Conceptualising an unfair practice regime in landlord-tenant law

Maphango v Aengus Lifestyle Properties
[2012] ZACC 2; 2012 5 BCLR 449 (CC)

1 Introduction

In *Maphango v Aengus Lifestyle Properties (Pty) Ltd*[1] Cameron J formulated the 'narrow question' in the case as 'when a landlord may cancel a lease and evict its tenants'.[2]

The Court's phraseology of the narrow question indicates the two-stage process in landlord-tenant evictions, namely, that the tenants' legal right to occupy the premises must first be terminated before the landlord can institute eviction proceedings. The majority judgment is the first of its kind[3] to engage with the first stage of the process and purposively shift the focus to the legitimacy of the ground for termination of the lease. What distinguishes the *Maphango* judgment from the previous landlord-tenant eviction cases is that the majority decided that the Rental Housing Act 50 of 1999 can be interpreted to invalidate the landlord's ground or reason for termination of the lease.

Consequently, the Court provided a mechanism[4] in terms of which tenants can enjoy substantive tenure protection,[5] since they can continue to lawfully

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[1] [2012] ZACC 2 (*Maphango*).
[2] *Id* para 1.
[3] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) (*Blue Moonlight*); *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (*Shulana Court*); and *Ndlovu v Ngcobo / Bekker v Jika* 2003 1 SA 113 (SCA) the courts dealt with the second stage/question, namely whether it would be just and equitable to evict socio-economically weak tenants and in effect render them homeless. See also Maass *Tenure security in urban rental housing* PhD thesis US (Stellenbosch) (2010) 218 where it is argued that the Rental Housing Act had an insignificant impact on landlord-tenant evictions prior to the *Maphango* decision.
[4] The preamble of the Rental Housing Act states that there is a need to strike a balance between the rights of landlords and tenants and to create mechanisms that would protect both parties against unfair practices and exploitation. It also states that dispute mechanisms should be developed to solve disputes in a quick and affordable fashion.
[5] See Maass and Van der Walt 'The case in favour of substantive tenure reform in the landlord-

occupy the landlord's premises subsequent to the 'expiration' of the lease. However, this form of tenure protection does not apply in a general, automatic fashion. Tenants will only succeed with a challenge against termination of the lease if they can prove that the ground (or reason) for the termination constituted an unfair practice, which is widely defined as a practice that unreasonably prejudices the tenants' rights *or interests*. Presumably, the unfair practice provision can therefore only afford protection against unlawful occupation (and consequent eviction) if the tenant lodges a complaint with the Rental Housing Tribunal and proves a link between the ground for termination of the lease and the harsh effect that this specific ground for termination would have on the tenant.

The Tribunal has to determine whether the termination of the lease should be invalidated or confirmed; and the Tribunal can set aside the termination of the lease if it finds in favour of the tenant. The implication is that the Tribunals are empowered to nullify contractually agreed upon termination clauses, overturn termination of leases and reinstate tenants as lawful occupiers. This development highlights a substantial departure from the common law of lease in terms of which either party can unilaterally end a periodic tenancy by notice to quit. In terms of the common law, the reason for cancellation cannot be scrutinised by any other party, including the courts. Cameron J's interpretation of the Act also ensures that termination clauses may not be enforced if it has an unfair or unreasonable impact on the tenant's rights or interests, which gives effect to the public policy principle. Even though Tribunals now have the power to override contractual provisions, which qualifies the *pacta sunt servanda* principle, one should recall that all landlord-tenant disputes must adhere to the Rental Housing Act and, in terms of the Court's interpretation of the Act, it explicitly allows Tribunals to invalidate termination clauses that have an unfair and unreasonable result. The purpose of this statutory development is to protect tenants and in some instances this purpose will be viewed as more important than notions such as *pacta sunt servanda*, which is in line with the transformative purpose of the Constitution.[6]

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tenant framework: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele; City of Johannesburg Metropolitan Municipality v Blue Moonlight*' (2011) *SALJ* 436 for the distinction between substantive and procedural protection.

[6]This approach is also in line with Van der Walt's subsidiarity argument where he argues that a litigant must first rely on legislation that was promulgated with the aim to give effect to a constitutional right if that person wishes to enforce that right: Van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) *CCR* 77 at 100. This principle was developed in *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52. In such a case the litigant may not rely directly on the constitutional provision, except where the constitutional validity of the legislation is challenged: Van der Walt (2008) *CCR* 101, referring to *South African National Defence Union v Minister of Defence* para 52; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign* as Amici Curiae) 2006 2 SA 311 (CC) para 437; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 248; *Engelbrecht v Road Accident Fund* 2007 6 SA 96 (CC) para 15. In this case the Rental Housing Act was promulgated to give effect to s 26 of the Constitution and the Court interpreted the Act specifically to fulfil the purpose of s 26 in the landlord-tenant framework.

Klare describes 'transformative constitutionalism' as 'a long-term project of constitutional enactment, interpretation and enforcement … to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.[7] The notion of transformative constitutionalism entails that social transformation should take place within the framework of the Constitution, and the Bill of Rights has a significant role to play in this project since it allows individuals to challenge hierarchical exercises of power that undermine constitutional values.[8] The Court's interpretation of the Rental Housing Act in terms of which Tribunals are empowered to provide enhanced tenure protection for struggling tenants in cases where the ground for termination of the lease would cause unreasonable hardship to the tenants is a welcome statutory reform in the South African landlord-tenant legal framework. The Court re-evaluated and transformed the hitherto uncontested right of landlords to unilaterally end periodic leases in order to give effect to the constitutional values of fairness, equality and reasonableness. Nevertheless, it is uncertain what extent the Court's decision will impact on struggling tenants' security of tenure since the unfair practice provision in the Act is not aimed at strengthening tenure rights in general.

