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DECLARATION:

In accordance with Rule G4.6.3, I hereby declare that the above-mentioned treatise/dissertation/thesis is my own work and that it has not previously been submitted for assessment to another University or for another qualification.

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This dissertation analyses the South African Rental Housing Act 50 of 1999 ("the RHA") with the aim of determining whether the RHA sufficiently protects the landlords' rights and interests as opposed to those of tenants (which it does indeed safeguard). Due to the current saturation of rental property in South Africa, landlords are no longer in an advantageous position as before. In fact, the RHA was introduced to redress the imbalance caused by discrimination against tenants. However, times have changed. The researcher submits that the RHA needs to be re-examined in light perception of the landlord as a consumer. Having regard to both common and foreign law, the researcher identified the following four fundamental legal and practical rights on the part of the landlord: the right to freely contract; the right to safeguard financial interests; the right to safeguard proprietary interests; and the right to evict a defaulting tenant. The research reveals that the RHA does not give adequate recognition to these fundamental legal rights, and accordingly does not sufficiently protect the landlord as a consumer. In total nineteen recommendations how the RHA can adequately recognize and protect the landlord’s interests are made.
KEYWORDS

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CHAPTER 1
INTRODUCTION

1 1 Introduction

This research aims to analyze the South African Rental Housing Act 50 of 1999 (the “RHA”) with regard to the rights of landlords. It involves an examination of the extent to which the RHA, read with the Unfair Practice Regulations (the “UPRs”), identifies and safeguards the interests of landlords in their relationship with tenants in the residential letting market. Although the RHA has principally sought to protect tenants as opposed to landlords from the outset, the question arises whether it makes adequate provision for the needs of landlords. At the time of the passing of the RHA, tenants were seen as being exploited by landlords who were in a higher bargaining position, as there was an undersupply of rental housing in general in South Africa. However, the residential letting market has changed since the passing of the RHA owing to the current oversupply of rental premises.¹ In fact, landlords are now actually in a weaker bargaining position than they were in 1999. Thus in view of this present situation, the researcher submits that there is a need for more

¹ Shisaka Development Management Services (Pty) Ltd in association with CSIR Built Environment ‘Small Scale Landlords: Research Findings and Recommendations’ Research Project sponsored by the National Department of Housing, the Social Housing Foundation and the Finmark Trust (2006-02-06) 2.2.
acknowledgement of the interests of landlords than there is at present in the South African legislation governing residential leases. It is this hypothesis that the research project will attempt to test in the course of its investigation of the RHA.

1 2 Definition of problem

The RHA came into operation on 1 August 2000. It functions as a State regulation of the relationship between landlords and tenants under residential lease agreements. Furthermore, it promotes the objectives of the Constitution of South Africa, especially section 26 of the Bill of Rights in terms of which everyone has the right of access to adequate housing.

The RHA aims to stimulate interest in investment in the rental of residential property through the promotion of a stable and growing market for the benefit of previously disadvantaged and indigent persons. In addition, the RHA aims to clarify the relationship between landlords and tenants with regards to their respective rights and duties. This research project focuses on the latter aspect only.

The legislature, which introduced the RHA, was motivated by an awareness of a decline in investment in the rental housing market. This decline aggravated the acute shortage of affordable housing in South Africa, which in turn led to the vulnerability of homeless persons who were exposed to exploitation in the housing market. The 1994 White Paper on housing titled “A New Housing Policy and Strategy for South Africa” indicated a strong need for consumer protection as well as the education of housing consumers in order to protect the desperate homeless persons who were “at the mercy of unscrupulous operators in the market”. These “unscrupulous operators” were identified as landlords willing to exploit the desperation of the homeless by charging excessive rentals without taking responsibility for the conditions of the premises. According to the White Paper this so-called exploitation resulted in an imbalance in the rental market, whereby too few rental properties were available to meet the needs of many homeless persons.

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2 Act 108 of 1996.
3 Memorandum on the Objects of the Rental Housing Bill 1999' Rental Housing Bill 1999 (as amended by the Select Committee on Public Services National Council of Provinces) B 29D-99.
6 Ibid.
imbalance was exacerbated by high rentals, disputes between tenants and landlords, lack of maintenance of premises, and sometimes even the abandonment of premises by landlords, thereby leaving tenants exposed to the risk of deteriorating living conditions.\(^7\) To counteract this imbalance, provision was made in the RHA for the imposition of a general duty on landlords to provide accommodation at a price that matches the general condition of the premises. The underlying objective of this provision was to curb further deterioration in the rental housing market.\(^8\)

The RHA constitutes consumer protection legislation in that it aims to protect the interests of the tenant as a housing consumer.\(^9\) The question arises whether and to what extent the RHA recognizes and protects all housing consumers in the rental housing market. This is the key focus area of this research. The submission is that the landlord is to be seen as a consumer having certain fundamental consumer rights. Specific attention is given to the question whether the provisions aimed at the protection of tenants take adequate cognizance of the interest of landlords.

The problem is that the rights of the landlord may not be adequately protected by the RHA. The researcher submits that there are several instances of inadequate recognition of the landlord’s interests in the RHA. One example is the fact that the RHA contains onerous provisions relating to joint inspections that the landlord and tenant must carry out together in order to protect the tenant from being accused of damage he/she did not cause.\(^10\) If a landlord fails to carry out this inspection, he/she forfeits all rights in respect of the use of the tenant’s deposit which covers, amongst others, damage to the premises and arrear rental.\(^11\) In practice, however, the carrying out of these joint inspections are impractical (sometimes impossible) and yet the duties imposed on the landlord by the RHA must be carried out.\(^12\) The fact that the RHA does not make allowances for the impracticality of joint inspections detrimentally affects the landlord’s financial and proprietary interests. Another example concerns the “anti-discrimination” provisions\(^13\) of the RHA. These

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8 Memorandum on the Objects of the Rental Housing Bill, 1999’ Rental Housing Bill B 29D-99.
9 N 7.
10 RHA s 5(3)(e)-(f)
11 RHA s 5(3)(j).
12 Unstructured interview with Vivien Marks, Western Cape Rental Housing Tribunal (2007-03-09).
13 RHA s 4(1).
provisions may be perceived as impacting negatively on the landlord’s right to choice of tenant, in other words his/her right to contract freely. The researcher will demonstrate that the measures contained in the RHA aimed at protecting the interests of tenants are not in each and every instance fair and reasonable having regard to the landlord’s interests as a consumer in the rental housing market.

The RHA must be seen in the context of the rental housing market. Since the inception of the Act on 1 August 2000 the overall housing sector has had a limited increase in the number of households living in rented accommodation, as more households are living in owned accommodation.\textsuperscript{14} This is the result of the 2004/2005 property market boom which opened the doors to home ownership on a grand scale. At the same time, the buy-to-let investment trend resulted in an oversupply of rental stock,\textsuperscript{15} very different from the situation that prevailed at the time when the RHA was enacted. Because there is no longer a shortage of supply of rental housing stock, landlords are no longer able to dictate terms and conditions to tenants to the same extent that they were able to do ten years ago. Accordingly, the imbalances in the rental market that informed the enactment of the RHA no longer exist. The question can thus rightfully be asked whether the RHA now overprotects the tenant at the expense of the landlord, who is also a consumer in the rental housing market.

13 Aim and objectives

131 Aim

The aim of this study is to analyze and establish whether the RHA adequately recognizes and protects the interests of the landlord, particularly in view of the current (2009) oversupply of housing stock in the rental housing market.

\textsuperscript{14} Shisaka Development Management Services (Pty) Ltd in association with CSIR Built Environment ‘Small Scale Landlords: Research Findings and Recommendations’ Research Project sponsored by the National Department of Housing, the Social Housing Foundation and the Finmark Trust (2006-02-06) 3.1.

1 3 2 Objectives

1 3 2 1 Definition of the landlord as a consumer in the rental housing market in terms of consumer protection principles

The objective of the study includes focusing on the principles of consumer protection in order to establish whether the landlord has a legitimate expectation to be protected in terms of consumer protection legislation. The South African legislature, through the RHA, has taken the view that the tenant is a consumer worthy of protection in the residential letting market. The question arises whether and to what extent the landlord has also been adequately identified as a consumer and protected as such. The researcher will explore why legislation is in place to protect consumers, and whether an unequal bargaining power between the landlord and tenant currently persists.

1 3 2 2 The identification of the rights and interests of the landlord

In order to determine whether the RHA adequately protects the interests of the landlord, it is necessary at the outset to identify the fundamental interests of a landlord that require legal protection. The researcher will seek to identify and analyze these rights and interests individually in separate chapters. Attention will then be given to what extent the RHA protects these rights.

1 3 2 3 Comparative analysis of the rights and interests of the landlord

The researcher will identify certain benchmarks which can be applied to determine whether the RHA adequately protects the rights and interests of landlords. This will entail a brief comparative legal research, aimed at establishing how and to what extent landlords’ interests are taken into account in rental housing legislation in foreign jurisdictions. Each right or interest of the landlord will be compared to determine whether other similar legal systems have identified that right, and to what extent those systems’ laws protect the right. The comparative study will, furthermore, analyze how other countries solved their landlord/tenant relationship issues as well as identifying current trends in this regard from an international perspective. This will lead the researcher to recommendations on how the landlord/tenant relationship in South Africa might possibly be improved. It must be noted that the researcher will embark on a full scale comparative analysis, but will

16 N 7.
briefly examine a few foreign legal systems in order to ascertain how those legal systems have dealt with their landlord/tenant issues and how they have addressed these issues. The foreign law discussed will serve as possible solutions to the landlord/tenant problems uncovered by the researcher in this study.

14 Research methodology

The research involves a fourfold process. The first step involves an identification and discussion of the legitimate interests of the landlord in the landlord/tenant relationship in South Africa. This is done in order to establish the fundamental areas worthy of protection in law. Common law will be the primary guide in this respect and data will be gathered via qualitative research. Interviews with leading letting agents are used in order to establish to what extent the common law protection of the landlord’s interests is supplemented in practice by suitably worded clauses in lease agreements.\(^\text{17}\) In South African property practice, lease agreements used by letting agents are standard form contracts and reflect the practice developed amongst letting agents to protect landlords.\(^\text{18}\) Besides letting agents, the Rental Housing Tribunals also provide insight into the interests of the landlord.

The second step identifies and establishes a suitable benchmark or yardstick for the protection and recognition of landlord’s interests. In addition to common law as a yardstick, the laws of certain foreign countries are examined briefly to find benchmarks regarding protection of landlord rights and interests. Legal systems that will be referred to are Canada, Australia and England (illustrating the approach in systems based on English law), Kenya and Uganda (because of South Africa’s commitment to African unity).\(^\text{19}\)

The third step entails an evaluation of the question whether the RHA fully protects the landlord, considering the fact that the landlord is a consumer in the rental housing market worthy of consumer protection.

The final step sets out recommendations regarding possible solutions to the problem.

\(^{17}\) Supra 200.
\(^{18}\) Supra 201.
\(^{19}\) The Objectives of the African Union (www.africa-union.org (accessed 2007-08-21)).
CHAPTER 2
CONSUMERISM IN THE RENTAL HOUSING MARKET

2 1 Introduction
The term “consumerism” is not easily defined. Fundamentally, it simply refers to the buying and/or using of goods and services by consumers.\(^{20}\) In this study the expression “consumerism in the rental housing market” refers to the use of residential property for the purposes of letting and hiring by consumers. This chapter explains who exactly a consumer is in the context of the rental housing market and what the fundamental principles of consumer protection in that market are. Although the tenant is generally

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perceived as a consumer, the submission is made that the landlord can also be identified as a consumer.

