human settlements
Department:
Human Settlements
REPUBLIC OF SOUTH AFRICA

Western Cape Government
Human Settlements

2030 NDP

NOTABLE CASE

REFERENCE NUMBER:	230515-000353	**DATE:**	10 October 2023
MATTER HEARD BY:	**BY THE WESTERN CAPE RENTAL HOUSING TRIBUNAL**		

1. NATURE OF DISPUTE

UNILATERAL CHANGES TO AGREEMENT – Electricity Charges being excluded from the rental amount.

1.1 The lease was signed during June 2022. The lease consisted of the lease agreement and an annexure. The lease duration was from 10 January 2023 to 10 December 2023.

1.2 Various rental payment options were available. The total rent for the 10 months was R106 500, with a R16 000 deposit.

1.3 The dispute relates to the charges for electricity – and the following extracts from the signed lease and Annexure are key to understanding it:

1.4 The lease at 2.1.8 provides that "The/This Lease/Agreement" means this agreement, including all annexures, addendums and Schedules concluded from time to time." Both parties accepted and signed the lease and the annexure.

1.5 Clause 5.7 provides that "It is recorded that the electricity water and gas are included in the rental of the leased premises……The Lessee will cover the costs of the electricity exceeding R400,00 per person per month."

1.6 The Annexure makes two references to electricity – in one it states "Services include …. Electricity for external lights, internet, access control, and alarm system,"; further down it states "Costs excluded …electricity for living units (Each living unit has its own independent prepaid meter)"

2. PARTIES TO DISPUTE

COMPLAINANT (TENANT) – represented himself.
RESPONDENT (LANDLORD) – represented by an attorney.

3. COMPLAINANT'S SUBMISSION

3.1 The complainant, a father who signed a lease for accommodation for his son who studies at a university.

3.2 Soon after signature of the lease in June 2022, the agents noted an error on the contract and requested the Complainant to sign a correction, which he duly did and returned the corrected lease to them.

3.3 On the 17 January 2024 the son took occupation and on the very day received an email requesting an amendment to be signed by the Complainant. The agent claimed that a bona fide error to the lease agreement was made and it needed to bring it in line with Annexure A, stating electricity is excluded from the rental amounts, unilaterally wanted to change the lease and that is an unfair practice in terms of the Act.

3.4 The Agent attached an Addendum to the abovementioned email "that must be signed by the lessee" intended to replace a "to bring it in line with annexure A: and the proposed new clause is to read "It is recorded that the leased premises is supplied with a pre-paid electricity supply and meter. The Lessee shall, together with his co-lessees, be liable for all consumption of electricity in respect of the leased premises for the full duration of this lease".

3.5 The Complainant has declined to sign this proposed amendment and now approaches the Tribunal claiming this to be a unilateral change to the lease and thus an unfair practice in terms of the Act.

3.6 That he (and his son) had embarked on a serious search for university accommodation – researched what was available in a costly and difficult environment and were particularly attracted by the provision in clause 5.7 that electricity is included in the rental. In a world of ever- increasing electricity prices and loadshedding this particularly attractive term meant they chose this lodging – and were it not for that provision they would have continued their search. Now faced with the demand of the Respondent to agree to pay for all electricity – a change in the terms and conditions - they refused to sign and come to the Tribunal to seek support for their interpretation and a remedy for in fact having to pay for the electricity provided during the lease via a calculated division of the costs amongst the tenants in each living unit. The Complainant submits that should he be successful he should be awarded R400,00 x the 11 months of the lease as he submits that what he should have received electricity as part of the paid rental.

4. RESPONDENT'S SUBMISSION

The Respondent raised 2 points *in limine*:

4.1 Firstly, since the lease contract provides for a dispute resolution process, that process should be followed.

The aggrieved person invites the other person to negotiation and if negotiation was unsuccessful the matter must be referred to mediation at the Rental Tribunal of SA or the Arbitration Foundation of Southern Africa, and in the absence of success the dispute "shall be submitted to arbitration for final resolution...by an Arbitrator … appointed by the Foundation." Accordingly, the attorney submitted that this Tribunal is barred from hearing the dispute and it must be referred to the designated arbitration process per the lease.