2 Factual background

The applicants occupied the respondent's property on the basis of periodic leases, although the terms of the leases varied.[9] The respondent (a property investment company) upgraded the property and intended to increase the existing rent[10] since the building was running at a loss.[11] The leases made provision for stipulated annual rent increases[12] and in order to increase the rent beyond those percentages, the landlord cancelled the leases by serving notices to vacate, but included in the termination letters that the tenants had the option to continue occupying the premises, provided that they agreed to the increased rent.[13] The applicants refused to accept the new leases, remained on the premises and

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[7] Klare 'Legal culture and transformative constitutionalism' (1998) *SAJHR* 146 at 150.
[8] Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 34.
[9] *Maphango* paras 6-7. At para 7 Cameron J pointed out that the leases were initially fixed-term tenancies. Once the fixed-term tenancies expired, the leases continued as periodic tenancies on the same terms and conditions as the initial leases. Consequently, either landlord or tenant could end the periodic tenancy by serving a notice to quit to the other party. See also Cooper *Landlord and tenant* (1994) (2nd ed) 61-65. See *Maphango* paras 74-78 for detail regarding the different leases.
[10] *Maphango* para 2. See also para 11.
[11] *Id* para 78.
[12] The Ithemba lease was different in the sense that the landlord could apply to the 'competent authority' to increase the rent beyond the annual increase: *id* paras 8 and 76. Nevertheless, the leases were generally aimed at keeping the rents at a fair level and allowed rent increases.
[13] *Id* paras 12, 16 and 79. The increased rent was more than double the rent the tenants were paying at the time when they received the notices.

lodged a complaint with the Gauteng Rental Housing Tribunal (Tribunal).[14] The matter led to arbitration,[15] but before it could be heard, the landlord instituted eviction proceedings in the High Court. The applicants withdrew their complaint with the Rental Housing Tribunal to concentrate on the eviction application.[16]

From a purely contract-based perspective regarding landlord-tenant negotiations, the High Court[17] found it inconceivable that the landlord would include in the rental contract a right to terminate the lease by notice if that right could not be used for exactly that purpose, namely, to terminate the lease and negotiate a new lease with different terms and conditions.[18] In the Supreme Court of Appeal, Brand JA held that a tenant does not have security of tenure post-termination of the lease. The tenant's right to occupy the premises is regulated by the terms of the lease and households' constitutional right of access to adequate housing[19] binds only the state, not private parties.[20]

In the Constitutional Court, the applicants' main argument was that the landlord's sole purpose for terminating the leases was to increase the rents beyond the contractually agreed percentage and the effect of the termination (and the envisioned rent increase) was unfair. Termination of the leases circumvented the tenants' contract and tenure rights.[21] The landlord argued that the Rental Housing Act does not empower the Tribunal to scrutinise a landlord's ground or reason for cancellation of a lease, nor may it determine whether the rent is reasonable.[22] Cameron J formulated the main question as 'whether the landlord was lawfully entitled to exercise the bare power of termination in the lease solely to secure higher rents'[23] and referred to the uncontested common law position

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[14] *Id* paras 13 and 80. See para 80 for details regarding the complaint; it basically accused the landlord of intimidation, threats of eviction and unfair rent charges. It is not clear from the judgment whether the tenants complained that the landlord's actions constituted an unfair practice and therefore contravened s 4(5)(c) of the Rental Housing Act.

[15] *Maphango* paras 13-14 and 81-85.

[16] *Id* paras 17 and 85.

[17] *Aengus Lifestyle Properties (Pty) Ltd v Maphango* Case No 09/22346, 2010-05-07 unreported.

[18] *Maphango* para 20.

[19] Section 26(1) of the Constitution.

[20] *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) para 28; *Maphango* para 21. See also *Maphango* paras 22 and 91-98 for details regarding the other arguments that were raised in the SCA, namely that the lease contained a tacit term and that termination of the lease was contrary to public policy. The Court specifically stated that reasonableness and fairness are not freestanding principles that can render a contract unfair. The Constitutional Court's interpretation of the unfair practice provision in *Maphango*, which will be discussed in later sections, now includes the values of reasonableness and fairness in lease contracts, at least to the extent that the grounds for termination of a lease may not have an unreasonable (and unfair) result.

[21] *Maphango* para 25. In terms of the Ithemba lease, the landlord should have approached the 'competent authority' for leave to the Tribunal that can allow a rent higher than that permitted by the lease.

[22] *Id* para 28. The landlord submitted that it had an unqualified right to terminate the lease in terms of the termination clause.

[23] *Id* para 29.

that a landlord may unilaterally terminate a periodic tenancy by serving a notice of termination on the tenant. In terms of the common law, neither the tenant nor any outside party has the authority to hinder this decision or scrutinise the landlord's reason for termination.[24] This common law right of the landlord, which was also included in the lease, was subsequently re-evaluated by the Constitutional Court in light of the extent of tenure protection that pre-1994 rent control laws afforded tenants, which consequently led to a new, transformative interpretation of the Rental Housing Act.

3 Tenure protection in landlord-tenant law

The Court referred to pre-1994 rent control legislation[25] and the far-reaching effect that these laws had on private landlords in the sense that they could not merely cancel residential leases at will, as, essentially, the aim of these impositions was to protect tenants during acute housing shortages.[26] Even though Cameron J did not refer to the term 'security of tenure', the aim of the Rents Acts and the final Rent Control Act 80 of 1976 was to provide tenants with secure tenure rights by converting the 'terminated' contractual lease into a statutory periodic tenancy.[27] The statutory protection that these laws afforded tenants was subsequently compared to the post-1994 constitutional dispensation and the transformative purpose of the Constitution and the Rental Housing Act. The Court therefore used the extent of tenure protection in the previous rent control regime as a measure to determine whether and to what length the Rental Housing Act can and should provide protection of tenure for tenants in the constitutional dispensation. Interestingly, the effect of the Court's interpretation of the Rental Housing Act, which will be analysed in the next section, is similar to one of the general aims of rent control, which is to enable tenants to continue occupying the leased premises subsequent to the expiration of the lease.

Rent control as both a security of tenure and rent restriction measure has intervened in private landlord-tenant relationships in a number of jurisdictions, including pre-1994 South Africa,[28] England,[29] New York City[30] and Germany.[31] In all

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[24] *Ibid*. Cameron J referred to Voet 19.2.9.

[25] The Court referred to the Tenants Protection (Temporary) Act 7 of 1920 and the Rents Act 13 of 1920. See Maass (n 3) 2.3 for a discussion of all the South African rent control laws.

[26] *Maphango* paras 29-31.