The aim of this chapter is to properly position both the landlord and the tenant in the context of consumer law principles. A proper understanding of the landlord’s position as a consumer is necessary in order to evaluate the protection afforded to landlords as consumers by the RHA. In the discussion that follows, the researcher will analyze the concept of the landlord as a consumer in the rental housing market in more detail. In doing so, the general definition of “consumer” will be set out and general consumer protection principles explained as they have been established in fundamental consumer rights. Thereafter, these principles will be applied in the context of the landlord/tenant relationship to develop further landlord specific rights.

2.2 General definition of “consumer” and fundamental consumer rights

2.2.1 Meaning of “consumer”

There is no internationally recognized definition of the word “consumer” and its meaning and significance varies.\(^2\) The simple denotative (law dictionary) meaning of the term “consumer” as defined in the Merriam-Webster’s *Dictionary of Law* is “one who utilises economic goods”. This denotation of the term forms the basis of this research. In other words, a consumer is basically an individual who buys, hires or uses goods or services.\(^2\) This is indeed a general definition and could be applied to the use John F Kennedy made of the term during a declaration to the US Congress in 1962. According to Kennedy, the word “consumers” could actually “include us all”. Kennedy added that consumers make up “the largest economic group, affecting and affected by almost every public and private economic decision”.\(^2\)

A definition of the term “consumer” can also be found in relevant South African legislation. The repealed Consumer Affairs (Unfair Business Practices) Act 71 of 1988

defined a consumer as “any natural person to whom any commodity is offered, supplied or made available.”

The Consumer Protection Act, the latest South African legislation on this topic, contains essentially the same definition as that of the Merriam-Webster’s Dictionary of Law. The former states that a consumer is a person to whom goods or services are advertised, offered, supplied, performed or delivered in the ordinary course of business. The definition of the term “commodity” in the Consumer Affairs (Unfair Business Practices) Act was broad, covering all movable and immovable, corporeal and incorporeal property, including any service. The definition of “goods” in the Consumer Protection Act is similar in that it covers all types of goods and services offered in the ordinary course of business.

2.2.2 Fundamental consumer rights

Consumer law is intended to remedy negative consequences that follow from various business practices in order to restore the balance of bargaining power between powerful suppliers and less powerful consumers. Thus, Consumers International has identified eight consumer rights, known as “The Consumer Bill of Rights”. Consumers International has official representation on many global bodies, including, inter alia, the United Nations Economic and Social Council and related United Nations agencies and commissions, the World Health Organization and the United Nations Children’s Fund. The South African Department of Trade and Industry is a member of Consumers International.

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25 Act 68 of 2008. The Act was assented to on 2009-04-24 and, according to Schedule 2 of the Act, it will commence 18 months after that date, unless otherwise indicated in the transitional provisions in Schedule 2.
26 Definition of “consumer” with the definition of “market” and “promote” in s 1.
27 S 1.
28 S 1.
30 Consumers International is an international non-governmental organization of a federation of worldwide consumer groups working together to be the only independent and authoritative global voice for consumers. The organization is also a signatory to the International Non-Governmental Organizations’ Accountability Charter in December 2005 (consumersinternational.org (accessed 2008-05-13)).
On 9 April 1985, the United Nations’ General Assembly adopted the UN Guidelines for Consumer Protection, which embraces the principles of Consumers International’s “Bill of Rights” as well as providing a framework for strengthening national consumer protection policies. This resulted in international recognition and the legitimacy of eight consumer rights as recognized by developing and developed countries. The eight consumer rights are the following: the right to safety; the right to be informed; the right to choose; the right to be heard; the right to satisfaction of basic needs; the right to redress; the right to education; and the right to a healthy environment.

The eight fundamental consumer rights recognized by Consumers International require closer examination. The right to satisfaction of basic needs entails having access to basic needs such as essential goods and services, food, clothing, shelter, health care, education, public utilities, water and sanitation. On a national level, these are provided for in the Constitution of South Africa in the form of adequate housing, health care, food, water, social security, and the right to education. A violation of these rights is the denial of basic human dignity.

The right to a healthy environment entails the right to live and work in an environment that is non-threatening to present and future generations. This includes water, air and soil that are all free from health threatening pollution and hazards.

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37 S 27.
38 S 25.
The right to safety comprises the right to be protected against products, production processes and services which are dangerous to one's health or life.\textsuperscript{43} Goods suppliers and service providers should refrain from providing goods or services that endanger the health and well being of a person.\textsuperscript{44}

The right to be informed is the right to be given the facts one needs to make an informed choice, and to be protected against dishonest or misleading advertising and labelling.\textsuperscript{45} This entails complete information on the price, quality, quantity, ingredients and other conditions relating to goods and services. With such information, consumers are able to make informed decisions and exercise their rights.\textsuperscript{46}

The right to consumer education is the right to acquire the knowledge and skills needed to make informed, confident choices about goods and services whilst being aware of basic consumer rights and responsibilities and how to act on them.\textsuperscript{47} Consumers must be educated about their rights and responsibilities in the market place. This ties up with the right to redress,\textsuperscript{48} which is the right to receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods or unsatisfactory services.\textsuperscript{49} Providing consumers with rights is worthless if there is no enforcement of those rights. The right to redress entails that consumers achieve quick and effective redress.\textsuperscript{50} The Constitutional right of access to courts in terms of section 34 of the South African Bill of Rights entails the right to redress.\textsuperscript{51}

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\textsuperscript{43} N 21.

\textsuperscript{44} The Draft Green Paper on the Consumer Policy Framework September 2009 at paragraph 19 explains that basic standards for product safety is one of the most basic and vital rights that consumers have, and is the key feature of consumer protection policy. See also the working paper by Mohan \textit{Safety as a Human Right: United National Committee on Economic, Social and Cultural Rights 25\textsuperscript{th} Session of The Committee on Economic, Social and Cultural Rights (2001-05-07) (www.unhchr.ch/tbs/doc.nsf (accessed 2009-12-16)}; \textit{Howells & Weatherill Consumer Protection Law (2005) 453}.

\textsuperscript{45} The right to information is a right in the South African Bill of Rights (Constitution of Republic of South Africa Act 108 of 1996 s 32); see also \textit{Currie & de Waal Bill of Rights Handbook (2005) 683}.

\textsuperscript{46} \textit{www.consumersinternational.org} (accessed 2008-05-13).

\textsuperscript{47} \textit{Ibid}.


\textsuperscript{50} \textit{www.consumersinternational.org} (accessed 2008-05-13).


The right to choose involves the right to be able to select from a range of products and services offered at competitive prices with an assurance of satisfactory quality.\textsuperscript{52}

The right to representation and good governance, also known as the right to be heard, is the right to have consumer interests represented in the formation and execution out of government policy, as well as having representation of consumer interests in the development of products and services. This right encourages accountability and good governance in public and private sectors of the economy.\textsuperscript{53}

The eight rights of Consumer International are consumer rights in respect of consumers as persons and the focus of these rights is not so much in respect of consumer goods. Worldwide recognition is given to the right to quality goods, in other words the right not to be wronged in respect of goods, for example, the Consumer Protection Act\textsuperscript{54} and the European Directive on certain aspects of the sale of consumer goods and associated guarantees\textsuperscript{55} recognize and identify the right to quality goods. Accordingly, for purposes of this study, it is submitted that the consumer’s right to good quality goods be included as a fundamental consumer right.

Having generally highlighted and discussed the meaning of “consumer” and the fundamental rights of consumers, the researcher will now apply these principles to the landlord in the context of the residential housing market. In the paragraph that immediately follows, the argument is made that the landlord, not just the tenant, is in fact a consumer worthy of protection. Thus, the fundamental consumer rights apply to the landlord too.


\textsuperscript{53} United Nations Department of Economic and Social Affairs (n 13) 'Statement of the National Consumer Forum' Consumer Rights Day referred to the \textit{United National Guidelines for Consumer Protection} (2002-03-12).

\textsuperscript{54} Consumer Protection Act 68 of 2008 Part H s 55.

\textsuperscript{55} 1999/44/EC.
2.3 Landlords of residential housing as consumers

As stated in paragraph 2.2.1, the meaning of the term "consumer" can be defined as one who utilizes economic goods. By its very definition, therefore, the term "consumer" includes both a tenant who makes use of a landlord's property as well as the landlord who makes use of the same property to generate an income. Both parties "utilize economic goods". However, when one considers the most basic meaning of the term, one could maintain that the landlord is more a consumer than the tenant as the former may utilize the goods over a longer period with many tenants while the latter utilizes the goods only for the duration of the specific lease he/she is engaged in.56

Considering the aforesaid definitions, it is submitted that the landlord is to be perceived as a consumer given the term as viewed in its broadest sense. The landlord is a utilizer of goods (housing) that generally can be obtained or exchanged for money (rent). Perceptions regarding the identity of a consumer change over time.57 Therefore, the landlord needs to be considered as a consumer based on the above argument even though he is may also be considered a supplier.

In the context of lease agreements in particular, it is clear that a tenant is a consumer as he/she hires and uses goods, namely the rented property supplied by the landlord in exchange for rent. In other words the tenant is utilizing financially viable goods in the sense of renting them. Traditionally, however, the landlord is not considered a consumer in the landlord/tenant relationship. Yet, in light of the definitions explained in paragraph 2.2.1 above, the landlord can also be perceived as an individual who utilizes goods involving financial transactions. However, in this case the use connotes the notion of "letting" those goods. The landlord invests in property to generate income with

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56 Cf Backman 'The Tenant as a Consumer? A Comparison of Developments in Consumer Law and in Landlord/Tenant Law' 1980 Oklahoma Law Review 18 where it is argued that the tenant is the consumer in the landlord/tenant relationship, and mentions the fact that the landlord is using his/her property over and over again to generate rental income, however, the author fails to mention that from this point of view, the landlord is definitely a consumer by definition in that he/she utilizes the property for this purpose.

57 Ibid.
the rent adjusted with inflation or the purchasing power of money.\(^{58}\) A landlord is a consumer in that he/she uses goods, namely the immovable property for investment or income purposes. In addition he/she is duty-bound to maintain the property in order to keep its value.

Both the landlord and the tenant are involved in financial transactions that focus on the use of particular immovable property. The tenant has a right to expect service, delivery and maintenance of the property for which he/she is paying money. On the other hand, the landlord has a right to income and reasonable upkeep of the consumer goods that he/she lets to the tenant in the financial transaction. The consumer goods, namely the immovable property, are also the landlord’s capital goods and he/she is a consumer in that he/she is using the goods for financial gain. The tenant is using the goods and pays rent in return. Yet, they are both consumers as well. The landlord has bought the goods that the tenant is paying for in a lease agreement. True, the landlord is also a supplier of goods, but that does not alter the fact that he/she is using consumer goods for economic reasons namely to generate income.

One of the aims of consumer protection legislation is to correct unequal bargaining relationships between a more powerful party and a less powerful consumer.\(^{59}\) The tenant is usually considered to be the less powerful consumer. However, the researcher’s argument is that the landlord is today the less powerful consumer in the rental housing market. Therefore the consumer protection legislation should in fact protect the landlord against tenants who are not adhering to their side of the bargain between them and the landlord. This makes the landlord a less powerful consumer and has a right to legal protection.


According to the Western Cape Rental Housing Tribunal annual reports, unscrupulous tenants are on the increase.\textsuperscript{60} Complaints relating to rental arrears, failure to vacate the premises at the end of the lease and claims for damage to property, amongst others, are being lodged with the Tribunal in larger numbers each year since the commencement of the Tribunal.\textsuperscript{61} The landlord is, thus, becoming more and more a victim in the landlord/tenant relationship and the tenant by victimizing the landlord is changing the usual power relationship in favour of the tenant.