4.2 Secondly, they objected to the Tribunal having the necessary jurisdiction – this submission was raised for the first time during the hearing and neither the Tribunal nor the Complainant had advance notice of it. The Respondent drew attention to the very recent SCA decision of Stay at South Point Properties (Pty) Ltd v Mqulwana and others (UCT intervening as Amicus Curiae) (2023)JOL59868(SCA). In this matter a full bench of the SCA held that students living in student accommodation during university term time could not rely on the protections of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 to oppose evictions from their student residence. The Respondent's attorney argued before this Tribunal that similarly the student tenant living in these premises should not be able to rely on the protections offered in the Act. The SCA in refusing to grant the students in that matter PIE protection held that such protection would be available to avoid eviction from "their home" when no alternative home would be available. He argued that in this matter similarly the Act was protecting students in the occupation of something that isn't their home – but likewise to the SCA matter – only a temporary place occupied during term student time. With respect the Respondent's representative has misconstrued the Act – while the SCA reasoning depends on an understanding of the potential evictees "home" which is central to the PIE Act, this Act ((the RHA) doesn't refer to a "home" at any stage but concerns a "dwelling" the definition of which in the Act noticeably does not include a "home" and significantly for our purposes incudes a "hostel" which in the ordinary course would be the residential place of scholars, students etc whose protection is excluded from PIE by the SCA case – but in these circumstances in the view of the Tribunal the landlords and tenant student occupants of a dwelling such as a hostel, or the premises leased in this matter, would still be subject to the provisions of the Act. Accordingly, the *in limine* objection by the Respondent based on the argument that the Act does not apply in this student environment is dismissed.

4.3 The Respondent submits that prima facie there is a difference on the one hand between the clause in the lease referred to in paragraph 5.2 above which clearly provides that electricity for the "leased premises" (i.e. the room) and is included in the rental – with the proviso that costs in excess of R400,00 per month are for the lessee; and on the other hand, with a clause in the annexure stating that, amongst the costs excluded are "electricity for living units." Worried by this difference – and

facing enquiries from the newly arrived tenants the Respondent sent out the email referred to in paragraph 4.8 above – which most tenants signed, but the Complainant and another refused. It is noted that the amendment too is in respect of costs for the "leased premises" (i.e. the room).

5. RULING OF THE RENTAL HOUSING TRIBUNAL

5.1 The failure of the Respondent to properly negotiate in writing to seek to amend the lease – but instead seeking to impose an amendment – is an unfair practice in terms of the Rental Housing Act of 1999;

5.2 The failure by the Respondent to devise an accounting system to charge each tenant for consumption of electricity constitutes an unfair practice;

5.3 The overall approach to remedying the contractual problems discovered by the Respondent constitute an unfair practice in that it failed to properly consider the Complainant's interests and rights;

5.4 The Complainant has failed to prove the actual cost incurred in his consumption of electricity in his leased premises and the Tribunal accordingly dismisses that claim for damages.

6. REASONS FOR THE DECISION

A. **Points *in limine* were dismissed**.

1.On the Jurisdiction aspect:

"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." – the relevant paragraphs in the lease state that – "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." (see M and others v 2012(3)531 (CC) - In the circumstances the submission that it has to go to arbitration is dismissed.

2. On the aspect of Students residences being excluded from the Rental Housing Act – the attorney argued that in this matter the Act was protecting students in the occupation of something that is not their home – but likewise to the SCA matter – only a temporary place occupied during term student time. With respect, the Respondent's representative has misconstrued the Act – while the SCA reasoning depends on an understanding of the potential evictees "home" which is central to the PIE Act, this Act (the RHA) doesn't refer to a "home" at any stage but concerns a "dwelling" the definition of which in the Act noticeably does not include a "home" and significantly for our purposes includes a "hostel" which in the ordinary course would be the residential place of scholars, students etc whose protection is excluded from PIE by the SCA case – but in these circumstances in the view of the Tribunal the landlords and tenant student occupants of a dwelling such as a hostel, or the premises leased in this matter, would still be subject to the provisions of the Act. Accordingly, the *in limine* objection by the Respondent based on the argument that the Act does not apply in this student environment is dismissed.