[27] See Maass (n 3) at 2.3 for a doctrinal analysis of the statutory tenancy.

[28] See *ibid* for a discussion of rent control during the pre-1994 era. The South African private landlord-tenant regime was regulated for more than seventy years and provided substantive tenure protection for tenants during acute housing shortages.

[29] See *id* 4.5 for a historical analysis of rent control in England and 4.6 for a discussion of the current laws that regulate landlord-tenant relationships. England has generally abolished a strict rent control regime, but it still makes provision for tenure protection in its social sectors.

[30] See *id* 6.4 for an analysis of rent regulation laws in New York City. The Rent Control Law and Rent Stabilisation Law regulates privately owned housing in (and outside) New York City. These laws are

of these jurisdictions the policy-makers and legislatures decided to regulate the private landlord-tenant relationship by enacting rent control laws to provide substantive tenure protection for struggling tenants. These interventions are usually justifiable in light of housing shortages. Regardless of the domination of ownership over other interests in land and its resistance against statutory intervention, 'governments routinely use (and have always used) legislation to amend or regulate the hierarchical domination of property ownership in response to social, economic and political circumstances and requirements. One significant example of such intervention is the embodiment of anti-eviction policies in legislation'.[32] In the landlord-tenant framework, these interventions usually take the form of rent control but they can take other, more implicit forms as well. Rent control is mostly applied in a general fashion, providing extensive tenure protection for either all or a majority group of tenants. These laws are usually also initiated by clear underlying policies. Rent control laws generally consist of a number of elements, namely, restricting rent increases, placing maintenance responsibilities on landlords and providing security of tenure for tenants.[33] The phrase 'security of tenure' in the landlord-tenant framework is defined as a form of protection against eviction, but in effect it is aimed at suspending (or preventing) the expiration of the tenant's legal right to occupy the premises. By means of these statutory interventions, tenants are allowed to continue occupying the landlord's property beyond expiration of the contractual lease. Rent control laws generally override the common law rights of landowners to evict tenants upon expiration of the lease and the effect is therefore also a restriction on landowner's property rights.[34] The prospect of substantive tenure protection for vulnerable occupiers might make rent control appealing for the South African policy-makers and legislature, especially since the imposition and limitation of rights would rest on private landowners.

However, the criticism against the strict imposition of rent control is unavoidable. A number of authors have convincingly argued that rent control statutes are futile if not combined with rent restrictions and maintenance responsibilities of the landlord.[35] Economists argue that by interfering with landlords' profits, rent control

currently still in operation. Similar to the rent control laws in pre-1994 South Africa, England and Germany, the aim of these laws is to provide tenure protection for tenants, although it generally also regulates the maintenance responsibilities of landlords and places restrictions on rent increases.

[31] German landlord-tenant law was regulated extensively for the greatest part of the 20th century: Maass (n 3) 7.2. The German Civil Code (*Bürgerliches Gesetzbuch (BGB)*) currently restricts rents and ensures security of tenure for all tenants, which is considered an integral part of landlord-tenant law without the strict imposition of rent control measures. German landlord-tenant law is discussed in later paragraphs of this note.

[32] Van der Walt *Property in the margins* (2010) 78.

[33] Ellickson 'Rent control: A comment on Olsen' (1991) *Chicago-Kent LR* 949; Olsen 'Is rent control good social policy?' (1991) *Chicago-Kent LR* 942-943; Miron 'Security of tenure, costly tenants and rent regulation' (1990) *Urban Studies* 167.

[34] See in general Maass (n 3) at 2.3.

[35] Ellickson (n 33) 949; Olsen (n 33) 942-943; Miron (n 33) 167.

will discourage new construction, cause under-maintenance and lead to more dilapidated buildings in areas where there are extant housing shortages. Based on this consideration, property lawyers and economists have argued that rent control is counter-intuitive since it causes greater housing shortages.[36] The introduction of an entire rent control regime would therefore require multifaceted statutes, regulating all the elements of private landlord-tenant relationships in a precise and calculated manner, which necessitates extensive research before this type of intervention can be imposed and continuous state administration. It is therefore not surprising that rent control was phased out in South Africa (and a number of other jurisdictions) during the 1990s,[37] but the question that the Constitutional Court indirectly raised was: What form of tenure protection replaced the previous statutory tenancy regime? And, more importantly, is the new level of tenure protection for struggling previously disadvantaged tenants in line with the spirit, purport and objects of the Constitution?[38]

Cameron J elegantly characterised lease as a valid housing option that is subject to constitutional scrutiny.[39] Even though the Court acknowledged that the primary duty to provide access to adequate housing lies with the state, the Court explained the role of private landlords in the provision of housing with reference to two mechanisms. In the first instance, private landlords should refrain from action that would impair the right of access to adequate housing. It means that the landowner's constitutional right not to be deprived of property in an arbitrary manner must be understood in consideration of the occupier's constitutional right not to be evicted arbitrarily.[40] This negative obligation was identified in *Government of the*

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[36] Epstein 'Rent control and the theory of efficient regulation' (1988) *Brooklyn LR* 753, 767 and 769. Epstein argues that rent control has an unfair effect in the sense that unwilling landlords must provide some subsidy to tenants: 755. Olsen (n 33) 935-938 refers to this wealth transfer as an 'implicit tax' on landlords. This was also highlighted in *Maphango* paras 34-36.

[37] See specifically Maas (n 3) 2.4.

[38] See specifically Maass and Van der Walt (n 5) 436 where it is argued that some tenants' tenure rights should be improved in order to give effect to ss 26 and 25(6) of the Constitution in the landlord-tenant framework. Tenure reform was introduced by s 25(6) (read with s 25(9)) to secure rights on land where these rights were previously insecure as a result of past racially discriminatory laws. Section 25(6) states that any person whose tenure is legally insecure as a result of past racially discriminatory laws is entitled to tenure that is legally secure. Section 25(6) must be read with s 25(9), which states that parliament must enact legislation in order to give effect to the constitutional commitment in s 25(6). This section's application could seem quite restricted due to the fact that only insecure tenure of land, which is insecure because of past discriminatory laws, may be reformed under this section. However, this section applies to the majority of black persons who currently occupy land with insecure tenure, because it has been accepted that these households' insecure tenure is either a direct or indirect consequence of apartheid land laws. It is irrelevant whether their insecure tenure is a direct or indirect consequence of apartheid laws: Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 291; Budlender 'The constitutional protection of property rights' in Budlender, Latsky and Roux (eds) *Juta's new land law* (1998) 1.