The basic reason for this reversal of power in the landlord/tenant relationship is to be found in the oversupply of rental stock. As stated in Chapter 1, since the inception of the RHA on 1 August 2000 the overall housing sector has had a limited increase in the number of households living in rented accommodation, as more households are living in owned accommodation.\textsuperscript{62} This is the result of the 2004/2005-property market boom. The buy-to-let investment trend, which characterized the property boom,\textsuperscript{63} resulted in an oversupply of rental stock. This is a very different situation compared to the one that prevailed at the time when the RHA was enacted. Although the buy-to-let market has slowed down somewhat during 2008 and 2009, the market is predicted to increase once the current slowdown has worked itself out during 2010 and beyond again triggering an oversupply of rental stock.\textsuperscript{64} Such an oversupply of rental stock causes an imbalance in the relationship between landlord and tenant in that the tenant is in a stronger bargaining position than the landlord, as the supply of stock is greater than the

\textsuperscript{60} The 2006-2007 Western Cape Rental Housing Tribunal’s Annual Report says that complaints relating to arrear rentals and failure to pay rents with claims for compensation have shown alarming increase. There has also been an increase of complaints with regards to failure to accept notice and to vacate premises and damage to the premises (30-35). Other provincial Rental Housing Tribunal Reports are not available for public access.

\textsuperscript{61} Western Cape Rental Housing Tribunal Annual Report 2006-04-01 to 2007-03-31 31-35.

\textsuperscript{62} Shisaka Development Management Services (Pty) Ltd in association with CSIR Built Environment ‘Small Scale Landlords: Research Findings and Recommendations’ Research Project sponsored by the National Department of Housing, the Social Housing Foundation and the Finmark Trust (2006-02-06) 3.1.


\textsuperscript{64} Interview with John Loos, FNB property strategist, conducted by Geoff Candy of Moneyweb Radio 7 ‘Rental Market on the Uptick’ 2008-02-12 (www.moneyweb.co.za (accessed 2008-03-28)); see also Du Toit ‘Investing in Residential Property: compiled by ABSA Home Loans’ 2008-07-15 (www.noagent.co.za/property-article69.php (accessed 2009-10-18)).
The reality is that the current recession is forcing tenants to shop around for better rentals and contract terms before renewing or entering into a lease. This results in landlords having to reduce their rentals to retain or attract tenants. Clearly landlords are therefore the weaker parties in the landlord/tenant relationship and will continue as such for some years in the future.

A landlord with property as an asset will seek to maintain its value. Thus, bearing in mind that the landlord is a consumer as much as a tenant, unscrupulous tenants who do not pay rent or abuse the landlord’s property will cause the landlord loss as a consumer. And since such tenants are frequent, the landlord needs protection as a consumer. Therefore the position of the landlord in the landlord/tenant relationship needs to be addressed through legislation, based on the consumer protection principles discussed under paragraph 2 2 2 above.

2 4 Landlords’ rights as consumers

2 4 1 Introduction

As discussed in paragraph 2 2 2, Consumers International has identified eight fundamental consumer rights. The question is to what extent do these rights apply to the landlord? As there is no authority on the subject of landlord consumer rights it is necessary to develop a framework of such rights. The researcher will discuss each of the fundamental consumer rights identified by Consumers International and its relevance and applicability to the landlord. Furthermore, from these broad fundamental consumer rights, the researcher will identify and formulate the specific rights of the landlord.

From the outset, one can deduce that not all eight rights will apply to the landlord’s situation, for the reason that they are not all landlord specific. The rights that do not apply to the landlord as such are namely the right to safety, the right to a healthy

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65 D’Alton ‘No Fireworks for Buy-to-Let Investors’ MoneyWeek 79 2009-02-02.
environment and the right to satisfaction of basic needs. The right to safety is not applicable in that it refers to protection from harmful products and services that are dangerous to one’s health and life. It is submitted that such a circumstance of an unsafe service does not directly apply to the landlord in terms of the landlord/tenant relationship. This right may apply in the bigger housing context, but not in terms of the landlord/tenant relationship. It may, however, apply to the tenant in that the tenant has the right to premises that is safe from potential harm to his/her life or health. Thus, it is the landlord who must ensure that the premises is maintained and fit for human habitation.

The same argument applies with regard to the consumer’s right to a healthy environment. This right entails the right to an environment that is not harmful to the well being of a person. Although this right may be applicable to the tenant, it is not applicable to the landlord in the context of the landlord/tenant relationship. There is no circumstance whereby the landlord’s well being would be threatened by pollution or other hazards in the landlord/tenant relationship.

Lastly, the right to satisfaction of basic needs does not apply in this context either. Again this right may be applicable to the tenant in terms of the right to shelter or adequate housing, but it is not applicable to the landlord as there is no circumstance in the landlord/tenant relationship where this right may be threatened as the landlord gives possession of his/her property, being the subject matter of the lease, to the tenant.

The remaining five consumer rights do apply to the landlord namely, the right to choose; the right to be informed; the right to redress; the right to be heard; and the right to education. The latter two rights concern the landlords’ rights vis-à-vis government and not so much the landlords’ rights vis-à-vis tenants. Since this study focuses on landlords’ rights vis-à-vis tenants and not vis-à-vis government, the right to be heard and the right to education will not be further discussed. The remaining three consumer rights taken with the right to quality goods, constitute the basis upon which four fundamental landlord rights can be identified, namely:
a) the right to contract freely (the right to choose);

b) the right to safeguard financial interests (the right to choose, the right to be informed and the right to redress);

c) the right to safeguard proprietary interests (the right to redress and the right to good quality goods);

d) the right to evict a defaulting tenant (the right to redress).

The formulation of these landlord specific rights will be examined more fully below.

2.4.2 Landlords’ right to contract freely

It is common knowledge that the relationship between landlord and tenant is contractual. Thus, firstly, the general consumer’s right to choose in the context of contractual relationships entails the right to choose whom to enter into a contract with. One can pinpoint this right in terms of every individual’s right to contract freely in that every individual has the right to choose whom to contract with. Specifically for the landlord, this is the right to choice of tenant, which can also be derived from the general right to contract freely. Another landlord specific right in this regard is the landlord’s right to disallow subletting or assignment of the lease agreement in that the subletting or assignment may affect his/her right to choice of tenant.

Secondly, the right of choice entails the right to choose the terms of the contract. This right, like the right to choice of contracting party, is derived from or informed by the general right to contract freely. Translated as a specific landlord right, this right comprises the landlord’s right to include certain clauses beneficial to his/her interests that are designed to protect his/her interests.

Lastly, the right of choice entails the right of every individual to choose when to terminate one’s contract. This right is also informed by the general right to contract freely as it deals with the termination of the contractual relationship between landlord and tenant. Translated into a specific landlord right, then, is the specific right to terminate the lease agreement.
To sum up the above discussion one might say that the right to contract freely informs each of the landlord specific rights formulated above. The landlord’s right to contract freely entails the landlord’s right of choice of tenant (including the right to disallow subletting or cession of the lease), the right of choice of contract terms and the right to terminate the lease agreement. A discussion of these landlord’s rights in terms of the landlord’s right to contract freely follows in Chapter 3.

2 4 3 Landlords’ right to safeguard their financial interests
The general right to choose does not only indicate the landlord’s right to contract freely, as further specific landlord rights can still be developed from this broad consumer right. When one considers that the landlord has the right of choice of tenant, which is a derivative of the right to contract freely, one can obviously assume that the landlord will also have specific rights regarding the rental amount. This includes the right to determine the initial rental amount and the right to increase the rental amount later. The amount the landlord would bargain for would be an amount negotiated to protect his/her financial interests and return on his/her investment. Thus, the landlords right is not only informed by the law of contract but also by the landlord’s right to safeguard his/her financial interests.

The general consumer right to be informed in a contractual setting involves the right to be informed about certain details of the other contracting party so that the contractant can decide whether he/she should enter into a contractual relationship with him/her. With regard to the landlord’s specific right the general consumer right indicates a right to be informed in detail about the tenant’s financial status and whether he/she can pay the rent. The right to be informed entails the right to make informed decisions and exercise choices based on the information gathered. Thus, the landlord has the right to gather as much information about a prospective tenant as legally possible before entering into a lease agreement with him/her. This will enable him/her to be in a position to make an informed decision about whether or not to let property to such a prospective tenant. Thus the landlord has the right to screen tenants by obtaining information relating to
their credit history. The landlord also has an expectation of honesty on the part of the tenant who should disclose all relevant financial information. In this way, the landlord is protected from contracting with dishonest and doubtful tenants. Thus, the right to be informed is a valuable landlord right and entails the specific landlord right, to screen prospective tenants as well as the right to honesty on the part of the prospective tenant. For, if the tenant does not disclose his/her financial circumstances and it transpires that he/she cannot afford to pay the rent, then the landlord will suffer financially as he/she will have to “foot the bill” every month whilst the tenant enjoys the property.

There is a possibility in every lease that a tenant may default on rental payments. In light of the general consumer’s right to redress, the landlord has a specific right to recover arrear rental from the tenant as speedily and inexpensively as possible. This is an important right as the payment of rent at the agreed time and place in accordance with the lease agreement is a vital legal element of the landlord/tenant relationship. The landlord as a property owner and financier needs the rent to be paid on time, otherwise he/she will suffer financially as various bills relating to the property must be paid out of rental income. At common law, a specific mechanism known as the landlord’s tacit hypothec is in place to protect the landlord’s financial interests and give immediate security to the landlord when the tenant has defaulted on rental payments. The landlord’s tacit hypothec is a valuable tool which can be derived from the consumer right to redress and which protects the landlord’s financial interests.

Accordingly, the general right to choose informs the landlords right to determine the initial rental amount and the right to increase that amount. The general right to be informed entails the landlord’s right to be informed about certain aspects of a prospective tenant. Lastly, the general right to redress entails the landlord’s right to recover rental arrears, which includes the landlord’s tacit hypothec. All these landlord specific rights are discussed in Chapter 4.
2.4.4 Landlords’ right to safeguard their proprietary interests

The general right to redress not only entails the landlord’s right to recover arrear rental as indicated above, but also entails the right to seek compensation for damage to the premises on the part of the tenant, as speedily and inexpensively as possible. This right covers the landlord’s right to have his/her premises returned to him/her in the condition it was given in, fair wear and tear excepted, on termination of the lease.

Moreover, the right to good quality goods embraces the landlord’s right to preservation of the integrity of the premise (the landlord’s “goods”) by the tenant, in other words, the right to have the premises taken care of by the tenant. This landlord right also includes his/her right to inspect the premises during the lease in order to ascertain certain damage to the premises cause by the tenant and thus be able to maintain the good quality of the premises.

The general right to redress and the right to good quality goods may be applied specifically to the landlord who has, therefore the following rights: the right to the have the integrity of the premises preserved by the tenant (the right to have the premises taken care of by the tenant) and the right to receive the premises in the same condition it was given to the tenant, fair wear and tear excepted, all of which will be discussed in Chapter 5.

2.4.5 Landlords’ right to evict a defaulting tenant

The landlord has a right to evict a tenant as quickly and inexpensively as possible if the tenant is in illegal occupation of the property. In such a situation, the landlord will want possession of his/her property as soon as possible in order to safeguard his/her proprietary interests, prevent damage to his/her property and mitigate his/her losses by replacing the tenant. Thus, the right to redress is applicable in this context in the form of the landlord’s right to evict a defaulting tenant. This landlord’s right is discussed in Chapter 6.
2.5 Consumer protection framework in South Africa

2.5.1 General protection of consumers in terms of South African common law and legislation

Prior to the promulgation of the Consumer Protection Act, the system of consumer protection law was piecemeal with seventy pieces of legislation spread across different sectors of industry and commerce, administered by various sectors of government. Some of these laws were general or specific in their application and formulation, for example, the general Consumer Affairs (Unfair Business Practices) Act and Trade Practices Act, while some were more specific such as the National Credit Act and Alienation of Land Act. The RHA is industry specific consumer protection legislation in that it protects consumer rights with the tenant recognized as the consumer.

