

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 43019/2020

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. YES/NO

.....
SIGNATURE

17 FEBRUARY 2023
DATE

In the matter between:

KHAPAMETSI MALEKE

APPLICANT

And

GAUTENG HOUSING TRIBUNAL

FIRST RESPONDENT

MI MOTALA N.O.

SECOND RESPONDENT

B MADUMISA N.O.

THIRD RESPONDENT

L MAHLANGHU N.O

FOURTH RESPONDENT

R. RAWAT N.O.

FIFTH RESPONDENT

SANDPIPER AUTOMATED PROJECTS (PTY) LTD

SIXTH RESPONDENT

Summary: *Review of decision of Rental Housing Tribunal – jurisdiction of Tribunal – mootness – review of decision by Tribunal that it had jurisdiction to adjudicate complaint moot – final ruling on merits of the complaint disposed of live issues in the complaint*

JUDGMENT

KEIGHTLEY, J:

1. This is an application to review, under s 17 of the Rental Housing Act 50 of 1999 (the Act),¹ the decision of the first respondent, the Gauteng Rental Housing Tribunal (the Tribunal), regarding a complaint lodged under the Act by the sixth respondent, Sandpiper Automotive Projects (Pty) Ltd (Sandpiper). The complaint centered on an amount of R128 000, representing three-months' advance rental paid by Sandpiper to the applicant, Ms. Maleke, at the commencement of a lease agreement. Under the agreement Mr and Mrs. Bhoola (represented by Sandpiper) were to take occupancy of a residential property owned by Ms. Maleke. The relationship between landlady and tenants ended acrimoniously before the Bhoodas took occupation. Sandpiper wanted the return of the advance rental paid, but Ms. Maleke asserted her right to its retention. This prompted Sandpiper to lodge a complaint with the Tribunal for the return of the money.
2. The Tribunal made two relevant decisions. The first was a ruling on a point *in limine* raised by Ms. Maleke to the effect that the Tribunal did not have jurisdiction to consider the complaint. The Tribunal rejected the point *in limine* in a ruling dated 29 September 2020. Ms. Maleka thereafter instituted this review application. Despite the application having been instituted, the Tribunal continued to process Sandpiper's complaint. It ruled on the merits on 5 August 2021, rejecting Sandpiper's complaint and upholding Ms. Maleke's defence. It found:

'The Tribunal finds the augments (*sic*) of the respondent compelling and finds in favour of the respondent under the circumstances in that the complainant clearly repudiated the lease agreement and must face the consequences thereof.

The respondent is entitled to retain the advance rent paid and interest accrued thereon as part of her pre-liquidation damages as claimed.'

¹ Section 17 states:

'Without prejudice to the constitutional right of any person to gain access to a court of law, the proceedings of a Tribunal may be brought under review before the High Court within its area of jurisdiction,'

Applicant relies in addition on the Promotion of Access to Justice Act 2 of 2000.

3. Ms. Maleke's application for review is unusual in that, despite ultimately succeeding with her defence in the complaint, permitting her to retain the advance rental paid, she nonetheless seeks a ruling from this court reviewing and setting aside the Tribunal's finding that it had jurisdiction to consider Sandpiper's complaint. While she does not directly seek to review the final decision of the Tribunal on the merits, if her review on the preliminary point succeeds, the inevitable consequence will be that the final decision can have no legal effect.
4. The obvious question arising is that of mootness. Not surprisingly, Sandpiper argues that the Tribunal's decision on the merits disposed of the live issues between the parties and that the matter has become moot. Ms. Maleke's stance is that despite the Tribunal endorsing her refusal to return the advance rental paid, the matter is not moot. One might ask why Ms. Maleke would want to persist on a course that would, in effect, deny her of this favourable outcome. Shouldn't she take the win, keep the money and be content with knowing that she can do so without incurring further legal costs?
5. The applicant's retort to these, not illogical questions, is that the dispute was from commencement non-suited for determination in the Tribunal. It ought to have been pursued in court. Thus, she says, the question of jurisdiction remains a live issue. What is more, she wishes to pursue a claim for her full contractual damages in the proper forum, namely in court. According to Ms. Maleke, the Tribunal's ruling prevents her from doing so because it has pegged her damages to the three-months' advance rental retained by her. This, she says, demonstrates quite clearly that the matter is not moot: in order to proceed with her damages claim she needs to expunge, as it were, the ruling of the Tribunal, which never had jurisdiction in the first place to consider the matter.
6. In brief, this is what the review turns on. First, it is necessary to provide some further background facts in order properly to understand the parameters of the dispute.
7. The lease agreement was concluded between the parties on 12 March 2020 for an initial period of twelve months, commencing on 1 April 2020. The property is

situated in Cape Town, however, as the agreement was concluded in Gauteng, there is no dispute, on this score at least, that the Tribunal lacked jurisdiction.²

