable the landlord to increase rents by amounts higher than those permitted by their leases. They failed to do so.

[127] Another factor to be taken into account in determining fairness in this case within the context of inquiring into whether or not the termination of the leases was contrary to public policy is that this is not a case where, during the currency of the leases, the respondent increased the rent to levels above those provided for in the leases. The respondent terminated the leases first and only sought to include the rent increases in new leases offered to the applicants. Therefore, the respondent did not act in breach of the leases to which the applicants were party. In fact, the respondent offered the applicants leases on the same terms save that the rent was much higher than before.

[128] The respondent found itself in a situation which did not permit it to continue with the leases on the terms prescribed by the leases with regard to the annual rent increase and found that it was an appropriate situation for it to use the escape route provided by the clause relating to termination on notice. There can be no justification for a suggestion that the respondent was obliged to continue with the leases as they stood, no matter how much the losses it was suffering and would continue to suffer if the rent was not drastically increased. Of course, the use of the clauses providing for the termination of the leases on notice is not necessarily a route that a lessor will always resort to because it entails the loss of a good tenant by the landlord whom the landlord may have wished to keep. Good tenants are not always easy to get. In other words, in terminating a lease in order to charge a much higher rent increase than is permitted by the lease, a landlord would also be freeing the tenant from his or her obligations and, in certain circumstances, may find it difficult to find another suitable tenant.

[129] I have said above that one purpose which is served by a clause providing for the termination of the contract on notice, even in the absence of a breach by the other party, is that it enables a party who, for one or other reason, wishes to get out of the contract to do so simply by giving the required notice. One situation is where one party wants to change certain terms and conditions of the contract and finds that the other party to the contract is not prepared to agree to the change or amendment of the contract. That is what happened in this case. In labour law, it is also permissible for an employer which wishes to change the terms and conditions of the contracts of employment of its workers,

to terminate them on notice if, after a proper consultation process, the position is that the existing workforce is not prepared to agree to the proposed changes.[71]

[130] The facts of the present case and the issue raised by the applicants resemble the facts and issue that the Courts had to decide in the *Fry's Metals* matter.[72] In that case, the employer sought to change certain terms and conditions of employment of its workforce but the employees were not prepared to agree to the changes. When this remained the position even after a lengthy consultation process, the employer terminated the employees' contracts of employment on notice, so that it could offer contracts with new terms and conditions to other people who were prepared to sign the contracts of employment that the existing workforce was not willing to sign. When, subsequently, the employees contended that the termination of their contracts of employment was unfair, the Labour Appeal Court rejected the contention and held that the termination was fair. In a subsequent appeal, the Supreme Court of Appeal upheld the decision of the LAC.

[131] The *Fry's Metals* matter ultimately turned upon whether or not an employer was entitled to terminate the contracts of employment of employees in order to make more profit in its business operations. The Courts said that an employer is entitled to terminate contracts of employment for this purpose if, after a fair consultation process, the

[71] *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & Others* (2003) 24 ILJ 133 (LAC) as approved by the Supreme Court of Appeal in *National Union of Metalworkers of SA & Others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA).

[72] Id.

employees refuse to accept the changes proposed by the employer. The question raised by the present applicants on this aspect of their case is whether or not the termination of their leases on notice by the respondent, in order to effect higher rent increases than those prescribed by the leases was fair, and therefore, in accordance with public policy. In my view, the answer is that the lessor or landlord is entitled to terminate the leases on notice in those circumstances. Just as it can be done in the field of employment law, it also can be done in the field of the law of landlord and tenant. In this case the respondent had no obligation to offer the applicants new leases but it did so and they spurned the offer. Just as an employer is entitled in labour law to terminate the contracts of employment of employees on notice to effect changes to contracts of employment so as to make more profit or to avoid suffering more losses, so is the landlord also entitled to terminate the leases of tenants who are not prepared to accept changes to their leases which will enable the landlord to earn a higher rent for his property or which will enable the landlord to avoid suffering more losses in connection with its property.

[132] In the circumstances, I hold that the termination of the applicants' leases or the enforcement of the termination clauses was not unfair or unreasonable and was therefore not contrary to public policy. Before I conclude this judgment it is appropriate that I refer to reasons, other than those reflected earlier in this judgment, for which I am unable to agree with the main judgment.