The seventy pieces of legislation dealing with consumer protection were considered unsatisfactory in that there were no general rules relating to consumers' fundamental rights to disclosure, information, transparency and fairness. Moreover, the issues of inadequate protection and limited redress; unsafe products; discriminatory and unfair market practices; lack of awareness of rights; as well as weak enforcement systems were not addressed by the previously fragmented consumer protection laws. Consequently, uneven and inadequate regulation of consumer protection law existed, which led consumer’s being open to abuse. Thus, in order to solve this unsatisfactory situation and reconcile the fragmented legislation, the Consumer Protection Act came into being with the aim of providing a comprehensive and overarching consumer law of general application that would regulate the interaction between businesses and

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68 Namely, twenty three by the Department of Trade and Industry, eight by the Department of Health, eight by the Department of Agriculture, six by the Department of Justice, and five by the Department of Transport and some even indirectly handled by the Departments of Environmental Affairs and Tourism, Water Affairs and Communications (Department of Trade and Industry ‘Consumer Protection Regulations to Move Away from Common Law’ 2008-05-06 (http://www.sabinet.co.za/sabinetlaw/news_par636.html accessed 2009-12-18)).
70 Act 76 of 1976.
71 Act 34 of 2005.
72 Act 68 of 1981.
consumers in the market place. Overall, the approach of the Act is rights-based and introduces internationally recognized and UN adopted consumer rights. These rights include the right to disclosure, choice, product safety, consumer education and redress.

The Consumer Protection Act is applicable to landlords as consumers in conjunction with the RHA. Mention must be made of the fact that the scope of this research is limited to the RHA only and not that of the Consumer Protection Act. Accordingly, in the paragraph that follows, the researcher will proceed with a discussion of the RHA as specific consumer protection legislation applicable to landlords of residential housing.

2.5.2 Rental Housing Act as specific consumer protection legislation

The RHA was created at the time of a decline in the investment of the rental housing market, aggravated by the acute shortage of affordable housing in South Africa. All these factors led to the vulnerability of homeless persons who were exposed to exploitation in the housing market, resulting in an imbalance in the rental housing market. The 1994 White Paper on housing titled “A New Housing Policy and Strategy for South Africa” indicated a strong need for consumer protection as well as the education of housing consumers in order to protect the desperate homeless people who were “at the mercy of unscrupulous operators in the market”. These “unscrupulous operators” were identified as landlords willing to exploit the desperation of the homeless by charging excessive rentals without taking responsibility for the conditions of the premises. Few available rental premises with many homeless persons seeking premises confirmed an imbalance in the rental market at the time. Thus, the RHA was passed primarily to protect tenants against exploitation by landlords in the market conditions at the time.

The RHA undoubtedly constitutes specific consumer protection legislation designed to protect tenants and initially aimed to counterbalance the unequal relationship between landlord and tenant that existed at the time when the RHA was created. However, the

77 Supra.
question remains to what extent the RHA serves as a satisfactory consumer protection measure for the protection of the rights of the landlord, who is also a consumer. This research will investigate this problem in the chapters that follow.

2.6 Conclusion
Since the promulgation of the RHA, the rental housing market has shifted in that there is currently an oversupply of rental housing stock meaning that the tenant is now the party in a stronger bargaining position than the landlord. As consumer protection principles dictate that a party in a weaker bargaining position must be protected by legislation, so too then the landlord needs protection from exploitation by tenants. Thus, the researcher has positioned the landlord as a consumer in the rental housing market and argued this point in order to break conventional methods of thinking in that the tenant is not the only party worthy of protection as a consumer.

With the landlord being a consumer, general and internationally recognized consumer protection principles are applicable to the landlord. These general principles may be formulated as consumer rights. Applicable in the context of the landlord/tenant relationship, these consumer rights form the basis of four landlord specific "consumer" rights, namely: the right to contract freely; the right to safeguard his/her financial interests; the right to safeguard his/her proprietary interests and the right to evict a defaulting tenant.

The RHA is a specific piece of consumer protection legislation that regulates the rental housing market. This legislation is examined in this study in order to determine to what extent the landlord’s specific consumer rights are protected as a consumer, the landlord is entitled to protection through the specific consumer protection legislation of the RHA, that does protect the tenant. With consumer protection principles serving as the backdrop for this study, the aim of this study is to analyze whether the RHA provides adequate protection for the rights and interests of the landlord.
CHAPTER 3
LANDLORDS’ RIGHT TO CONTRACT FREELY TO PROTECT THEIR INTERESTS

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3.1 Introduction

This chapter examines the RHA in light of the landlord’s entitlement to safeguard his/her rights by means of legal and binding agreements. As discussed in Chapter 2, the general consumer right to choose informs many specific landlord rights such as the right to choose contract terms, the right to choice of tenant, the right to sublet and the right to terminate the lease agreement. These rights, collectively, constitute the landlord’s right to contract freely. Each of the individual or specific rights will be fully discussed in this chapter as follows. Firstly, the general principles of the right to contract freely in South Africa will be stated and fully explained. Thereafter, there will be a discussion of how parties in a contractual relationship are restricted to a contract are restricted from contracting freely in terms of the common law. Then, a look at the law relating to unfair contract terms in South Africa and foreign law will follow. The aim of this chapter is to
set a standard for an analysis of the RHA’s provision for the landlord’s right to contract freely and also to set a standard for an analysis of the landlord’s right to contract freely as a whole.

This chapter will focus on the relevant sections of the RHA relating to freedom of contract. These provisions will be compared to rental housing legislation of selected foreign legal systems. The following aspects will be discussed:

a) general principles of the right to contract freely;
b) regulating unfair contract terms in South African law and foreign law;
c) specific clauses found in standard form lease agreements;
d) the landlord’s right to choice of tenant; and

e) the landlord’s right to terminate the lease agreement.

An evaluation of the above aspects will be made and a conclusion will be drawn whether the landlord’s right to contract freely has been adequately recognized and protected by the RHA.

3.2 General principles underlying the right to contract freely in South African law

Whether in reference to the landlord or tenant, the right to contract freely basically refers to the right to choose one’s contracting party and to freely negotiate the terms of the contract. In principle, contracts allow parties to create their own enforceable terms and conditions and thus, parties are free to tailor contracts according to their own unique circumstances.

The nature of this contractual freedom is such that parties are to agree on terms or conditions regardless of whether they are to their advantage or to their detriment. This is because principles of the free market encompass the right to contract freely as a

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fundamental right.\textsuperscript{79} The right to contract freely is the underlying concept of the law of contract \textsuperscript{80} and vital to the successful functioning of a free market. Every consumer has that right, including a landlord or tenant. It is supported by the rules of consensus that form the basis of a contract.\textsuperscript{81}

The right to contract freely entails the principle that people enter into contracts expecting that they will be enforceable and will not be affected by government or court interference. It does not matter whether this interference is in the form of consumer protection legislation or other laws.\textsuperscript{82} To reiterate this point, Innes CJ in \textit{Wells v South African Alumenite Company}\textsuperscript{83} stated the following:

"If there is one thing which more than another public policy requires is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract."\textsuperscript{84}

Furthermore, the Latin maxim of \textit{pacta sunt servanda} entrenched in contract law, entails that parties should comply with contractual obligations that have been freely and

\textsuperscript{79} In Trebilcock ‘The Limits of Freedom of Contract’ 1995 \textit{The Modern Law Review} 446, the author argues that the exercising of the freedom of contract in a society improves welfare, enhances freedom and avoids harm to others.

\textsuperscript{80} Van der Merwe et al \textit{Contract General Principles} (2007) 11.


\textsuperscript{82} Department of Trade and Industry ‘Consumer Law Benchmark Study’ GN 26774 May 2004. Sutherland maintains that "[i]t is perhaps an exaggeration to state that sanctity of contract has ever been regarded as absolute...the importance of sanctity of contract has often been overstated in South Africa. The time is ripe to reconsider this principle against the backdrop of the Constitution, the importance of the state in the regulation of the economy and the need for consumer protection.” (Sutherland ‘Ensuring Contractual Fairness in Consumer Contracts after Bakhuizen v Napier 2007 (5) SA 323 (CC) – Part 2’ 2009 \textit{Stellenbosch Law Review} 50 53).

\textsuperscript{83} 1927 AD 69.

\textsuperscript{84} This was originally stated by Sir George Jessel MR in the English case \textit{Printing and Numerical Registering Co. v Sampson} (1875) LR 19 EQ 462 465, and is considered to be the leading case on the doctrine of freedom to contract. This case has long been accepted as a correct reflection of the law by our courts. In \textit{Osry v Hirsh, Loubser & Co Ltd} 1922 CPD 531 Koze JP said the "spirit of modern jurisprudence is in favour of liberty of contract” (546). In \textit{Sasfin (Pty) Ltd v Beukes} 1989 (1) SA 1 (A) Smalberger JA said that public policy generally favours "utmost freedom of contract” (9B). See also \textit{Standard Bank of South Africa Ltd v Wilkinson} 1993 (3) SA 822 (C) 826G and Kessler ‘Contracts of Adhesion-Some Thoughts about Freedom of Contract’ 1943 \textit{Columbia Law Review} 629 631 where Sir Jessel’s quote is mentioned in an argument for the supporting of freedom of contract.
voluntarily entered into by them.\textsuperscript{85} This is the right to self-autonomy or the ability to control one’s own affairs, even to one’s own detriment. Moreover, it is the basis of the right to contract freely and a vital part of dignity.\textsuperscript{86} The landlord too has this right to protect his/her interests.

Until recently, the maxim of \textit{pacta sunt servanda} has been adhered to and protected by the courts,\textsuperscript{87} but has subsequently been changed by the Constitutional Court judgment of \textit{Barkhuizen v Napier},\textsuperscript{88} where it was held that the maxim is not absolute in its application and must yield to public policy notions of fairness, justice and reasonableness, which are constitutional values.\textsuperscript{89} Accordingly, the notions of public policy are that the doctrine of self-autonomy cannot be applied absolutely and without exception. Contracting parties, especially those who are not in equal bargaining positions are subject to, and protected by, the values of society, namely constitutional values.\textsuperscript{13} It is trite law that a court will not enforce a contract term that is against public policy (\textit{contra bones mores}).\textsuperscript{90} Values of society are influenced by the Constitution of

\begin{thebibliography}{99}
\bibitem{Human} \textit{Human v Riesenberg} 1922 TPD 157; \textit{Linstrom v Venter} 1957 (1) SA 125 (SWA); \textit{Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere} 1964 (4) SA 760 (A); \textit{Wells v South African Alumenite Co} 1927 AD 69; \textit{Tamarillo (Pty) v B N Aitken (Pty) Ltd} 1982 (1) SA 398 (A); \textit{Donelly v Barclays National Bank Ltd} 1990 (1) SA 375 (W), \textit{Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd} 1991 (2) SA 754 (A); \textit{Standard Bank of South Africa Ltd v Wilkinson} 1993 (3) SA 822 (C).
\bibitem{Mukeibir} Mukeibir ‘The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant’ 2000 \textit{Obiter} 325 348; Howells and Weatherhill Consumer Protection Law (2005) 261. Woolman criticises the \textit{Barkhuizen} judgment and takes the view that the court does not “engage in the direct application of the Bill of Rights...[but] continually [relies] on s 39(2) of the Constitution to decide challenges to both the rules of common law and to provisions of statutes [...] obviate[ing] the need to give the specific substantive rights in Chapter 2 [of the Constitution] the content necessary to determine the actual validity of the rule being challenged in the instant matter and of similar rules challenged in subsequent matters” (Woolman ‘The Amazing Vanishing Bill of Rights’ \textit{SALJ} 762 763).
\bibitem{Brand} Brand ‘The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution’ 2009 \textit{SALJ} 71 73; \textit{Shifren v SA Sentrale Ko-operasie Graanmaatskappy Bpk} 1964 (2) SA 343 (O) 346H; \textit{Morrison v Angelo Deep Gold Mines Ltd} 1905 TS 775 785; \textit{Wells v South African Alumenite Co supra} 73; \textit{Baart v Malan} 1990 (2) SA 862 (E); \textit{Ocean Diners}
\end{thebibliography}
the Republic of South Africa.\(^{91}\) In fact, all law (including landlord and tenant law) is subject to the Constitution, and constitutional values must revise all laws, including the law of contract.\(^{92}\) Furthermore, when the courts have the task of developing the common law of contract, they are required to do so in a manner that promotes the spirit, purport and objects of the Bill of Rights.\(^{93}\) Accordingly, the courts are even entitled to develop the common law of landlord and tenant in such a manner. It was further held in *Barkhuizen* that the court will not enforce a contract term if it finds that the implementation of the contract term would result in unfairness, or would be unreasonable for being contrary to public policy, despite the fact that the parties freely and voluntarily consented to those terms.\(^{94}\) Ngcobo J established a test for determining the fairness of a clause,\(^{95}\) which requires that the following questions must be asked. Firstly, is the clause itself unreasonable? If the clause is found to be objectively reasonable, a second question must be asked, namely, whether the clause should be enforced in light of the circumstances that prevented compliance with the clause.\(^{96}\) This means that once it is established that a clause does not objectively infringe public