8. The Bhoodas sought early occupation of the premises, but this did not suit Ms. Maleke. What then transpired was that their plans were interrupted by the modern-day 'ides of March' in the form of the Covid lockdown, announced on 23 March 2020 with effect from 27 March 2020. This prompted Ms. Maleke to offer early occupation from 26 March. The offer was made on 24 March but the Bhoodas did not take her up on this offer. Ultimately, what transpired was that they never took occupation of the premises.
9. There was much to-ing and fro-ing between Mr Bhooda and Ms. Maleke's letting agents on the issue of occupation. It is not necessary to go into it in much detail, save to note that Ms. Maleke's agent attempted to make arrangements for an alternative occupation date later in April when, she said, the Bhoodas could take occupation without contravening the lockdown regulations. This was not acceptable to Mr Bhooda. He contended that the Covid situation had given rise to a *vis maior*. He could not take occupation as he was stuck in Johannesburg, and the business opportunity that he had sought to move to Cape Town for no longer existed. Furthermore, he was an Australian citizen and had been advised by his government that all citizens should return to that country. He wrote that he was cancelling the contract. This was not accepted by Ms. Maleke. Mr Bhooda then wrote that the contract had been extinguished.
10. Ms. Maleke, disputed Mr Bhooda's right to cancel the contract or that it had been extinguished. Her agent advised that Ms. Maleke viewed Sandpiper's (as represented by Mr Bhooda) stance to amount to a repudiation of the lease agreement, which she accepted. She advised Mr Bhooda that while her agent would return the deposit paid, she would be retaining the three-months' advance rental payment as 'part of her liquidated damages, including (the agent's) *pro rata* commission.'
11. At this point the lawyers became engaged in the matter. Again, it is not necessary to provide a detailed record of what was said by each side. It is relevant to record

² In the early stages of the dispute there was a challenge to the geographical jurisdiction of the Tribunal but this was not persisted with for purposes of the review.

that Sandpiper's stance, as stated in its lawyer's letter dated 11 May 2020 was that, among other things:

'It is trite that the correct legal position, if your client/s (sic) had indeed suffered any damages, (which is denied), your client must approach the Courts to adjudicate on any potential claim for damages'; and

'No such application has been brought and it is clear that your clients claim to the R128 000.00 as "damages" is arbitrary, mala fide and may very well contravene the provisions of the Conventional Penalties Act, as well as constitute an Unfair Practice in terms of the Rental Housing Act'. (My emphasis)

12. Ms. Maleke's attorneys responded:

'...our client has elected to retain the advanced rental payments made by your client as her pre-liquidated damages, representing lost rental income, calculated from 07 May 2020, and estate agent's commission..'; and

'Our client will not entertain any further litigation by correspondence and should your client deem it necessary, it is welcome to take whatever legal steps it wishes to do. Our client's full and further rights remain reserved.'

13. Sandpiper elected to approach the Tribunal and to lodge a complaint about the refusal to return the three-months' advance rental. It did so on 10 June 2020. The complaint was lodged by way of completion of the prescribed Statement Form. The form is populated by a series of questions to which the complainant must fill in an answer or tick the appropriate box. The complainant is asked to identify what the complaint is about by completing the form under the relevant heading. The headings give the following options: rental, maintenance (of the property), services, deposits, eviction or issuing of summons, attachment of property, non-payment of rent and lockout.

14. Mr Bhoola completed the section under the heading 'rental'. He noted that the complaint concerned an 'advance payment' and that he had paid three months in advance. To the question: 'Why are you complaining about rental?', he answered: 'Could not take occupation due to Lockdown and landlord refuses to refund rental.' The form also asked: 'Did the landlord take any reasonable steps to correct the

situation?' Mr Bhoola inserted the following as his response: 'No, landlord refuses to refund rental paid in advance'.