[39] *Maphango* para 31.

[40] *Id* paras 32 and 33. The right not to be evicted in an arbitrary manner is provided for in s 26(3) of

Republic of South Africa v Grootboom[41] and was developed in numerous decisions that followed.[42] The second mechanism was defined as a measure taken by the state itself, which in this case referred to the Rental Housing Act.[43] The Court mentioned the general role of landlord-tenant law in the provision of housing; the need to strike a balance between the rights of landlords and tenants; and the counter-intuitive effects of the previous rent control regime.[44] One of the aims of the Rental Housing Act is to transform the rental housing market to such an extent that it would meet the rental housing demands of previously disadvantaged and financially weak households.[45]

4 Transformative statutory interpretation

The essence of Cameron J's judgment is centred on the tenants' initial complaint to the Rental Housing Tribunal[46] that the landlord's action in terminating the lease constituted an 'unfair practice'. The majority held that this complaint was also the essence of the tenants' submission in the Constitutional Court and courts of previous instance.[47] Section 4(5)(c) of the Act states that the landlord has the right

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the Constitution, which ensures that the courts must consider all the relevant circumstances before an eviction order may be granted.

[41] 2001 1 SA 46 (CC) para 33.

[42] See specifically *Gundwana v Steko Development* 2011 3 SA 608 (CC) and *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC).

[43] *Maphango* para 34.

[44] *Id* paras 34-36. Rent control is counter-intuitive since it causes greater housing shortages. It discourages investment in the rental housing market, which decreases the availability of housing stock. One should also note that the South African rent control laws only applied to white tenants and could therefore not have provided any protection for previously disadvantaged tenants in the new constitutional dispensation, except if the application of the Rent Control Act were amended specifically with that aim.

[45] *Id* para 36. See Maass (n 3) 2.3 for a discussion of the pre-1994 landlord-tenant regime and specifically the weak tenure rights that were awarded to the previously disadvantaged.

[46] Cameron J accepted that the tenants were generally forced to withdraw their complaint with the Tribunal before the dispute could go for arbitration because they 'lacked resources and energy' to litigate in both the arbitration matter and the eviction application. The effect of withdrawal did not amount to an abandonment of their right to fight termination of the lease on the basis that it constituted an unfair practice: *Maphango* paras 45-46. See paras 139-142 for the minority's interpretation regarding the applicants' decision to withdraw the complaint before arbitration. In essence, Zondo AJ was of the opinion that the circumstances could not have placed that much pressure on the applicants to withdraw their complaint.

[47] *Id* para 46. The minority disagreed and found that the tenants contended that termination of the lease amounted to an infringement of their constitutional right of access to adequate housing: paras 103, 110 and 111. This argument is quite different from the one accepted by the majority. At para 104 Zondo AJ for the minority held that if the tenants based their case on the argument that termination of the lease constituted an unfair practice, 'they would have had to state the grounds upon which they contended that the termination was unfair'. They would also have had to show that these grounds were included in the lease. These arguments should have been included in their affidavits, which would have given the respondent an opportunity to address those grounds in its

to 'terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease'. Section 13(1) empowers any tenant or landlord to lodge a complaint with the Rental Housing Tribunal concerning an unfair practice, which is defined as 'a practice unreasonably prejudicing the rights or interests of a tenant or a landlord'.[48] The Tribunal can refer unfair practice disputes to either mediation or a hearing and make a ruling to terminate any unfair practice.[49] The Tribunal's ruling is deemed to be an order of the Magistrate's Court and enforceable in terms of the Magistrates' Courts Act.[50] It is important to note that the Tribunal cannot hear applications for evictions.[51]

The critical question before the Court was whether termination of the lease could have amounted to an unfair practice.[52] The Court held that section 4(5)(c) of the Act contains two requirements that a landlord must satisfy if he wishes to terminate the lease, namely that there must be a ground for termination in the lease and the ground (or reason) for termination may not amount to an unfair practice.[53] In light of the general scheme of the Act, the Court established that a Tribunal's determination of an unfair practice would override the contractual agreement between the parties.[54]

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replying affidavit. At para 111 Zondo AJ stated that it would be unfair for the Court to decide whether termination of the lease was valid since this argument was not established by the facts, which denied the respondent an opportunity to respond to it in their papers. The minority considered the applicants' contention that the effect of termination amounted to an infringement of their s 26 right: see paras 118-120. Zondo AJ decided that the effect of termination merely cancelled the applicants' legal entitlement to occupy the premises. Termination in itself did not deprive the tenants of access to housing; it merely changed the nature of their occupation into being unlawful. An eviction order would have impacted on their s 26 rights.

[48]Section 1 of the Act was amended by the Rental Housing Amendment Act 43 of 2007 to include 'any act or omission by a landlord or tenant in contravention of the Act' as an unfair practice. In terms of the Gauteng Unfair Practices Regulations, neither the landlord nor the tenant may 'engage in oppressive or unreasonable conduct' and the landlord may not interfere with or limit the rights of the tenant: Reg 14(1) and 14(2). See also *Maphango* paras 40-41.

[49]Section 13(4)(c). The Tribunal can also force the guilty party to comply with the Act or it can refer the matter to further investigation: ss 13(4)(a) and 13(4)(b). In terms of s 13(5), the Tribunal can make a ruling that concerns the rent amount, but it must take into consideration the rental housing market and the landlord's investment-backed expectation. These powers of the Tribunal and other factors that must be taken into consideration when determining the outcome of unfair practice disputes are mentioned at paras 42-44 of the majority judgment.

[50]Act 32 of 1944. *Maphango* para 44.

[51]Section 13(4) was included by the Rental Housing Amendment Act 43 of 2007.

[52]*Maphango* para 47. It is important to note that Cameron J formulated the question as follows: 'whether the termination was capable of constituting an unfair practice'. The Court did not specifically ask whether the *ground* for termination amounted to an unfair practice, which might imply be that the ground for termination is not that significant in determining whether termination of the lease amounted to an unfair practice.