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\(^{92}\) *Barkhuizen v Napier* 333C-E; see also *Barnard v Barnard* 2000 (3) SA 741 (C). Sutherland argues that "the justifications of using public policy as the necessary hook to hang constitutional principles onto the law of contract are unconvincing". He further adds that "the contention of Ngcobo J that all law is now derived from the Constitution and constitutional values should be mediated through public policy is a *non sequitur*...The manner in which the Constitution should apply ought to depend on the nature of the constitutional right and the nature of the attack on existing contract law. Public policy often will be the most appropriate area for accommodating the Constitution, but will not always be the case." (Sutherland 'Ensuring Contractual Fairness in Consumer Contracts after Barkhuizen v Napier 2007 (5) SA 323 (CC) – Part 1' 2008 *Stellenbosch Law Review* 390 403-404).


\(^{94}\) *Barkhuizen v Napier* 334A-B; Marx & Gowndjee 'Revisiting the Interpretation of Exemption Clauses' 2007 *Obiter* 622 633. Kessler concludes that "the meaning of [freedom of contract] must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract" (Kessler 'Contracts of Adhesion-Some Thoughts about Freedom of Contract' 1943 *Columbia Law Review* 629 642); Brand adds that "the concept of public policy needs development and fine tuning. But one of the great attributes of our legal system is exactly....that, over many years, it has allowed the courts to provide for the changing needs and values of society by incremental change without creating a wholesale legal and commercial uncertainty" (Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' 2009 *SALJ* 71 87-88).

\(^{95}\) *Barkhuizen v Napier* 56.

\(^{96}\) *ibid.*
policy, a party to a contract may still avoid the effect of non-compliance, if it can be shown that a good reason existed for non-compliance.\textsuperscript{97} Courts are, thus, empowered to declare contract terms unenforceable on the basis that enforcement would be unfair.\textsuperscript{98}

In particular, the courts are entitled to attend to the revision of standard-form contracts (also known as contracts of adhesion), which are contracts that are drawn up mostly in circumstances when an unequal bargaining position between the powerful supplier and less powerful consumer exists.\textsuperscript{99} Such contracts are entered into on the basis of a standard set of contractual terms that are contained in a single document constructed by only one of the parties, usually the more powerful party.\textsuperscript{100} The problem with standard form contracts is that they present little choice to the party who has not drawn up the contractual document. In other words the party must either accept or reject the terms, which is difficult in the case where the party who formulated the contract is in a stronger bargaining position as for example, when landlords hold the monopoly in the rental housing market.\textsuperscript{101} This was the particular situation at the time of the promulgation of the RHA, when landlords who were in a stronger bargaining position, were imposing standard form lease agreements on tenants. As explained in Chapter 2, the bargaining positions of the landlord and tenant has now changed in that the tenant is now in the stronger bargaining position.

Apart from the influence of case law, the right to contract freely in terms of common law will substantially be influenced and changed by the Consumer Protection Act,\textsuperscript{102} which provides for the right to fair, just and reasonable terms and conditions. This right entails that the interests of the consumer and supplier be balanced and will result in many

\begin{itemize}
\item \textsuperscript{97} Delport ‘Unfair Contract Terms: Constitutional Court Approach’ 2007 Commercial Law Bulletin 4.
\item \textsuperscript{98} Ibid.
\item \textsuperscript{100} Braun Policing Standard Form Contracts in Germany and South Africa: a comparison LLM dissertation University of Cape Town (2006) 10.
\item \textsuperscript{102} Act 68 of 2008. This Act will only come into effect in October 2010.
\end{itemize}
businesses amending certain standard terms and conditions in their contract (see paragraph 3.3.1). The Act specifically prohibits unfair, unreasonable or unjust contract terms, unilateral changes to contracts, certain types of agreements, and any form of contracting out of the Act. Thus, this legislation will affect common law principles of the right to contract freely in general, and more specifically the landlord’s position as an investor in the property market.

3.3 Legislative regulation of unfair contract terms
Consumer laws invariably contain principles that regulate different types of contracts such as lease agreements. A discussion of statutory provisions relating to unfair contract terms follows in the paragraphs below.

3.3.1 South African law
Residential lease agreements, whether negotiated by landlords or their letting agents, usually take the form of a standard pre-printed document. Standard lease agreements are freely available on most property websites, from newsagents and from the Estate Agency Affairs Board. The 2004 Consumer Law Benchmark Study produced by the Department of Trade and Industry, defines standard contracts as contracts “that do not allow a consumer the opportunity to negotiate its terms, [and] hence, are imposed on the consumer.” Abusive contract terms, called unfair or unconscionable terms may exist in standard contracts that may create an unfair burden for the consumer who may not be able to negotiate out of these terms. Consumer

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104 A standard form contract generally has the characteristic of being an agreement between two parties containing pre-drawn terms, used by a business entity in transactions with consumers. The contract is used to supply mass demands for goods and services. Generally the will of the user of such contract terms dominates the transaction. The consumer is required to accept contractual terms without negotiations notwithstanding some particulars. Often the consumer accepts such terms without knowing or understanding such, thus creating an unequal bargaining position (Burke ‘Contract as Commodity: A Nonfiction Approach’ 2000 Seton Hall Legislative Journal 285 286; Burgess ‘Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion’ 1986 Anglo-American Law Review 255 257).

105 www.leaseagreement.co.za; www.landlords.co.za; www.law24.co.za to name a few.

protection measures are, thus, necessary in these situations to avoid exploitation of consumers by unscrupulous suppliers and/or service providers.\textsuperscript{107}

The Consumer Protection Act enhances the legal position by prohibiting certain unfair or unjust transactions as well as unconscionable conduct.

According to section 48(1), a supplier must not:

"(a) offer to supply, supply, or enter into an agreement to supply, any goods or services—
(i) at a price that is unfair, unreasonable or unjust; or
(ii) on terms that are unfair, unreasonable or unjust;
(b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
(i) to waive any rights;
(ii) assume any obligation; or
(iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction."

Without limiting the generality of section 48(1), section 48(2) states that:

"a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—
(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
(b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
(c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
(d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—
(i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
(ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.\textsuperscript{108}"

Section 51(1) of the Act states that a supplier must not make a transaction or agreement subject to any term or condition if its general purpose or effect is to defeat the purposes and policy of this Act (which is basically the eight fundamental consumer rights referred to in chapter 2); mislead or deceive the consumer; or subject the consumer to fraudulent conduct. Furthermore, a prohibited term, amongst others, is one which directly or indirectly purports to waive or deprive a consumer of a right in terms of this Act; avoid a supplier’s obligation or duty in terms of this Act; or set aside or override the effect of any provision of this Act and so on. If a provision, term or condition of a contract contravenes this section of the Act, such provision is void. Basically, section 51(1) contains a detailed set of the prohibited conditions, terms, transactions and agreements.

Section 52 provides that if the Act has no remedy, the court may make an order prescribed by the Act. In making an order, section 52(2) provides that the court must consider, inter alia, the fair value of the goods and services; the nature of the parties involved in the agreement including subjective elements such as education, experience, sophistication and bargaining power; whether those circumstances were reasonably foreseeable at the time that the agreement was concluded irrespective of whether the Act was in force at that time; the objective conduct of parties; extent of negotiations; the actual or reasonably expected knowledge by the consumer of the existence of a

108 S 49 provides that in addition to exemption clauses, any notice or provisions which impose an obligation on the consumer to indemnify the supplier for any cause or constitute an acknowledgement must also be drawn to the attention of the consumer. Furthermore, a provision or notice that concerns an activity that is subject to any risk of an unusual character or nature, the presence of which the consumer could not reasonably be expected to be aware of, or which an ordinarily alert consumer could not reasonably be expected to notice, or that could result in serious injury or death, must be drawn to the attention of the consumer and the consumer must have assented to that provision or notice by signing or initialling the provision acknowledging the notice and acceptance of the provision.

109 S 51(1)(a)(i). This is, *inter alia*, the promotion and protection the economic interests of consumers; improvement of access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs; protection of consumers from hazards to their well-being and safety; development effective means of redress for consumers; and the promotion and provision for consumer education (Preamble to the Consumer Protection Act 68 of 2008).

110 S 51(1)(a)(ii)-(iii).

111 S 51(1)(b).

112 S 51(3).
particular provision; and the amount of identical, equivalent goods or services in the market.

After consideration of the elements in section 53, if the court finds that a contract term is unconscionable, unjust, unreasonable and unfair in whole or in part, the court has the power to make a declaration to that effect, or may make a further order the court considers just and reasonable in the circumstances, including, but not limited to, an order:

“(i) to restore money or property to the consumer;
(ii) to compensate the consumer for losses or expenses relating to—
(a) the transaction or agreement; or
(b) the proceedings of the court; and
(iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier’s conduct.”

Accordingly, the factors that the court must consider in reaching a decision might be considered to be a test or set of guidelines for the courts when determining the fairness/unfairness of a contract term.

A discussion about the possible effects of these sections of the Consumer Protection Act on the landlord/tenant relationship falls outside the scope of this research. However, the point must be made at this stage that implications of these sections for landlords and their right to contract freely are significant with the result being that each lease would, probably, have to be individually negotiated to a considerable degree for each landlord/tenant relationship, and the use of standard form contracts would disappear. Furthermore, mention must be made of the fact that not every landlord should be considered a supplier in the context of the Consumer Protection Act. The Act is only applicable to those landlords that let his/her premises continually in the course of business. Thus, the Consumer Protection Act does not apply to a landlord that lets a property once-off, and such a landlord will not be restricted by the provisions of the Act.

113 S 52(3).
33.2 Foreign law

There are two sources of control over unfair contract terms in England, namely the Unfair Contract Terms Act 1977\(^{114}\) and the Unfair Terms in Consumer Contracts Regulations 1999.\(^{115}\) The latter was created to incorporate the comprehensive European Community Directive on Unfair Terms in Consumer Contracts\(^{116}\) into English law.\(^{117}\) The Regulations overlap to some extent with the Unfair Contract Terms Act 1977, which deals particularly with exemption clauses.\(^{118}\) The Regulations contain a test to determine whether a term is unfair and has three requirements that must be met before the term is considered unfair. Firstly, the term should not be contrary to good faith requirements. Secondly, it must create a significant imbalance with respect to the rights and obligations of the parties and to the detriment of the consumer. Lastly, the term must not have been individually negotiated in that the consumer has not had the opportunity to formulate the contract.\(^{119}\) In addition to this test, the nature of the contract at the time that it was concluded, and all the circumstances relating to conclusion of the contract, must also be considered.\(^{120}\)

The various Canadian states have Consumer Protection statues and other consumer protection legislation that adopt different approaches to standard contracts and unfair terms. The Business Practice and Consumer Protection Act\(^{121}\) of British Columbia contain a test to determine whether an act or business practice is unconscionable. This is a provision that was intended to be a statutory embodiment of the judicial doctrine of unconscionability.\(^{122}\) The court may set an unfair contract term aside by considering all

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\(^{114}\) Chapter 50.