Additional reasons for which I am unable to agree with the main judgment

[133] In the course of this judgment so far I have given some of the reasons why I am unable to agree with the main judgment. I do not propose to repeat them here. However, I set out below other reasons which have not been captured above. In the main judgment an order is made that—

(a) postpones the appeal;

(b) gives until 2 May 2012 to refer, if so advised, a complaint to the Tribunal concerning the termination of the applicants leases or concerning the rent proposed by the respondent for the flats occupied by the applicants failing which the appeal is dismissed; and

(c) allows the parties, if the complaint is lodged within the stipulated time, to apply to the Court for further directions once the Tribunal has given its ruling on the complaint or once the complaint has been disposed of in any other way.

[134] Although this order is couched as a postponement order, it in effect is an order staying the appeal proceedings in this Court. Furthermore, although the order purports to give either party an opportunity to refer a complaint to the Tribunal, it in fact gives the applicants that opportunity and not the respondent. I say this because the order is to the effect that, if no referral of the complaint is lodged with the Tribunal by the stipulated date, the appeal will be dismissed. That would mean that the respondent succeeds and effectively the order of the Supreme Court of Appeal confirming the order of the High

Court will stand. Both those orders were in favour of the respondent. It would make no sense for the respondent to refer a complaint to the Tribunal, at least not before the applicants have referred their own complaint to the Tribunal. On the terms of the order made in the main judgment, the applicants have everything to lose if they do not refer the complaint to the Tribunal. They will lose the appeal as well as their occupation of the flats. Accordingly, for all intents and purposes, the order made in the main judgment has as its purpose, the giving of another opportunity to the applicants once again to refer their complaint to the Tribunal.

[135] In my view this Court should not make an order staying the appeal proceedings in this matter. This Court should decide the appeal before it on the same record that the Supreme Court of Appeal had when it decided the appeal. It is the decision of the Supreme Court of Appeal that is on appeal before us and we must decide whether that decision is right or wrong.[73] The main judgment does not decide the issue before us and the issue which was argued by the parties for determination by this Court. This Court ought to decide that issue. If, on the same record that the Supreme Court of Appeal had before it, its decision was wrong, the appeal should be upheld in which case the applicants would be entitled to a judgment in their favour. If, however, on that record the decision of the Supreme Court of Appeal was right, the appeal should be dismissed and the respondent is entitled to a judgment in its favour. On this we ought to be firm. After

[73] *Health Professions Council of SA v De Bruin* [2004] 4 All SA 392 (SCA) at para 23; see also *Tikly and Others v Johannes N.O. and Others* 1963 (2) SA 588 (T) at 590H and *Commercial Staffs (Cape) v Minister of Labour and Another* 1946 CPD 632 at 638-41.

three years of litigation in the High Court, the Supreme Court of Appeal and this Court one of the parties is entitled to a final decision.

[136] The main judgment effectively grants the applicants a stay of the appeal proceedings in circumstances in which they did not make any application to this Court for a stay. Indeed, they did not make an application for a stay even in the High Court. A party that seeks an order staying court proceedings is required to make an application to court – preferably on affidavit – in which it would motivate why it should be granted a stay of proceedings and the other party would get an opportunity to oppose the application and challenge the grounds upon which the stay is sought. In this case the applicants did not apply for a stay before the completion of the eviction proceedings in the High Court, nor did they apply for it in the Supreme Court of Appeal. Indeed, even before us, they did not apply for a stay. In *Bel Porto*, Chaskalson CJ, with the concurrence of the majority, was not able to agree with the relief that Ngcobo J proposed and the reason that Chaskalson CJ gave was that the relief which Ngcobo J proposed "was not the relief sought by the appellants in the High Court or in this Court, and it is inconsistent with the attitude adopted by the appellants throughout the litigation."[74] We are not dealing here with unrepresented litigants who may have failed to apply for a stay of proceedings because they did not know that they had that right. We are here dealing with litigants who have been legally represented at all material times. They had an attorney who was with them even at the mediation meeting concerning their complaint in

[74] *Bel Porto* above n 57 at para 115.

the Tribunal. In the High Court they were represented by an attorney and counsel. That was the position also in the appeal in the Supreme Court of Appeal. Before us they were represented by Senior Counsel and two juniors. In these circumstances it is, to my mind, extremely unfair to the respondent that the applicants should be granted a stay of proceedings for which they never applied.