[53]*Id* para 50.

[54]*Id* para 51.

Cameron J's interpretation of the Act brought about a substantial departure from the common law. In terms of the common law, a periodic tenancy automatically terminates once either party has served a notice to quit.[55] Once this decision has been made, the other party is not at liberty to oppose termination. The landlord's reasons for ending the lease cannot be scrutinised by either the tenant or any other institution.[56] The result of termination has recently rendered the occupation of socio-economically weak tenants unlawful, which has given rise to complicated eviction proceedings.[57] In all of these cases, the courts decided to provide some procedural protection for the tenants by suspending the eviction orders and forcing the state to provide alternative accommodation.[58] Procedural protection is different from substantive protection in the sense that procedural protection protects tenants against arbitrary evictions; this form of protection only becomes relevant once the tenancy has come to an end. Substantive tenure protection entails that tenants are protected against termination of their lawful occupation by either precluding or postponing termination of the lease.[59] A key distinction between the previous landlord-tenant disputes and the majority judgment of Cameron J is that in the previous cases the courts had to decide how and to what extent it could provide some procedural relief for the unlawful tenants against being rendered homeless, since the nature of their occupation was already locked into being unlawful. In light of those judgements it might seem that the courts are generally not in the position to overturn the nature of the tenants' occupation once it has become unlawful, but this observation is arguably premature since the occupiers never argued for the reinstatement of their previous lawful occupation.

The Court defined 'unfair practice' as a practice that the MEC prescribes as 'unreasonably prejudicing the rights or interests of a tenant or landlord' and highlighted the distinction between 'interests' and 'rights' to include more than legal rights under the umbrella of tenants' welfare that could be affected by termination of the lease.[60] These 'interests' include all aspects that could possibly have a negative impact on the tenants' well-being, including her security.[61] The tenant's interests should likely include her home interest, security of tenure interest and all other socio-economic and personal interests that the tenant has established in the specific community. If the ground for termination of the lease, as provided for in the contract, contravenes any of these interests, the tenant should be able to argue that termination of the tenancy constitutes an unfair practice.[62] If the Tribunal is in

[55]Cooper (n 9) 61-65.
[56]See specifically Maass and Van der Walt (n 5) 446.
[57]See for instance *Shulana Court*; *Blue Moonlight*.
[58]*Shulana Court* paras 10-18; *Blue Moonlight* paras 42-53.
[59]Maass and Van der Walt (n 5) 445.
[60]*Maphango* para 52.
[61]*Ibid*.
[62]*Id* para 53.

agreement, termination of the lease would be set aside and the tenant would be able to continue occupying the premises as a lawful occupier.[63]

In *Maphango*, the landlord's ground (reason) for termination of the lease was straightforward – the landlord wanted to increase the rent beyond the escalation clauses. Consequently, the landlord terminated the lease in order to make provision for new leases with higher rents. One could argue that a decision of this kind, by itself, would usually not be uncommon, nor would it necessarily have an unfair impact on the tenant since (in most cases) the tenant would have the option to either accept the new lease with the higher rent or find alternative accommodation. In *Maphango*, the reason for termination of the lease did constitute an unfair practice because the tenants could neither agree to the higher rent, nor could they relocate to suitable alternative accommodation.[64] Arguably, there was therefore a link between the landlord's reason for termination of the lease and prejudice to the tenants' interests. In addition, the landlord's reason for cancelling the lease was irrefutably to circumvent the escalation clauses. These provisions were initially included in the lease to protect the tenants against unreasonable rent increases and the landlord evaded their purpose through cancellation of the leases, which prejudiced the tenants' housing and security interests.

At this stage it is not clear whether there has to be such a direct relationship between the ground for termination of the lease and prejudice to the tenant's interests in order for the tenant to argue against expiration of the lease. If termination of the lease would undoubtedly cause a significant hardship to the tenant (or her family) she might succeed with a challenge of unreasonable prejudice – without having to prove such a direct link between the ground for expiration and the effect. In such a case the court would likely take into account the landlord's reason for termination; the impact of termination (taking into consideration the probable hardship that the tenant would suffer); and weigh the interests of both parties by means of a proportionality exercise.

German landlord-tenant law is noteworthy in this regard. The German Civil Code[65] restricts rents[66] and ensures security of tenure for all tenants, but these measures are not 'traditional' rent control interventions. The Civil Code generally requires that the landlord should rely on a compelling reason[67] in order to terminate the lease. In addition, a lease for an indefinite period of time may only

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[63] *Id* para 68.

[64] *Id* para 89. It was indicated that the tenants were unable to find affordable alternative accommodation.

[65] *Bürgerliches Gesetzbuch (BGB)*. Landlord-tenant law is regulated in Book 2, Title 5 of the *BGB*. See *Bundesministerium der Justiz* 2012 http://www.gesetze-im-internet.de for all English *BGB* translations.

[66] Even though rents are unregulated, landlords can only increase the rents by reference to rents of other leases in the vicinity during the preceding three years: Kleinman *Housing, welfare and the state in Europe: A comparative analysis of Britain, France and Germany* (1996) 105.

[67] A compelling reason also includes the case where the lessee has defaulted on payment of rent: *BGB* § 543. The list of compelling reasons in *BGB* § 543 is not exclusive.

be terminated by the landlord by giving notice if she has a justified interest[68] in terminating the lease.[69] The tenant may object to the notice of termination and require continuation of the lease if expiration of the lease would cause a hardship to the tenant that is not justifiable, even when taking into account the justified interest of the landlord.[70] Hardship suffered by the tenant includes the scenario where she is unable to find suitable alternative accommodation on reasonable terms.[71] If the tenant's objection is successful the lease continues for an appropriate period, taking into account all relevant circumstances. The terms of the original contract would remain in force, except where the landlord cannot be reasonably expected to continue with the lease under the previous terms. In such a case the terms may have to be amended.[72]

Arguably, the Constitutional Court's wide interpretation of an 'unfair practice' (in *Maphango*) as a practice that unreasonably prejudices tenants' interests is similar to the German hardship provision, which aims to protect tenants against unjustifiable hardship. The meaning of *unreasonable prejudice* is similar to *unjustifiable hardship*. The German hardship provision allows tenants to fight termination of the lease on the basis that the effect of termination would cause an unwarrantable hardship, which could relate to the tenants' personal or socio-economic circumstances. The unfair practice provision in the South African Rental Housing Act now possibly makes provision for a similar type of statutory protection since the tenant can oppose the landlord's ground for termination of the lease if it unreasonably prejudices the tenant's interests. The only difference is that the German hardship provision does not require any connection between the landlord's reason for termination of the lease and the harmful effect of such expiration on the tenant's interests, while – on the face of it – the South African Rental Housing Act does require such a link. One could argue that in due course the South African courts would move towards a more lenient approach and rather concentrate on the impact of termination on both parties' interests.