15. The Statement Form is clearly designed to elicit relevant information from complainants who may not be legally represented. It comprises a long list of questions under each heading which prompt a complainant to provide relevant information. In other words, it directs the complainant to fill in details that will assist in processing the complaint, rather than expecting a complainant to formulate a complaint under their own steam.
16. This is in keeping with the underlying objectives of the Act, one of which is stated in the Preamble to be the need 'to introduce mechanisms through which conflicts between tenants and landlords can be resolved speedily at minimum cost to the parties' (my emphasis). Section 13(1) of the Act permits:

'Any tenant or landlord or group of tenants or landlords or interest group ... to lodge a complaint in the prescribed manner with the Tribunal concerning an unfair practice.'

17. An unfair practice under the Act is:

(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 landlord.³

18. In this case, it is the Gauteng Unfair Practice Regulations, 2001 which prescribe these unfair practices. Regulation 2 states that:

'Any person who contravenes any provision of these regulations commits an unfair practice.'

19. Regulation 14(1)(d) prohibits 'oppressive or unreasonable conduct' on the part of a landlord. It should be noted that the Act, read with the Regulations, provides for a

3 Section 1 of the Act.

wide range of conduct falling within the scope of an unfair practice. Essentially, any oppressive or unreasonable conduct would be sufficient to trigger an unfair practice inquiry by the Tribunal. It is for this reason that the prescribed statement form, as I have already noted, directs a complainant to provide all relevant information. This assists the Tribunal to determine whether the complaint relates to an unfair practice and hence whether it must consider the complaint. It promotes the speedy and cost-effective resolution of the dispute by making it simple for a layperson to approach the Tribunal with a complaint.

20. There is a duty on the Tribunal to consider complaints that may involve unfair practices. This arises from s13(2) of the Act which directs that: ‘... if it appears that there is a dispute in respect of a matter which may constitute an unfair practice’ the Tribunal must deal with the complaint by taking certain steps. It must investigate to determine whether the dispute is one which may constitute an unfair practice.⁴ If such a determination is made, it may refer a matter to mediation⁵ and, where this is not appropriate or successful, it must:

‘... conduct a hearing and, subject to this section, make such a ruling as it may consider just and fair in the circumstances.’⁶

21. In this matter the Tribunal appointed a mediator in the dispute, one Advocate Mulder. The issue of jurisdiction was raised with her but she dismissed the applicant’s submissions on the issue. This prompted Sandpiper, very late in the day, to file a supplementary affidavit, attaching an affidavit from Advocate Mulder in which she expresses the view that her decision on jurisdiction in the mediation process was final. On this basis Sandpiper argued that the review was fatally flawed in that it was not directed at the mediator’s decision. In view of the conclusion I reach on the mootness issue, it is not necessary for me to deal with this argument save to comment, for what it is worth, that in my view Advocate Mulder’s interpretation of her own powers as a mediator are wide of the mark. The only remaining relevance of this aspect of the case is, first, to a costs argument made by the applicant and, second, I must record, as a matter of fact, that the

4 Section 13(2)(b).

5 Section 13(2)(c).

6 Section 13(2)(d).

mediation was unsuccessful and the dispute progressed to the Tribunal for a hearing.

22. Ms. Maleke raised her *in limine* jurisdiction point before the Tribunal. It directed the parties to file written submissions in support of their respective positions on the issue. It was on the basis of these written submissions that the Tribunal dismissed the *in limine* point, finding that it had jurisdiction to consider the matter.

23. In her written submissions Ms. Maleke submitted that the dispute arose from a legal contract, and not an unfair practice cause of action. For this reason, the dispute was in the incorrect forum. More specifically, she submitted that:

23.1. The dispute was not a 'rental dispute' nor was it about unreasonable, unfair or oppressive termination on the part of Ms. Maleke. Sandpiper had not alleged and proven an unfair practice.

23.2. Properly construed, the dispute was a legal one, centered on the doctrine of impossibility of performance or repudiation. This required a determination of the respective party's rights and obligations *ex post facto* cancellation. Consequently, the Tribunal lacked the jurisdiction to act in the matter.

24. In rejecting the point *in limine* the Tribunal summed up its finding as follows:

'In summary, the hallowed constitutional principle guaranteeing a party access to justice trumps any narrow parochial argument that certain matters fall outside the jurisdiction of the Tribunal by virtue of its nature. Countenancing such an argument is tantamount to placing an interpretation on the Act which is narrow and not intended by the legislature which is enjoined in making laws to give effect to the rights enshrined in the Constitution.'