[137] If the applicants wanted a stay, the proper forum and time for that application was before the High Court and before it handed down its judgment. Once the High Court had delivered its judgment without that application having been made, there was no room for the application because, from that time on, there was a judgment in favour of the respondent which could only be set aside if it was found to be wrong. In case I am wrong in the view that this application could have been made only before the High Court handed down its judgment, then the least that the applicants would be required to do if they applied for a stay of the appeal to the Supreme Court of Appeal would have been to explain why they did not make that application before the High Court handed down its judgment and why they took as long as they would have taken to bring that application. They would have had to give a proper explanation for all of this. The respondent would have been entitled to oppose the application for a stay and to show the prejudice that a stay would occasion it. On the same basis, if the applicants had applied to this Court for a stay of the appeal pending the referral, once again, of their complaint to the Tribunal, they would have had to explain why they were only seeking to do this after three years of litigation and deal with the prejudice to the respondent. They would also have had to

explain why they must be given another opportunity three years later to refer their complaint and why they withdrew their complaint before the Tribunal at a time when they were about to be afforded a hearing that could have resulted in an award in their favour which would have prevented the litigation in the High Court, Supreme Court of Appeal and in this Court. The main judgment grants the applicants a stay without their having had to give any explanation for their withdrawal of their complaint in the Tribunal and for their failure to apply for a stay all these years.

[138] The applicants did make an application for a stay of proceedings in their supplementary answering affidavit but not one pending the possible referral of a complaint to the Tribunal but for a stay of the eviction proceedings pending the joinder of the municipality and provincial government. That application was made to deal with a situation where the Court was to find that the leases had been validly terminated. Obviously the applicants knew of the availability of the right to apply for a stay of proceedings and elected not to apply for a stay of proceedings such as the one that the main judgment, in effect, now proposes in its order. The Court must respect the choice that the applicants made in circumstances in which they had professional legal advice available to them.

[139] Another reason why I am unable to agree that we should, in effect, grant a stay of proceedings pending a possible referral of a complaint to the Tribunal by either party is the following. The applicants did refer a complaint as is contemplated in the order

proposed in the main judgment to the Tribunal in 2008. That complaint was that the respondent sought to charge them "exploitative" rental and was threatening them with unfair evictions. The Tribunal regarded that alleged conduct on the respondent's part as one that fell or could fall within the ambit of an unfair practice in terms of the RHA read with the regulations promulgated thereunder. It called the parties to a mediation meeting. The attorneys for both the applicants and the respondent were present at that meeting. The complaint was not resolved at the mediation meeting. As required by the RHA, the Tribunal then referred the complaint to arbitration. The Tribunal set the complaint down for the arbitration hearing on 19 June 2009. In terms of the RHA in those proceedings the arbitrator would have had the power, if he or she found that the conduct of the respondent constituted an unfair practice, effectively to prevent the respondent from charging the applicants and other tenants the high rent it sought to charge them and to prevent their eviction and could have effectively set aside the termination of the leases.[75]

[75] Section 13(4) of the RHA reads:

> "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 this Act;
>
> (b) where it would appear that the provisions of any law have been or are being contravened, refer such matter for an investigation to the relevant competent body or local authority;
>
> (c) make any other ruling that is just and fair to terminate any unfair practice, including, without detracting from the generality of the aforegoing, a ruling to discontinue—
>
> (i) overcrowding;
> (ii) unacceptable living conditions;
> (iii) exploitative rentals; or
> (iv) lack of maintenance."

[140] The applicants elected to withdraw their complaint against the respondent after the Tribunal had set the complaint down for the arbitration hearing. The reason that the applicants advance in their papers for withdrawing their complaint from the Tribunal is quite strange. They say that they withdrew the complaint from the Tribunal because the respondent had launched eviction proceedings against them in the High Court and they wanted to "concentrate" on opposing that application. I do not think that they would have withdrawn the complaint without discussing it with their then-attorney. After all, he attended the mediation at the Tribunal to advise them. In fact the respondent says that the then-attorney of the applicants informed the respondent's attorney in advance that the applicants would withdraw the complaint from the Tribunal. Although the applicants subsequently dismissed that attorney on the basis that he had entered into a settlement agreement with the respondent's attorneys without their instructions, nowhere in their affidavits have they accused him of any wrongdoing connected with the withdrawal of their complaint from the Tribunal. If he had withdrawn their complaint without their instructions, or against their will, they would have said so in their papers. Moreover, on their showing, the applicants had previously been advised that, once a complaint has been lodged with the Tribunal, the matter may not be referred to court.