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[68]Such a justified interest exists where the lessee has culpably and significantly breached his contractual duties; where the landlord requires the leased premises for his own use; or where the landlord would be denied from making sufficient economic use of the premises if the lease was sustained, which would result in an excessive loss for the landlord: *BGB* § 573(2). The list is not exclusive.

[69]*BGB* § 573(1). Increasing the rent is not a justified reason for the termination of the lease. Van der Walt (n 32) 88 refers to these grounds for cancellation as the 'normal cases', because the lease is cancelled in accordance with the agreed prescribed procedures and requirements.

[70]*BGB* § 574(1). Van der Walt (n 32) 89 mentions that through this provision the interests of the tenant are balanced against those of the landlord.

[71]*BGB* § 574(2).

[72]*BGB* § 574a(1).

5 Developing the common law of lease?

The Court did not make a decision concerning the lawfulness of the termination,[73] nor did it express any views regarding the landlord's common law right to cancel the lease. It also refrained from discussing whether the common law should be developed in line with the Constitution,[74] perhaps rightly so, since the case was decided on the basis of a purposive interpretation of the Rental Housing Act, and in terms of subsidiarity principles, the development of the common law would in such a case be both unnecessary and impermissible.[75] The Court held that the dispute should be resolved through the statutory measures provided by the Rental Housing Act and a generous interpretation of the Act ultimately sufficed to initiate a measure that struggling tenants can use to argue for continued occupation rights.[76] This conclusion is in line with the constitutional right of access to adequate housing and a different interpretation would have thwarted the transformative purposes of the Act.[77] The Court's decision to abstain from discussing the development of the common law was therefore apt, since the Act now overrides/restricts landlords' common law right to end leases. However, this qualification does not apply in a universal manner and can only be accessed on a case by case basis, which means that the common law remains relevant to all other landlord-tenant disputes that fall outside the unfair practice realm.

Arguably, Cameron J's interpretation of the Rental Housing Act introduced a revised, Constitution-compliant landlord-tenant framework in terms of which tenants have the option to rely on the protective measures in the Rental Housing Act for enhanced tenure protection. This development is analogous to one of the aims of typical rent control law, which is to provide tenure protection for socio-economically weak tenants. However, the construction, application and complexity of rent control laws are different. As mentioned above, rent control laws are usually multifaceted statutes that regulate various elements (if not all the elements) of private landlord-tenant relationships. The grounds for termination of the lease (and consequential eviction) are generally also predetermined.[78] These laws typically find application in a general manner and provide protection for a majority group of tenants. The Court's interpretation of the unfair practice provision can, similar to rent control laws, also provide extensive tenure protection for socio-economically weak tenants but this form of protection is less complicated than rent control. The unfair practice provision does not apply to all tenants in a general fashion since it can only be 'accessed' by a specific tenant if he/she wishes to fight the ground for termination of the lease on the

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[73] *Maphango* para 52.
[74] *Id* para 55.
[75] Van der Walt (n 6) 108.
[76] *Maphango* para 55.
[77] *Id* para 57.
[78] See specifically Maass (n 3) at 2.3, 4.6 and 6.4.

basis that such expiration would prejudice his/her interests. The provision is also free-standing in the sense that it is not linked to other regulatory provisions, such as rent restrictions or maintenance responsibilities. It is therefore a readily accessible tool that can be used by tenants if and when the need arises. Once a tenant decides to trigger this form of protection, the Tribunal will have to consider both parties' interests and decide the matter on the specific circumstances of the case.[79] Such an approach allows the Tribunal to make a context-sensitive decision, which is in line with the transformative purpose of the Constitution. This approach also avoids a predetermined hierarchy of rights since neither the landlord's right to terminate the tenancy, nor the tenant's right to oppose such termination on the basis of the unfair practice provision would necessarily be enforced.

The Court's interpretation of the unfair practice provision is interconnected with the Tribunals' modified power to set aside the termination of the lease. On the other hand, the landlord could also have lodged a complaint with the Tribunal arguing that the rent should be increased since it is uneconomic and therefore unsustainable, which has an unfair effect on the landlord.[80] The powers of the Tribunal are therefore quite significant in the sense that it can set aside a contractual provision that allows the landlord to terminate the lease and it can approve rent increases beyond the contractually agreed rent settings.

One of the basic principles of contract law is that contracts are binding and the provisions in a contract must be enforced by the courts (*pacta sunt servanda*).[81] The point of departure is that the contracting parties have the freedom to negotiate the terms and conditions of the lease, which means that both parties should be held accountable for their initial decisions through the mechanism of enforcement. The 'classic model' of contract law also assumes that the parties have equal bargaining power; that there is equal bargaining in the market (in general); and that the parties truly participate when negotiating the lease.[82] This 'classic model' is no longer a realistic representation of contract law since a number of these basic principles have come under revision – the pressure for transformation in contract law is currently evident, especially in consideration of a number of new developments.[83] Two developments are worth mentioning here, namely, the development of the welfare state, which aims to eradicate poverty through increased levels of regulation in various markets, and the rising importance of human rights.[84]

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[79]This approach is analogous to the German position.
[80]*Maphango* paras 58-59. The Court mentioned that the Tribunal should take cognisance of the landlord's fading investment as a result of the low rents at Lowliebenhof – the landlord's property and investment – and determine a rent that would be just and equitable to both parties. If the landlord is dissatisfied with the Tribunal's decision, it can take the matter under review. These findings were based on ss 13 and 17 of the Act.
[81]Hutchison and Pretorius (eds) *Kontraktereg in Suid-Afrika* (2010) 22.
[82]*Id* 26.
[83]*Ibid*.
[84]*Ibid*.