25. In reaching this conclusion, the Tribunal considered the relevant provisions of the Act and relevant Regulations. It dismissed the cause of action argument raised by Ms. Maleke on the basis that the cause of action was irrelevant. It noted that under the Act the Tribunal enjoyed very wide jurisdiction involving unfair practice disputes. Further, the Act recognised the need to provide an alternative

mechanism for resolving disputes between landlords and tenants. It said in this regard that:

‘To then narrowly interpret the powers, functions and by implication it’s (sic) jurisdiction is tantamount to negating this imperative of the Act.’

26. In her review application Ms. Maleke identifies the following reviewable errors on the part of the Tribunal:

26.1. The Tribunal took into account irrelevant factors, including jurisprudence involving the inherent jurisdiction of the High Court, and other cases dealing more generally with the right under s 34 of the Constitution. The submission here is that neither of these considerations was relevant to the issues to be determined. The Tribunal also failed to consider the cause of action.

26.2. There is no rational objective basis justifying the connection made by the Tribunal between the reasons for its decision and the decision itself. Ms. Maleke submits that this was demonstrated by the Tribunal’s misdirections relating to the first ground of review.

26.3. The Tribunal committed a material error of law most particularly in that, it was submitted, its reliance on s 34 of the Constitution resulted in the Tribunal mistakenly holding that this right ‘trumped’ objections to its jurisdiction. The right is for disputes to be considered in the correct forum, not the forum of one’s choice if that forum does not have jurisdiction.

27. At the hearing before me Mr Robertson, for Ms. Maleke, expanded on these grounds of review in submissions which were well prepared and helpful. As I noted at the commencement of this judgment, interesting as the issues Mr Robertson raised may be, the first hurdle for his client to overcome is the question of mootness. It is so that to some extent the question of jurisdiction and that of mootness overlap. However, on my analysis, the question of mootness in this case can be decided on a relatively straightforward basis without the necessity of getting tangled in the intricacies of the jurisdiction question.

28. The Constitutional Court very recently confirmed that:

'A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court's decision or which would be resolved by a court's decision.'⁷

As I explained earlier, Ms. Maleke contends that the ruling of this court on the jurisdiction issue will have practical effect. This is because if I find that the Tribunal did not have jurisdiction in the matter the inevitable consequence will be that the final decision of the Tribunal will be a legal nullity. It is only then, so the argument proceeds, that Ms. Maleke can pursue a claim for damages in the ordinary courts.

29. The underlying premise of Ms. Maleke's case on mootness, as expanded on by Mr Robertson, is that what the Tribunal did in its final ruling was to accept that Ms. Maleke had a claim for pre-liquidated or pre-estimated damages, pegged at three month's advance rental. In other words, the argument is that it made an order for damages. This presents a legal obstacle to Ms. Maleke pursuing a fuller claim for damages in court because it is in the nature of pre-estimated damages that the agreed amount claimed is a final determinant of the amount of damages that a party may claim.
30. As I see it, the critical question that should be asked is what is the nature and effect of the final ruling. Mr Robertson emphasised the contractual legal issues that were raised between the parties before the Tribunal and in the correspondence leading up to this. He pointed out that in its answering affidavit Sandpiper described the merits of the dispute to involve the questions of impossibility of performance, *vis maior* and cancellation. This he said indicated that the parties were of the same mind that this was a legal and not an unfair practice dispute. To my mind, this approach is misdirected. The correct starting point is the initial complaint: what was Sandpiper complaining about and what did it want the Tribunal to do?
31. Sandpiper's complaint, as explained within the ambit of the Statement Form, was that it had paid three months' advance rental to Ms. Maleke; the Bhoolas had not been able to take occupation because of the lockdown; and Ms. Maleke acted unreasonably in refusing to repay the advance rental to Sandpiper. What

⁷ *Minister of Tourism and Others v Afriforum NPC & Another* [2023] ZACC 7 (8 February 2023)

Sandpiper wanted, quite simply, was a return of its R128 000 that it complained was being unreasonably withheld. It was Ms. Maleke who responded by saying that she was entitled to retain the rental as pre-liquidated damages. It is important to appreciate that the question of damages was never at the centre of the dispute presented before the Tribunal. I can find nothing in the record to show that in her defence of the complaint Ms. Maleke provided any evidence, or indeed made any submissions, to persuade the Tribunal that she was entitled to pre-liquidated damages. There is no reference to a pre-liquidated damages clause in the lease agreement, nor to any other basis upon which any finding could be made that the parties had agreed to pre-liquidated damages.