\(^{115}\) Statutory instrument 1999/2083.

\(^{116}\) Directive 93/13/EC.

\(^{117}\) Howells & Weatherill Consumer Protection Law (2005) 267. The Regulations and EC Directives must not be implemented in isolation from each other, but they must be viewed as two separate legal instruments in force in England. Furthermore, the relationship between the Act and the Regulations is one of double control (ibid).


\(^{119}\) Reg 5(2) read with reg 8(2).

\(^{120}\) Reg 6(1).

\(^{121}\) 2004 Chapter 2.

surrounding circumstances at the time of conclusion of the contract. The court may also take into account various factors, such as if:

" (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;

(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

(c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;

(d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;

(f) a prescribed circumstance."

The Act also identifies specific contracts that have caused concerns for consumers.

In terms of the Consumer Protection Act of Uganda an agreement is considered to be unfair according to the following factors: if it results in unreasonable and unequal exchange of value or benefits; is oppressive; imposes liabilities on one party that are unreasonable for the protection of the other party; unreasonably excludes or restricts the obligations of a consumer; or is contrary to commonly accepted standards of fair dealing.

Therefore, the above foreign law provides for a standard set of factors for the courts to consider when determining whether to set aside an unfair contract term, as does the South African Consumer Protection Act.

123 Part 2 s 8. See also Morrison v Coast Finance Ltd (1965) 54 WWR257; Harry v Kreutziger 1978 (9) BCLR 166. These are the two leading British Columbia cases of the unconscionability doctrine. Both are classic examples of when the court will intervene and rescind a contract under the unconscionability doctrine.

124 See the Business Practices and Consumer Protection Act part 4 (Consumer Contracts), which regulates direct sales contracts, future performance contracts, timeshare contracts, funeral and interment right contracts, and distance sales contracts.

125 S 20(3).
3.4 Specific restrictions on landlords’ freedom to contract

With the above general restrictions on the right to contract freely and the regulation of unfair contract terms serving as a yardstick, the RHA and the UPRs\(^\text{126}\) will be examined to ascertain specific curtailments on the landlord’s right to contract freely. Of particular significance are:

a) the anti-discrimination” clause under section 4(1) of the RHA;

b) section 5(6) of the RHA that prohibits contracting out of the RHA by the landlord or tenant; and

c) the common regulation of the six UPRs that prohibits the landlord from inducing the tenant to contract out of the RHA, the UPRs and any other law.

Point (a) will be discussed in paragraph 3.5 in the context of the landlord’s right to choice of tenant, whereas a discussion of points (b) and (c) will immediately follow.

3.4.1 Rental Housing Act

Section 5(6) of the RHA states that the obligations of the landlord and tenant must be stated in a written lease. Moreover, these obligations must not detract from the provisions of section 5(3) of the RHA or the UPRs.\(^\text{127}\) Section 5(3) deals with the law relating to obligations of both the landlord and tenant with regards to: deposits; joint inspections; issuing of receipts; abandonment of the premises by the tenant; and damage to the premises caused by the tenant.\(^\text{128}\) The RHA also states that the landlord and tenant must not contract out of nor waive the provision of section 5(3).\(^\text{129}\)

A prohibition of contracting out is also found in the provincial UPRs. The following standard regulation reads:


\(^{127}\) S 5(6)(g).

\(^{128}\) S 5(3)(a)-(o).

\(^{129}\) S 5(4).
“A landlord may not -
(a) ...
(b) ...
(c) ...
(f) ...
(g) induce the tenant to waive his or her rights under the Act, these Regulations or any other law, or to withdraw from proceedings before the Tribunal.”

For convenience purposes, the regulation under discussion will be referred to as “the prohibition of contracting out regulation”. A closer look at this regulation is needed in respect of its interpretation and extent of application. It must be mentioned that no case law or published opinion exists regarding the interpretation of this section.

Firstly, the question that comes to mind is, what does “induce” mean? The *Merriam-Webster Dictionary* defines “induce” as “to move by persuasion or influence”. A synonym for “persuade” is “convince”. Thus, if the landlord merely “persuades” or “convinces” the tenant to enter into a contract that contains a term that is contrary to the RHA, UPRs or any other law, then the landlord has contravened this section. One could maintain that every party is persuaded or convinced, whether positively or negatively, to enter into a contract, depending on the circumstances. For, if a party was not persuaded or convinced, he/she would not have entered into the contract. Thus, it is submitted that “induce” could cover all circumstances surrounding a conclusion of a lease agreement. In fact, any situation where there is a contracting out of the RHA, UPRs or any other law to be a contravention of this law. It is submitted that this is unfair and contrary to contractual freedom principles that promote negotiation, and thereafter consensus, between parties. Furthermore, it is difficult for a tenant to be induced into entering into a lease agreement these days as the rental housing market currently has an oversupply of rental housing stock. The tenant now has the upper-hand to decide which premises to rent. If the tenant does not agree to the terms and conditions of the prospective lease presented before him/her, he/she will simply look elsewhere.

130 Free State UPR reg 10(1)(f)-(g); Western Cape UPR reg 9(1)(f)-(g); Gauteng UPR reg 14(1) (f)-(g); Kwazulu-Natal UPR reg 21(1) (f)-(g); North West UPR reg 14(1) (f)-(g); Mpumalanga UPR reg 19(1) (f)-(g).
The UPRs go further by prohibiting the landlord from contracting out of “any other law”. The researcher submits that there is no legal difficulty with regard to the prohibition against contracting out of the RHA or UPRs. For, what is the point of creating a law that can be avoided by means of a mere contractual provision? Moreover, the prohibition against contracting out of an RHA is especially logical in terms of consumer protection principles. Practical and legal problems for the landlord may, however, lie with regards to the prohibition against contracting out of “any other law”. Three questions arise in this instance: what does “any other law” entail; what are the implications of this provision for the landlord; and what are the legal consequences if the landlord does contract out of the provisions of the RHA, UPRs or any other law?

With regard to the first question, it is submitted that “any other law” refers to the common law of landlord and tenant. This is the only logical inference regarding its meaning when one considers the context and the fact that the RHA and the UPRs have been given specific mention already in this discussion. Thus, in terms of the UPRs, it would appear, the landlord may not change the common law by means of contract. Furthermore, the landlord cannot change provisions of the RHA or UPRs either by means of contract. In other words, the landlord is confined to contracting within the provisions of the RHA and UPRs only.

With regard to the second question, the legal consequences of the landlord not complying with the UPRs would be that an unfair practice exists. This does not mean that the contract term would be automatically null and void. It is the task of the Rental Housing Tribunal to determine whether an unfair practice exists and what the consequences of this will be.

With regard to the third question, it is submitted that the landlord needs the right to change common law to safeguard his/her rights or interests. The following practical example serves as an illustration of how detrimental it is if the landlord cannot change common law. A hypothetical situation may exist where the premises are in a poor state

131 Reg 2 found in all the UPRs states that any person who contravenes any provision of the Regulations commits an unfair practice.
of repair but is still adequately habitable. The landlord and tenant negotiate and sign a lease for R3 000 as opposed to R10 000 per month on condition that the landlord is released from his common law maintenance obligations. In other words, the landlord merely "persuades" the tenant to contract out of his/her right to maintenance of the premises by the landlord. The landlord enters into such an agreement to protect his/her interests, and the tenant suffers no prejudice as he/she is paying a lesser rental. Each party gains from the agreement that is a win-win situation. However, in terms of the UPRs, this agreement constitutes contracting out of common law by the landlord and is therefore an unfair practice. Under no circumstances would the landlord be able to change his/her common law obligations, even if the agreement is acceptable for both the landlord and tenant. One could think of many other examples of situations where the landlord is not able to contract out of common law. The point remains that the landlord is not legally able to change common law even to safeguard his/her own interests. Yet, it is imperative that the landlord be legally able to safeguard his/her interests under the present rental housing market conditions.

Whatever the extent of unfairness regarding the prohibition of contracting out of common law, these laws do not apply in the Eastern Cape, Northern Cape and Limpopo provinces. There are no UPRs in place in these provinces. Thus, in these provinces, the landlord is allowed to change the common law. However, he/she may not contract out of the RHA's provisions as section 5(6) of the RHA forbids this. Accordingly, the law of landlord and tenant not only generally but specifically, in the instance of the prohibition of contracting out by the landlord, is fragmented in that it differs from province to province. South Africa is not a federation of states, but is one country governed by one legal system. A uniform approach needs to be adopted in this regard, especially in so far as the law places an unnecessary burden on the landlord.
3.4.2 Foreign law

The New South Wales Residential Tenancies Act\textsuperscript{132} prohibits contracting out of the Act. Any lease that includes a term and condition, whether in writing or not, that attempts to annul, vary or exclude any provision of the Act has no effect.\textsuperscript{133} Moreover, the Act prohibits persons from entering into any “agreement, contract or arrangement with the intention, either directly or indirectly, of defeating, evading or preventing the operation of this Act.”\textsuperscript{134}

The British Columbia Residential Tenancy Act of 2002 contains a similar section to that of New South Wales in that a landlord and tenant may not “avoid or contract out of this Act or the Regulators”.\textsuperscript{135} Such an agreement is of no force or effect.\textsuperscript{136}

3.4.3 Evaluation

It is apparent that the RHA, in certain respects, is unfair and contrary to contractual freedom principles that promote negotiation and thereafter, consensus between parties. The RHA is undermining the underlying common law principle of consensus.

The word “induce” as used in the prohibition of contracting out regulation is not appropriate when one considers the current rental housing market where an oversupply of rental housing stock exists. Accordingly, an unfair situation exists for the landlord who is not in position to dictate the terms of his/her lease agreement and needs legislative protection and more pertinently, the use of the common law protection.

In light of these provisions of the RHA and UPRs, it is submitted that the landlord’s right to contract freely is severely restricted in so far as he/she is restricted from formulating certain terms of his/her lease agreement as was the case at common law. As explained in Chapter 2, the RHA is consumer protection legislation, yet the landlord’s freedom to

\textsuperscript{132} Act 26 of 1987.
\textsuperscript{133} S 120(1).
\textsuperscript{134} S 120(2).
\textsuperscript{135} S 5(1).
\textsuperscript{136} S (5)(2).
contract has been restricted as a consequence of consumer protection principles. The question is whether it is a fair restriction of the right to contract freely.

The foreign laws discussed, that of Australia and Canada, also restricts the landlord’s right to contract freely in that he/she is prohibited from contracting out of the respective Act and Regulations. However, these foreign laws do not prohibit the landlord and tenant from contracting out of common law. This is where the RHA has gone too far: the UPRs take the restriction regarding freedom to contract further by prohibiting both the landlord and tenant from contracting out of any other law, in other words, common law. This is more extensive that foreign legislation which merely prohibits the landlord from contracting out of the relevant RHA.

Therefore, it is submitted that the term “any other law” be removed from the prohibition of the contracting out regulation of the UPRs as it severely restricts the landlord’s right to contract freely which is detrimental to a landlord in today’s rental housing market.

3.5 Specific clauses regulated by the Rental Housing

Standard form lease agreements usually contain a number of standard clauses drafted with the intention of protecting the landlord’s interest. The landlord includes such clauses as a tool to protect his/her interests and thereby, exercises his/her right to contract freely. These include, inter alia; exclusion clauses and cancellation clauses. Certain laws, however, may prevent the landlord from using these clauses. Consequently, the landlord’s right to contract freely may be infringed upon.