[141] The applicants' withdrawal of their complaint at a critical time when they were so close to getting a decision which could have granted them full relief against the respondent is difficult to understand. They made the decision at a time when they had professional legal advice available to them. If they had allowed the arbitral process to

take its course, the eviction application may have been abandoned. There may not have been an appeal to the Supreme Court of Appeal and the present proceedings in this Court may not have happened. In fact, it is at that time that the applicants should have applied to the High Court for a stay of the respondent's application pending the outcome of the arbitration. The applicants elected not to do so. It would be unfair not to bring this dispute between the parties to finality and instead to make an order that, for all intents and purposes, forces the parties to re-open a process that was abandoned in 2009 at the instance of the applicants. That is completely unfair to the respondent which has a business to run. It is unduly favourable to the applicants.

[142] There were no circumstances that can reasonably be said to have put undue pressure on the applicants to withdraw their complaint. One would have thought that the fact that the Tribunal had already allocated a date for the arbitration hearing of their complaint would have inspired the applicants to make sure that the arbitration hearing took place rather than to withdraw the complaint.

[143] The main judgment also says that it has not been suggested that by withdrawing the complaint the applicants abandoned or waived their right to pursue it under the RHA. The answer to this is simply that there has been no such suggestion because the respondent has not been given an opportunity to deal with the possibility of an order to stay these proceedings and to afford the applicants an opportunity to refer to the Tribunal a complaint that they voluntarily withdrew three years ago just before there was to be an

arbitration hearing, which may have given them the relief that they seek in these proceedings. The respondent has not suggested this because that was not part of the case that it was called upon to meet in these proceedings. I have little doubt that, on the facts of this case, and when one has regard to the circumstances which prevailed at the time of the applicants' withdrawal of the complaint from the Tribunal, if the respondent had been given a chance, it would have argued that the applicants had no right to refer the same complaint to the Tribunal for a second time three years later. The stay is ordered in circumstances where the respondent was not afforded the opportunity to be heard. This is in breach of the *audi alteram partem* rule, an important aspect of the rules of natural justice.

[144] The main judgment states that the Tribunal was bound to adjudicate the complaint that had been lodged by the applicants and other tenants.[76] But, the Tribunal had no obligation to adjudicate the complaint once it had been withdrawn by the complainants.

[145] The main judgment states that the High Court should have stayed the proceedings before it to enable the tenants to resuscitate their complaint against the landlord and to enable the Tribunal to determine whether the termination of their leases was an unfair practice.[77] This criticism of the High Court is not only unjustified in law but is also unfair. I know of no principle of law that required the High Court to stay proceedings

[76] [66] above.

[77] [67] above.

before it in circumstances where that was not an issue between the litigants before it, and none of the parties had asked for a stay, particularly, as in a case like this, where all the parties were legally represented. The main judgment also does not refer to any principle of law that supports its criticism of the High Court on this point. A court is required to adjudicate only the issues between the parties and whether or not the proceedings before the High Court should have been stayed was not one of the issues between the parties. It would have been irregular for the High Court to have gone outside the issues before it to make an order that no party had asked for. I do not understand why the High Court should have stayed the proceedings in order to give the applicants an opportunity to start all over again a legal process which they had voluntarily withdrawn and which they did not tell the High Court they wanted to resuscitate.

[146] The effective stay of the appeal proceedings in this matter, pending the referral or ruling of the Tribunal on the complaint that the applicants have been granted another opportunity to resuscitate, will unduly postpone the determination of the dispute between the parties. This is so because, if the applicants refer the complaint to the Tribunal by the stipulated date, as they are likely to do, and the Tribunal makes a ruling, that ruling may be taken on review in the High Court, and yet further on appeal to a higher court. What this means is that this appeal will remain in abeyance until that process has reached finality. Meanwhile the applicants would remain in occupation of the flats. By the time that process is completed, they will likely have remained in occupation of the flats for over seven years with the respondent not being able to make any progress in its business

venture. In fact, by then the delay in the finalisation of the dispute might have proved disastrous to the respondent's economic or financial situation.

[147] In the light of all of the above I conclude that the applicants' leases were validly terminated. Accordingly, I would dismiss the appeal with no order as to costs.

FRONEMAN J (Yacoob J concurring):

[148] I concur in the judgment of Cameron J (main judgment) and merely wish to add some comments in support of its reasoning.