32. My point, in this regard, is not to suggest that the Tribunal was wrong in its conclusion. Rather, it is to show that the Tribunal simply did not engage in a damages inquiry, as it was never required to do so. It considered the legal arguments proposed about *vis maior* and repudiation and there was obviously a legal dimension to its inquiry. However, this does not mean that it made a legal finding on damages. The Act envisages that the disputes it adjudicates may have a legal and an equitable dimension. Section 13(6) enjoins the Tribunal, when determining whether an unfair practice exists, to have regard to:

(b) the common law to the extent that any particular matter is not specifically addressed in the regulations or a lease;

(c) the provisions of any lease to the extent that it does not constitute an unfair practice; ...

(e) the need to resolve matters in a practicable and equitable manner.'

These factors inevitably become intertwined in the unfair practice inquiry. Consequently, a reference to 'damages' in the Tribunal's ruling ought not to be regarded as being determinative of the nature of the dispute or as an indication that it made a finding on damages.

33. The real dispute in this case was about whether there should be a refund of the rental paid, as the Tribunal itself recognised in its final ruling. It is so that the Tribunal in its summary of findings, cited earlier, found that: 'The respondent is entitled to retain the advance rent paid and interest accrued thereon as part of her pre-liquidation damages.' However, once one properly understands the nature of

the complaint, it is plain that this finding is not a finding on damages: The Tribunal was doing nothing more than upholding, in more or less the words used by Ms. Maleke, her defence to what was essentially a complaint that her retention of the advance rental was unreasonable in the circumstances of the case. This is also demonstrated by the fact that the Tribunal concluded that Ms. Maleke could retain the rental as 'part of her pre-liquidation damages'. Quite clearly, in the Tribunal's mind, the question of damages remained open.

34. For these reasons I conclude that Ms. Maleke is incorrect in her assertion that the Tribunal made a ruling on damages, the effect of which is to preclude her from instituting an action to recover additional damages, over and above the R128 000 she was permitted to retain by the Tribunal. Of course, in any claim for damages in court she would have to disclose that her loss was mitigated to the extent of the R128 000 she retained. However, the outcome of the Tribunal proceedings present no legal impediment to Ms. Maleke claiming further damages, should she be advised that she has such a claim.
35. It follows that the final ruling of the Tribunal disposed of the live issues between the parties arising out of Sandpiper's complaint. Ms. Maleke's claim for damages may be pursued in the ordinary court regardless of the outcome of the Tribunal's final decision. It would thus serve no practical purpose for this court to proceed with the review application in respect of the Tribunal's *in limine* finding on jurisdiction. The application must fail for this reason.
36. The only issue remaining is that of costs. The parties are of the same mind, bar two aspects, that costs should follow the result. Mr Spangenberg, for Sandpiper, urged me to make a punitive award of costs against the applicant. There is no basis for such an award. Ms. Maleka was justified in continuing with her review application after the final decision was made. She wished to have certainty on what her position was for purposes of a further claim for damages in court. While she may not have succeeded in getting this certainty through a successful review application, she did not proceed recklessly in persisting with the application.
37. Mr Robertson argued that I should disallow Sandpiper's costs associated with the preparation and filing of its further supplementary affidavit on or about 19 January 2022. The purpose of this affidavit was to put before the court the mediator's opinion that her decision on jurisdiction was final. I have already suggested

(without finding) that her opinion lacked merit. Quite apart from this, the affidavit was filed many, many months after the review application was instituted, and almost a year after Sandpiper filed its answering affidavit. No reason was given for Sandpiper's inability to obtain the mediator's opinion (if it thought that this might be relevant) before filing its answering affidavit. It was clearly an afterthought and Sandpiper was not justified in attempting to put this evidence before the court. I agree with Mr Robertson that there is no reason why Ms. Maleke should carry the costs associated with the affidavit.

38. I make the following order:

1. The application is dismissed.
2. The applicant is directed to pay the costs, on a party and party scale, of the sixth respondent, save for the costs associated with the sixth respondent's further supplementary affidavit dated 19 January 2022, which are excluded from this costs order.
3. The respondent is entitled to the costs of counsel where so employed.

R.M. KEIGHTLEY
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 17 FEBRUARY 2023

APPEARANCES

Counsel for the applicant:	ADVOCATE DM ROBERTSON
Attorneys for the applicant:	STBB (SMITH TABATA BUCHANAN BOYES)
Counsel for the sixth respondents:	VALLY CHAGAN & ASSOCIATES
Attorneys for the sixth respondents:	ADVOCATE JP SPANGENBERG

Date of hearing:

06 AND 10 FEBRUARY 2023

Date of judgment:

17 FEBRUARY 2023