B. **The complaint – UNILATERAL CHANGES TO AGREEMENT. The Tribunal noted the following**:

1. The original clause is a clear and unequivocal statement that electricity is included in the rent,

except if it exceeds R400 per person per month;

2. Having discovered a conflict between the lease provision and the annexure provision the Respondent doesn't refer it to the Complainant for discussion and negotiation (as was done with the earlier amendment) — it rather insists on amending the lease provision and goes further in their later correspondence to demand that if the Complainant doesn't agree the lessor will consider "the agreement invalid which will demand from the occupant to vacate the premises within a reasonable time." It should be acknowledged that at the hearing the Respondent advised that it had no intention of seeking that the Complainant's son vacate the premises.
3. The Annexure provides that costs that are excluded are in respect of electricity in the "living units" – and there are 5 living units each with its own particular number of separate bedrooms – the Complainant's son occupied a living unit which had 9 bedrooms and according to the evidence that living unit has one – not nine – electricity meters thus making it impossible for each person's electricity consumption to be accurately measured. In practice the Respondent testified that students in each unit decided amongst themselves how they would contribute their share to the meter so as to keep the unit supplied with electricity;
4. The problem facing the Respondent in this regard is that inasmuch it thought it was bringing the annexure and lease provisions in line with one another, the lease provides that the "premises" are room B14 Die Weides on the front page and at clause 1.7 it is the specific room again which is referred to as the premises. Accordingly, the one meter in each unit (not room) cannot serve the purpose intended by the proposed amendment;
5. It should also be noted that the proposed amendment – intended to bring it in line with the annexure provision – states that the Complainant will be liable for "all consumption of electricity in respect of the leased premises for the full duration of the lease." The annexure however records that certain electricity services are included in the rent – and perhaps the way the tenants divide their payments (not submitted in evidence) – both mean that the Tenant is not liable for "all consumption."
6. The Complainant – whatever the meaning of the proposed amendment - refused to sign it – and submits that he isn't bound by the amendment and should therefore receive electricity free of charge for his room to the value of R400,00 per month;
7. The Respondent however submits that the resolution of this complainant, citing contractual provisions and precedent is that in these circumstances the Complainant is bound by the proposed amendment and ought to (as he has in fact done) pay for the electricity as proposed by the amendment.
8. In M's case the Constitutional Court, considering the Rental Housing Act, held at paragraph 4 and then 52 and following:

   "(4) 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.

   (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.

   [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."

9. **This Constitutional Court decision will apply equally to a complaint about any practice based on a clause in a lease** – and in light of the discussion of the clauses relating to electricity in the lease in paragraph 8 above the Tribunal is of the view that **our approach has to be that of the Constitutional Court rather than relying only on "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 light of both parties' rights and interests."** Thus, in this matter the confused contractual position and the last-minute amendment proposed by the Respondent (even if contractually sound) is in the view of the Tribunal an unfair practice in terms of the Act.
10. The Complainant proposed that if the Tribunal rules in his favour the remedy ought to be that the Respondent reimburse him the amount spent on electricity which he argued would be the R400,00 per month as provided in the lease for the 11 months of occupancy. This is the clause he retains and which the Respondent wished to amend/rectify by way of what the Tribunal considers an unfair practice. The Tribunal has considered this but finds that he (or his son) would be entitled to their actual expenditure on electricity for the period of their occupancy – that would have been the value of the electricity up to a maximum of R400,00 per month. There however is no evidence before the Tribunal in this regard and accordingly even though they have spent on electricity during the year in view of the absence of proof of the amounts involved the Tribunal is not able to make any monetary award.