In *Barkhuizen v Napier*,[85] Ngcobo C for the majority held that the public policy principle represents the general public's perspective regarding justice, fairness and reasonableness. In general, the public policy principle supports the traditional principles of contractual freedom and the right to enforce contractual provisions. However, it can also prohibit the enforcement of certain contractual provisions if the effect of such implementation would be unfair or unreasonable.[86] In order to determine whether a contractual provision is reasonable, the Court formulated two questions. The first question is whether the provision is, by itself, unfair. This first inquiry is therefore directed at the objective terms of the contract. If the objective terms of the contract are, on face value, consistent with the public policy, the second question will arise and determine whether the provisions are contrary to public policy as a result of the specific circumstances of the relevant parties.[87] *Pacta sunt servanda* is undoubtedly a fundamental part of contract law[88] since it gives effect to the constitutional values of freedom and dignity.[89] However, this principle is not absolute. The freedom to contract and the principle of *pacta sunt servanda* may lead to 'excessive contractual oppression and unreasonableness or the contravention of other societal values or interests that are judged to be of greater weight in the circumstances'.[90]

In *Maphango*, the issue was whether the landlord could circumvent the escalation clauses by relying on its right to terminate the lease. In terms of the lease, either party could end the lease through written notice.[91] In terms of the *pacta sunt servanda* principle, the landlord should have been able to merely rely on the termination provision. Even though the Court did not decide this matter, the enforcement of the termination provision could have been against public policy since its effect could have been unfair and unreasonable in the specific circumstances. The *pacta sunt servanda* issue became redundant because the Court decided that the notions of fairness and reasonableness, which give effect to the public policy principle, are included in the Act by means of the unfair practice provision and the Tribunals should declare termination provisions invalid if they are in conflict with these notions. Cameron J confirmed that 'the Act superimposes its unfair practice regime on the contractual arrangement the

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[85]2007 5 SA 323 (CC).
[86]*Id* paras 70 and 73. At para 28 the Court also found that public policy was 'now deeply rooted in our Constitution and the values which underlie it.'
[87]*Id* paras 56-58.
[88]See specifically Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implication for the development of contract law' (2004) *SALJ* 395 at 417-419 and *Barkhuizen v Napier* para 57 where Ngcobo J held that *pacta sunt servanda* 'gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.'
[89]*Barkhuizen v Napier* para 57.
[90]Van Huyssteen, Van der Merwe and Maxwell *Contract law in South Africa* (2010) 63.
[91]*Maphango* para 3.

individual parties negotiate.'[92] The provisions in the Rental Housing Act, and the powers of the Tribunals, will qualify the *pacta sunt servanda* principle in cases where the *actual* ground for termination of the lease, which in this case was to increase the rent beyond the stipulated percentage, will constitute an unfair practice. Hypothetically, any ground for termination, as included in the lease, can be set aside if the Tribunal decides that its effect unreasonably prejudices the tenant's interests.[93] This development is grounded in the Court's transformative interpretation of the Rental Housing Act, which is in line with the Constitution (the embodiment of human rights in South Africa) and the eradication of poverty through regulatory measures.[94]

The Court decided that the High Court should have postponed the eviction proceedings first to allow the Tribunal to decide whether the ground for termination of the lease constituted an unfair practice. Even though the Act imposes a three month suspension on evictions after a party has lodged a complaint with the Tribunal, which the landlord in this case had honoured, the court is still at liberty to stay the eviction proceedings until the Tribunal has made a ruling.[95] Section 13(9) is significant in this regard since it 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.' A strict reading of this provision entails that apart from the expiration of the three month moratorium and the landlord's claim for eviction in the High Court, the Tribunal still had to make a ruling regarding the tenants' complaint.[96] Section 13(10) confirms this explanation because it enables any person to approach a court for urgent relief, which could pertain to rental arrears or a claim for eviction, 'in the absence of a dispute regarding an unfair practice'.[97]

The Tribunal should therefore adjudicate the tenants' complaint, while the landlord should also be at liberty to lodge a counter-complaint about inadequate rentals if it wishes to do so.[98] Cameron J held that:

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[92] *Id* para 51.

[93] The Court (*ibid*) decided that the effect of the unfair practice provision is that 'contractually negotiated lease provisions are subordinate to the Tribunal's power to deal with them as unfair practices'.

[94] Durand-Lasserve and Royston 'International trends and country contexts – from tenure regularization to tenure security' in Durand-Lasserve and Royston (eds) *Holding their ground, secure land tenure for the urban poor in developing countries* (2002) 1 at 7 mentions that tenure status is one of the core elements in the poverty cycle and weak tenure security exacerbates poverty.

[95] *Maphango* paras 62-63.

[96] *Id* para 64.

[97] *Id* para 65. The Court stated that '[t]he 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'. The Court decided that this restriction on eviction applications must be read in line with the moratorium. Eviction applications should therefore only take effect once the three-month period has expired and the Tribunals should still decide matters that concern unfair practices.

[98] Court acknowledged that it provided a remedy even though it is one that the parties did not

> 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.[99]

Apart from the three-month moratorium, there are doctrinal considerations pertaining to the nature of the tenant's tenure that requires some reflection. As a point of departure, it would be futile for the High Court to hear an eviction application if a complaint has been lodged (and not decided) with a Tribunal and it concerns the nature of the tenant's tenure. The Court's interpretation of section 13(10) of the Act also suggests that apart from the three-month moratorium, the landlord cannot institute eviction proceedings if the Tribunal has not determined the status of the tenant's tenure. The Tribunal must first decide whether the ground for termination amounts to an unfair practice and if it finds in favour of the tenant, the termination would be set aside. The tenant would therefore be entitled to continue occupying the premises as a lawful tenant. Consequently, the landlord cannot claim eviction in the High Court because the tenant is not an unlawful occupier – PIE specifically states that it only regulates the eviction of unlawful occupiers.[100] The Court's conclusion that the High Court should have suspended the eviction application pending the Tribunal's decision is therefore logically sound.