In the discussion that follows, exclusion clauses and cancellation clauses are defined and explained as to why they are of particular benefit to the landlord. Laws outside of the RHA restricting the use of these clauses will not be discussed as they fall outside the scope of this dissertation. The focus will be on whether the RHA does in fact restrict these standard clauses, and to what extent these restrictions affect the landlord’s right to contract freely.
3.5.1 Exclusion clauses

3.5.1.1 General

An exclusion clause, also called an exemption clause or exception clause, is a provision in a contract that aims to either limit the rights of the parties in the contract or to exclude their liabilities or responsibilities. The inclusion of an exclusion clause is a significant way to allocate and evenly apportion the risks of the contract between the parties.\(^{137}\)

There are various types of exclusion clauses, namely, *inter alia*: \(^{138}\) a clause that recognises a potential breach of contract and then excuses liability for the breach; \(^{139}\) a clause that imposes a limit on the amount that can be claimed for a breach of contract, regardless of the actual loss; and a clause stating that an action for a claim must be instituted within a certain period of time failing which the cause of action becomes extinguished. Thus, in order to restrict the consequences of breach of contract, parties are free to conclude contracts that do not contain these consequences. For example, parties would commonly modify usual contractual liability by excluding the obligation to pay compensation for breach or limit the amount of compensation payable. As Poole explains in *Textbook on Contract Law*:

"It should not be thought that exemption clauses are necessarily bad, or that the classical law was excessively naïve in allowing parties to abdicate all responsibility for their promises. The classical law assumed (in a way which today most lawyers would challenge) that all parties to contractual negotiation would be bargaining freely, would be best placed to know their own interests, and would agree to such terms only if some, not necessarily immediately apparent, benefit would accrue from so doing."\(^{140}\)

In general, standard form contracts, including lease agreements, may be used to impose an exclusion of liability clause that has not been individually negotiated. Such clauses are particularly harmful in consumer contracts where there is an unequal bargaining relationship between the parties and the consumer has no alternative but to


\(^{138}\) Van der Merwe *et al* *Contract General Principles* (2007) 297.

\(^{139}\) An example of an exclusion clause is the following:

"The Lessee shall have no claim for damages against the Lessor and may not withhold or delay any payment due to the Lessor by reason directly or indirectly of a breach by the Lessor of any of its obligations under this lease."

accept the terms.\textsuperscript{141} Therefore, an exclusion clause may be invalid either for lack of consensus between the contracting parties,\textsuperscript{142} or for the reason that consensus has been obtained in an improper manner by the party in the stronger bargaining position.\textsuperscript{143} The courts may strike down an exclusion clause if it finds it to be contrary to public policy.\textsuperscript{144}

Where parties are at equal bargaining levels, exclusion clauses provide an important tool for the allocation of risks. Yet, as a result of the standard form contract, it is generally accepted today that exclusion clauses are not freely negotiated and thus, legal intervention may be needed.\textsuperscript{145} It is submitted that this type of legal intervention may be necessary in the case of contractual agreements between landlords and tenants for the reason that the landlord nowadays is in a weaker bargaining position with regard to his/her legal relationship with the tenant. The landlord, thus, needs to make use of the exclusion clauses to protect his/her interests and prevent exploitation by unscrupulous tenants. Therefore, the law should in fact support and enforce the landlord’s effective use of exclusion clauses. This should be effectively provided for in the RHA. The question is whether the RHA does actually make provision for the landlord’s right to contract freely to protect his/her interests via exclusion clauses. This is discussed next.

\textbf{3.5.1.2 Rental Housing Act}

The Gauteng and North West Province UPRs states:

A lease agreement must exclude any provision which -

(a) \ldots;

(b) excludes liability of either party for failing to comply with a duty under the lease, these regulations, the Act or any other law;

(c) \ldots;

\textsuperscript{141} Van der Merwe et al Contract General Principles (2007) 297.
\textsuperscript{142} See Allen v Sixteen Sterling Investments (Pty) Ltd 1974 (4) SA 164; Du Toit v Atkinson’s Motors Bpk 1985 (2) SA 893 (A).
\textsuperscript{143} Van der Merwe et al Contract General Principles (2007) 102-152.
\textsuperscript{144} See Barkhuizen v Napier and Consumer Protection Act 68 of 2008.
It is submitted that the type of exclusion clause prohibited is an exclusionary clause that prevents the tenant from exercising his/her remedies relating to breach of contract that arises when the landlord fails to comply with a duty in terms of the lease, the UPRs, the RHA or any other law. A common example of this exclusionary clause in a lease is one which states to the effect that the tenant has no right of recourse against the landlord if the landlord fails to maintain the premises. Accordingly, the Gauteng and North West UPRs prohibit such an exclusionary clause. The landlord is, hypothetically, then, liable to the tenant to make good the loss the tenant has incurred as a result of the landlord’s failure to carry out his/her maintenance duties. This hypothetical situation is clearly unfair as it prevents the landlord from regulating his/her relationship with the tenant by means of the exclusion clause. In other words, an exclusion of breach of contract liability is prohibited outright in terms of the Gauteng and North West Province UPRs. It is submitted that the landlord’s right to contract freely is, consequently, infringed upon, as explained by means of this practical situation.

The UPRs of the Western cape, Mpumalanga Kwazulu-Natal, Eastern Cape, Limpopo, Northern Cape and Free State provinces do not contain a prohibition on exclusion clauses. Thus, in these seven provinces, common law applies which is not restrictive in its possible application to the landlord’s use of exclusion clauses and right to contract freely. In these provinces, therefore, an exclusion clause, may be void in terms of section 48 and 51 read with section 52 of the Consumer Protection Act as was discussed in paragraph 3 3 1 above. Thus, there is no uniformity of the law regarding the prohibition of the use of exclusion clauses in contracts. Such a situation is unsatisfactory as it creates inconsistency of laws in South Africa and furthermore, poses tremendous practical problems for landlords who let properties in different provinces.

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146 Both reg 3(3)(b).
3.5.1.3 Foreign law

In England, the legislation dealing with rental housing, namely the Housing Act,\(^{147}\) contains no specific clause disallowing exclusion clauses in lease agreements. The fairness/unfairness of an exclusion clause is determined generally under common law, the Unfair Contract Terms Act (1977) and various other statutes that require certain terms to be included in contracts.\(^ {148}\) There is no outright ban on the use of exclusion clauses by landlords. Instead, the general test to determine the unfairness any clause in a contract is used when an exclusion clause in a lease agreement is challenged. It is submitted that a general test is a good approach because it serves to protect the landlord’s rights as a consumer in that the unfairness of a particular exclusion clause depends on the circumstances of the case. Thus, in England, the fact that the landlord is in a weaker bargaining position than the tenant may be used as a factor in the justification of the use of exclusion clauses.

3.5.1.4 Evaluation

The legislative prohibition of exclusion clauses is undeniably justified when the party is not free to negotiate the terms of the contract and where an equal bargaining relationship does not exist between the parties. As explained in Chapter 2, the situation currently in South Africa is that the tenant is arguably the party with the higher bargaining power, owing to the oversupply of rental stock, and the landlord’s contractual freedom is being undermined. The landlord, thus, needs to include an exclusion clause in a lease agreement in order to effectively contain or limit the relevant damage or to effectively allocate the risks of the contract.

It is submitted that the outright ban on exclusion clauses in terms of the RHA in terms of the Gauteng and North West Province UPRs is extremely unfair to the landlord under the current rental housing market circumstances. This is also not in line with foreign law. A general legislative test to determine the unfairness of an exclusion clause, or

\(^{147}\) 2004 Chapter 34.

\(^{148}\) The following questions should always be asked with regards to the unfairness of an exclusion clause: has the clause been incorporated into the contract; does the clause effectively cover the breach; and what effect does the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 have on the clause? (Kelly, David, Holmes & Hayward Business Law (2005) 143).
any clause for that matter, as found in section 52(1) the Consumer Protection Act\textsuperscript{149} is a just way of dealing with potentially unfair clauses.

The Gauteng and North West UPRs do not seem to take into account the landlord’s position as a consumer who needs to include an exclusion clause in the lease agreement as a tool to protect his/her interests and right to contract freely in this regard. It is, accordingly, suggested that the Gauteng and North West Province UPRs be amended to allow the landlord the full use of exclusion clauses to protect his/her interests. The general principles discussed in 3 2 1 above should be applied to determine whether or not a contractual term is unfair, especially those principles formulated in the \textit{Barkhuizen v Napier} and the Consumer Protection Act.

3 5 2 Cancellation clause

3 5 2 1 General

As a consumer, the landlord may wish to make use of a cancellation clause in his/her lease agreement as a tool to protect his/her interests and thus, exercise his/her right to contract freely. In fact, almost every lease of residential premises will contain a cancellation clause. This is a clause that states the conditions under which each party may terminate the contract and entitles the landlord to end a lease on the occurrence of certain specific events.\textsuperscript{150} Without such a clause, the landlord cannot bring the lease to an end before the date the lease expires, unless the tenant has caused a major breach of contract.\textsuperscript{151} In this case the usual remedies for breach of contract are at the landlord’s disposal.\textsuperscript{152}

A cancellation clause typically stipulates what circumstances constitute a breach, thus, entitling the landlord to cancel the lease forthwith. An example of such a cancellation clause is one that allows the landlord to cancel the lease if the tenant fails to pay the

\textsuperscript{149} Act 68 of 2008.
\textsuperscript{150} Van der Merwe \textit{et al} \textit{Contract General Principles} (2007) 399.
\textsuperscript{152} Ibid; Kerr \textit{The Law of Sale and Lease} (2005) 363.
rent on the due date (even if payment was made late only once). Even in the case of an extremely minor breach that has been identified by the clause in advance as being fundamental, cancellation may follow.

Generally, a court will uphold a cancellation clause and will not, in fact, relieve the breaching party. The party who caused breach is barred from arguing that the breach was too minor to justify cancellation. At common law the only way to escape from the clause would be to argue that the clause is contrary to public policy and therefore, unenforceable.

3522 Rental Housing Act

The Act and UPRs contain a general provision relating to termination and cancellation of the lease. This provision impacts on the use of cancellation clauses by the landlord. The meaning and implication of this provision for the landlord is discussed in paragraph 3612 below in detail under the landlord’s right to terminate the lease.

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153 Kerr The Law of Sale and Lease (2005) 364-389. Kerr extensively considers the position of a forfeiture clause where payment is frequently accepted late by the landlord and the contract contains a “non-variation/waiver” clause. Kerr also examines cases where there is a “non-variation/waiver” clause and cases where there are no such clauses by referring to Garlick Ltd v Phillips 1949 (1) SA 121 (A), Myerson v Osmond Ltd 1950 (1) SA 714 (A), Sotiñades v Patel 1960 (2) SA 812 (SR), Dunseth v Munro 1962 (3) SA105 (C). Brisley v Drotsky 2002 (4) SA 1 (SCA).


155 See Estate Thomas v Kerr and another 1903 (20) SC 354; Human v Rieseberg 1922 TPD 157 163-165; Oatorian Properties (Pty) Ltd v Maroun 1973 (3) SA 779 (A) 785C. If a contract fails to stipulate which obligations are so fundamental that breach will entitle the innocent party to cancel the contract will have the result that the innocent party may have to approach the courts to decide whether, in all the circumstances, a particular term of the contract was so fundamental that a breach would entitle the other party to cancel (Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd (formerly Malbak Consumer Products (Pty) Ltd) and Others 2005 (3) SA 54 (W)).

156 Tomson v Ross 1947 (2) SA 1233 (W).

157 Barkhuizen v Napier 334A-B; Marx & Govindjee ‘Revisiting the Interpretation of Exemption Clauses’ 2007 Obiter 622 633.

158 This is the RHA s 4(5)(c) and Free State UPR reg 5(1)(b); Gauteng UPR reg 8(1)(b); Kwazulu-Natal UPR reg 17(1)(b); Mpumalanga UPR reg 5(1)(b); North West Province UPR reg 8(1)(b); Western Cape UPR reg 5(1)(b).
3 6  The right to choice of tenant

3 6 1  Tenant discrimination

3 6 1 1 Common law

A contract of lease is entered into when it is agreed that one party (the landlord) shall give the temporary use and enjoyment of the immovable property to the other party (the tenant), in return for rent.\(^{159}\) This definition of a contract of lease implies that the landlord can choose with whom he/she wants to enter into a contractual relationship. The landlord’s right to choose his/her contracting party lies at the heart of his/her right to contract freely.