[149] This case is ultimately about the eviction of the applicants from the homes they lease from the respondent. The Rental Housing Act[1] (Act) applies to relations between tenants and landlords.[2] Both the High Court[3] and the Supreme Court of Appeal[4] interpreted the Act and came to the conclusion that the respondent's right to cancel the leases was unaffected by its provisions. The main judgment finds that interpretation to be

[1] Act 50 of 1999.

[2] Chapter 3, sections 4 and 5.

[3] *Aengus Lifestyle Properties (Pty) Limited v Maphango (Mgidlana)* Case No. 09/22346, 7 May 2010, judgment of Van Der Riet AJ, unreported at paras 25, 25.4, 26 and 31.

[4] *Maphango (Mgidlana) and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) at paras 31-4.

wrong. That the interpretation of the Act lies at the heart of this matter, however pleaded, has never been doubted.

[150] I thus have considerable difficulty in understanding how this appeal can be determined in this Court without interpreting the Act. Whether the Act applies to leases in general is a matter of law. So is the question whether the cancellation of a lease amounts to an unfair practice under the Act.

[151] Under the Constitution all law is, or needs to be, infused by constitutional values.[5] Legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights.[6] It is common cause that section 26 of the Constitution is implicated. Interpretation of what constitutes an "unfair practice" under the Act in light of this is thus inevitably a constitutional issue, a matter of law. Interpretation and application of the law under the Constitution is never a mechanical application of rules; it always involves a value judgment. Our Constitution and law are infused with moral values. The days of denying the value-laden content of law are long gone.[7]

[152] It would be a denial of constitutional responsibility for any court to decide a matter without considering legislation where it was aware of applicable legislation. This would

[5] Sections 1, 2 and 39 of the Constitution.

[6] Section 39(2) of the Constitution.

[7] The rigid distinctions discussed in *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (AD) at 795C-797J (a pre-constitutional matter) must thus be cautiously re-assessed in the light of our new constitutional dispensation.

be so no matter how the case was pleaded. Fortunately neither the High Court nor the Supreme Court of Appeal did so here. Criticism of the main judgment for considering the Act is in my view unwarranted.

[153] The main judgment finds that the Supreme Court of Appeal's interpretation of the effect of the Act in respect of cancellation of the leases is wrong[8] and that it is primarily the jurisdiction of the Tribunal to determine whether a purported cancellation may amount to an unfair practice under the Act.[9] This is the ground on which the remedy in the main judgment is based. Courts deciding constitutional matters may, and in some circumstances are obliged to, make any order that is just and equitable.[10] These powers are not confined by the pleadings.

[154] I see no prejudice to the respondent in the order made in the main judgment.

[155] What are the alternatives to this order, given the finding in the main judgment that the Tribunal is the appropriate port of call to decide unfair practice disputes under the Act?

[8] [55]-[56] above.

[9] [47] and [52] above.

[10] Section 172(1)(b) of the Constitution.

[156] One alternative would be to refer the matter back to the High Court. The application before the High Court was for the eviction of the applicants. A Court determining an application for the eviction of an applicant from his or her home is obliged to take into account "all the relevant circumstances".[11] A court would be failing in its duty if it limited this constitutionally-mandated enquiry by not determining whether it was appropriate, in the circumstances of the case, for the Tribunal to determine whether the cancellation amounted to an unfair practice. This is surely a "relevant circumstance" to be considered by the High Court before an ejectment order is made. Consideration of this might lead to a similar order as the one made in the main judgment, in which case the process will simply take longer.

[157] Another alternative would be to dismiss the eviction application. Neither alternative is less prejudicial to the respondent than the order in the main judgment.

[158] Lastly, the Supreme Court of Appeal's rejection of the *Barkhuizen*[12] public policy defence to eviction proceeded from its finding that the cancellation did not amount to a 'practice' under the Act. The main judgment rejects this finding.[13] Even if it is indeed inappropriate to decide the matter directly under the Act, the assessment of the *Barkhuizen* defence would have to take into account the correct interpretation of the Act.

[11] See section 26(3) of the Constitution as well as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 at para 2 of the Preamble and at sections 4(6); 4(7); and 6(1).

[12] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[13] [57] above.

But, for the reasons given in the main judgment, I agree that direct application of the Act is appropriate. Determining the true ambit of *Barkhuizen* must wait for another day.

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