The remaining question is whether the nature of the tenants' occupation ever became unlawful. Would the tenant's legal right to occupy the premises be rendered unlawful as a result of the notice to quit if the tenant remains on the property and decides to lodge a complaint with the Tribunal regarding an unfair practice, or would the nature of the tenant's occupation remain lawful pending the outcome of the Tribunal? In terms of the common law, the nature of the tenant's tenure would automatically become unlawful once the landlord has served a notice to quit. One could argue that the Court's interpretation of the Act did not alter the common law position. The change brought about by the Court's decision pertains to the Tribunal's power either to confirm or nullify the termination of the lease, which consequently has a direct effect on the tenant's tenure. The Tribunal must either verify termination of the lease and confirm the tenant's occupation as unlawful; or nullify termination of the lease on the basis that it constitutes an unfair practice. In the latter case, the Tribunal would set aside termination of the

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necessarily seek (para 68). This decision was to a large extent justified by its decision in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) where it similarly gave a remedy that did not correspond with what the parties pleaded. Zondo AJ (for the minority in *Maphango*) at paras 113-144 disagreed with the majority's invocation of statutory provisions where the parties did not rely on those provisions in their pleadings. According to the minority, this decision is not in line with neither *Bel Porto School Governing Body v Premier, Western Cape,* 2002 3 SA 265 para 119 nor *Phillips v National Director of Public Prosecutions* 2006 1 SA 505 (CC) para 39. See also para 136 of the *Maphango* minority judgment.

[99] *Maphango* para 68.

[100] See the preamble and s 4 of the Act.

lease and reinstate the tenant's lawful occupation. The effect is that the Tribunal would be able to repeal the unlawful termination,[101] which also means that the tenant's unlawful occupation would be reversed. The Court's interpretation of the Act implies that the Act merely regulates the lawfulness of the termination of the lease. The Act does not introduce a statutory tenancy since the contractual lease would simply continue in the case where the Tribunal finds in favour of the tenant.

In the absence of a complaint lodged with the Tribunal, the tenant's tenure would remain unlawful and the landlord would be at liberty to institute a claim for eviction. The decision to lodge a complaint against unlawful termination of the lease therefore rests with the tenant. If the Tribunal finds in favour of the landlord and confirms termination of the lease, the landlord would still have to lodge eviction proceedings in the high court and comply with section 26(3) and the provisions of PIE to successfully evict the tenant. The tenant would therefore enjoy the protective measures in both the Rental Housing Act and PIE if she decides to first fight termination of the lease and then, if unsuccessful, eviction. On the other hand, if the Tribunal declares termination of the lease contrary to the Rental Housing Act and it is therefore invalid, the landlord would be at liberty to bring the proceedings of the Tribunal under review in a high court.[102]

In light of Cameron J's decision, the alternative argument is that the Act amended the common law to the extent that the nature of the tenant's occupation never became unlawful as a result of the notice to quit. The tenant's lawful occupation would continue despite the notice to quit; and the Tribunal would first have to determine whether or not the ground for termination amounted to an unfair practice. The alternative argument implies that the burden of proof would rest with the landlord if he wished to end the lease. The landlord would first have to approach the Tribunal and prove that he terminated the lease lawfully. Once successful, the landlord would be able to institute eviction proceedings on the basis that the lease was terminated lawfully and the tenant is unlawfully occupying the premises. The problem with this alternative argument is that it shifts the burden of proof to the landlord, which would place a heavy burden on landlords in general. The more plausible argument, which was first raised, is that the nature of the tenant's occupation automatically became unlawful as a result of the notice to quit and the decision to fight termination of the lease therefore rests with the tenant. If the tenant decides to approach the Tribunal on the basis that the lease was terminated unlawfully, the burden of proof would rest on the tenant.

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[101] In terms of the pre-1994 rent control laws of South Africa and the English rent control laws, the tenant's occupation would never be rendered unlawful, because once the contractual tenancy has terminated, the statutory tenancy would immediately commence if the tenant decides to continue occupying the premises: Maass (n 3) 2.3, 4.6.1.

[102] Section 17 of the Rental Housing Act.

6 Concluding remarks

State intervention through the imposition of statutory measures in landlord-tenant law is not uncommon, especially when socio-economic circumstances necessitate enhanced tenure protection for vulnerable tenants. These legislative mechanisms (for example, rent control) usually apply in a general fashion and are aimed at regulating all the facets of landlord-tenant relationships. The purpose of these interventions is to qualify the common law of lease with the aim to impose protective measures on a temporary basis.[103] Once the private landlord-tenant market is deregulated and rent control is phased out, the common law will resurface, although unamended by the legislation.[104] In light of *Maphango*, the Rental Housing Act now places a qualification on a landlord's unilateral right to terminate a lease since the ground for termination may not constitute an unfair practice. The unfair practice provision allows the Tribunals to take into consideration the effect of continuation or expiration of the lease on both parties; weigh the socio-economic and financial interests of both parties; and either confirm or nullify termination of the lease. This provision gives effect to the public policy principle because it empowers the Tribunals to counter the enforcement of termination clauses that will have unfair and unreasonable results. The unfair practice provision can therefore also trump the principle of *pacta sunt servanda*, although it would depend on the specific circumstances and the Tribunal's judgment of what type of prejudice should override a contractual right to cancel the lease.

At this stage it is unclear whether the Tribunals would be able to adequately weigh the interests of both parties and adjudicate unfair practice disputes on a case by case basis without any real statutory guidance regarding the landlord's legitimate grounds for termination and consequential eviction. In the interim this judicial development is a welcome innovation but it remains unclear whether the Legislature should not intervene and provide thorough guidance for the Tribunals (and courts) to adjudicate landlord-tenant disputes. The extent to which the unfair practice provision will find application in future depends on the Tribunals' strict reading of the 'required' link between the ground for termination of the lease and the impact of such expiration. Arguably, the mere hardship that a tenant would suffer as a result of cancellation should be able to resist such termination since the aim of the Act is to protect tenants. The requirement of a definite link between the reason for termination and the unreasonable effect of expiration might become problematic and undermine the purpose of the provision.

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[103] See for instance Maass (n 3) 46-48, 53, 54 and 80.
[104] *Id* 2.5.