At common law, the landlord has the absolute right to choose the tenant he/she considers to be suitable. This also means that the landlord is able to reject prospective tenants after considering various factors such as financial status and lifestyle. Furthermore, the landlord has the right not to choose prospective tenants based on his/her own personal prejudices.

Notably the main criteria for the landlord when considering potential tenants is whether the tenant can afford the rent and whether the tenant will look after the premises in a reasonable manner.\(^{160}\) Such information is easily obtainable by means of the Internet.\(^{161}\) Furthermore, at common law there is no legal impediment against the


\(^{161}\) See www.landlords.co.za, www.privateproperty.co.za and www.rentaspot.co.za amongst others. The landlord might obtain this information from the prospective tenant by performing credit checks on him and requesting previous landlord referrals. A credit check can be easily done online for a small fee, and the landlord only needs the prospective tenant’s identity number. In fact, there is an online Tenant Profile Network accessible through various websites where landlords and letting agents can obtain ratings of prospective tenants based on previous leases, finances and credit. The landlord needs permission from the applicant to acquire this information otherwise the landlord will be violating the applicant’s fundamental right to privacy. Permission may be given verbally or in writing. The latter means of permission is attained when the tenant completes and signs a standard rental application form that grants the landlord permission in the fine print (Irwin *The Landlord’s Troubleshooter: A Survival Guide for New Landlords* (2004) 88-99).
landlord to choose tenants based on these criteria. In other words, the landlord can exclude a prospective tenant based on grounds of financial status or his/her status as a previous tenant (dealings with previous landlords) at common law. However, there are now various laws in place restricting the landlord’s right to choose a tenant. The impact of these laws on the landlord’s right to contract freely requires closer examination. This is discussed next.

3612 Rental Housing Act

The general right not to be unfairly discriminated against is a fundamental right entrenched in the Constitution, known as the “equality clause”.\textsuperscript{162} No person may discriminate against another person on any grounds, such as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.\textsuperscript{163} The Promotion of Equality and Unfair Discrimination Act\textsuperscript{164} (“Equality Act”) also generally prohibits unfair discrimination on the same prohibited grounds as those mentioned in the Constitution, including any ground other than those listed in the Constitution, where discrimination based on that ground causes or perpetuates systematic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on one of the grounds listed above.\textsuperscript{165}

Besides these general laws, the RHA specifically prohibits tenant discrimination by the landlord. The landlord is not allowed to discriminate against tenants and prospective tenants based on the grounds listed in section 4(1) quoted below:

“[i]n advertising a dwelling for purposes of leasing it, or in negotiating a lease with a prospective tenant, or during the term of a lease, a landlord may not unfairly discriminate against such prospective tenant or tenants, or the members of such tenant’s household or the bona fide visitors of such tenant, on one or more grounds, including race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth.”\textsuperscript{166}

\textsuperscript{162} Constitution of Republic of South Africa Act 108 of 1996 s 9(4).
\textsuperscript{163} S 9(3) & (4).
\textsuperscript{164} Act 4 of 2000 (“Equality Act”).
\textsuperscript{165} S 1 “prohibited grounds” definition.
\textsuperscript{166} S 4(1).
In order to understand the inclusion of such a restricting law on the landlord’s freedom to contract, a brief discussion on the background of this section of the RHA is necessary.

The predecessor of the RHA was the Rent Control Act of 1976. Twenty years after its promulgation, the Act considered highly discriminatory because it provided for the application of rent control over premises on a racial basis including the income and age of the tenant. The Rent Control Act was thus abolished and one of the RHA’s main aims was to “afford tenants added protection by expanding on their constitutional and contractual rights”. It was the legislature’s contention at the time that the removal of discriminatory rent control laws would assist in the reduction of housing shortages. Furthermore, it was essential that the State take legislative action given the following: the drawback of the oppressive Rent Control Act; the post-apartheid political climate at the time of the RHA’s drafting; the constitutional value of equality entrenched in the Constitution; and the need to eradicate housing shortages. This legislative action leaned towards the abolition of discriminatory mechanisms and conventions in respect of gender, race, religion and belief. Such anti-discrimination measures were internationally recognised as being essential to a successful housing programme, which was an important criterion to be included in the RHA.

Laws against discrimination may be perceived in certain situations as restricting the freedom of individuals with regards to their freedom of choice. More specifically, a clash of rights exists between a tenant’s right not to be arbitrarily discriminated against and the landlord’s right to contract with whomever he/she chooses. As explained in this

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168 Ibid.
169 Ibid.
171 For a discussion on freedom to contract, see paragraph 3 2.
chapter, the law of contract is based on principles of consentuality that include principles of the right to contract freely. Flowing from this, people are entitled to trade with whomever they choose. With these factors in mind, one might ask if it is fair that the landlord be penalised for not wanting to contract with a prospective tenant based on the landlord’s personal preferences. One could argue that it is, after all, the landlord’s property, investment and means of income that he/she has put time and money into.

It may be argued that a prospective tenant has freedom of choice regarding which landlord he wants to contract with. A tenant could also “discriminate” against a landlord if he chooses not to rent the premises because of his/her own personal prejudices, such as those based on race, the neighbourhood where the premises is situated and cleanliness of the premises. The RHA does not specifically prohibit the tenant from discrimination against the landlord, but the Constitution and the Promotion of Equality and Unfair Discrimination Act does prevent discrimination against the tenant. Proof of discrimination against landlords is difficult to obtain. However, this does not detract from the principle of prohibition against discrimination that should be equally applied to both landlord and tenant.

Considering the background and rationale behind the anti-discrimination provision in the RHA, it seems that the legislature considered the landlord’s property rights and personal freedom to be of much less importance than the State’s need to provide equal access to housing and to eradicate discrimination. This is because the right of access to housing is seen as a fundamental right in the Constitution, and the State has a duty to ensure that no one is denied equal access to housing. Such socio-economic rights by implication are preferred over the freedom of choice and freedom to contract in South African's free market society. This situation perhaps needs analysis and legal redress.

174 This conflict of rights has never been challenged in a South African court. It was, however been challenged in a Michigan Supreme Court case of McCready v Hoffius (Michigan Appellate Division Digest COA#185182 (www.laryholland.com/micaselaw/Digest/newHTML/18515221.htm (accessed 30-06-08)) where it was ruled that state interests regarding access to housing are more important than freedom of
Various questions arise regarding the anti-discrimination section of the RHA. Firstly, what is the yardstick for determining unfair discrimination? Secondly, are grounds of discrimination limited to those listed in the section? Thirdly, what constitutes grounds for discrimination that are not listed? Following from this is the vital fourth question as to whether the landlord can discriminate against the tenant on the grounds of financial status or his/her status or his/her as a previous tenant?

In answering the first three questions, case law has provided a solution by means of an interpretation of the more general equality clause in the Constitution. There is no case law dealing with the interpretation of section 4(1) of the RHA, so the case law dealing with the interpretation of the equality clause of the Constitution will have to suffice. Furthermore, the equality clause of the Constitution is similarly worded as section 4 of the RHA, and so the interpretation of Constitution’s clause may provide a solution.

In *Harksen v Lane NO*, the courts formulated a multi-stage enquiry to determine whether there has been a violation of the equality clause in the Constitution. Basically, a preliminary enquiry is conducted to determine whether a person’s conduct indicated differentiation between people or categories of people. In other words, if no differentiation is identified, then there can be no violation of the equality clause. If differentiation is detected, then it must be determined whether it is fair or unfair differentiation. If the differentiation is based on one or more of the listed grounds in the section in the anti-discrimination section of the Constitution, then discrimination is presumed to be present, until the contrary is proved. If differentiation not on a listed ground is detected, then it will be considered discriminatory if it is based on a ground choice.

Leef maintains that “[l]aws against housing discrimination have no place in a free society. They solve an imaginary problem with a vicious and wasteful means that hastens the erosion of freedom” (Leef ‘Anti-Discrimination Law and the Continuing Erosion of Property Rights’ 1999 *Freedom Daily* (www.ff.org accessed 2008-06-30).)

*Harksen v Lane NO* 1998 (1) SA 300 (CC).

*Supra* 53.
that is "analogous" to the listed grounds. In the case of discrimination, an "analogous ground" is characterized by attributes that impact on the human dignity of the individual.

Human dignity is considered to be what gives a person their inherent worth. In Ackermann J in National Coalition for Gay & Lesbian Equality v Minister of Justice at paragraph 29 states that "it is a difficult concept in precise terms", and "requires us to acknowledge the value and worth of all individuals as members of society."

If discrimination is found on listed or analogous grounds, then the "guilty" party will have to prove that discrimination was fair by invoking the general limitations clause of the Constitution, namely section 36.

Ascertaining an answer to the fourth question is not so clear-cut. As explained in paragraph 361, the main criteria the landlord might consider when choosing a tenant is whether the prospective tenant can afford the rent, and whether the prospective tenant will look after the premises in a reasonable manner whilst in occupation. In other words, the landlord should legally be able to choose a tenant based on his/her financial status or status as a previous tenant. The question is whether the law does allow for the landlord to discriminate on these grounds. Thus, the above yardstick as formulated in Harksen v Lane NO might serve as the test to determine whether the landlord is in fact able to discriminate against a prospective tenant on these grounds.

177 Ibid.
179 1999 (1) SA 6 (CC).
180 The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose (s 36).
The researcher submits that the law concerning the landlord’s choice not to contract with a prospective tenant on the grounds of not being able to afford the rent and pay it on a regular basis does not amount to discrimination for the reason that:

1) it does not amount to any one of the listed grounds in section 4(1) of the RHA; and

2) one cannot successfully maintain that it is differentiation based on an “analogous ground” as it does not, in fact, offend the tenant’s human dignity.

If it is purely for business reasons that the landlord decides not to choose a particular tenant, i.e. because the latter does not have sufficient finances, then this cannot be considered to offend the tenant’s dignity directly or indirectly when one considers the definition of human dignity described by Ackermann J in National Coalition case. The landlord’s decision is not based on the individual’s value and worth as such. Therefore, if the landlord discriminates against a tenant based on his financial status, the landlord does not contravene the anti-discrimination section of the RHA because the discrimination does not contravene the Harksen v Lane NO enquiry.

In determining whether the landlord is legally able to discriminate against a prospective tenant based on his/her status as a previous tenant, the same logic could apply. If the landlord refuses to contract with a prospective tenant based on housekeeping habits or history as stated in previous landlord referrals, it does not indicate discrimination in terms of any of the listed grounds of section 4(1). Nor does it indicate that the landlord is discriminatory against the tenant on any analogous ground when one considers the fact that the landlord is basing his decision on housekeeping habits of the prospective tenant. One cannot maintain that such a decision offends the dignity of the prospective tenant. Again it is purely for business reasons that the landlord would reject a notoriously untidy prospective tenant. However, it must be noted that when choosing

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183 There are results from studies that indicate discrimination across several types of landlord behavior and support the hypotheses that landlords discriminate both out of personal prejudice and in response to the prejudice of present and future white clients (Stricker & Yinger ‘Do Landlords Discriminate? The Incidence and Causes of Racial Discrimination in Rental Housing Markets’ 1999 Journal of Housing Economics 185-204).
a tenant, the landlord must base his/her decision on objective business qualifications and laws. To be precise, the landlord must strictly act within the ambit of the “anti-discrimination” section of the RHA by applying the same criterion to all applicants.

In light of the argument that the RHA does not prohibit the landlord from excluding a prospective tenant on grounds of financial status and his/her status as a previous tenant, the researcher submits that the RHA has sufficiently recognized the landlord’s right to choice of tenant with regards to financial status and status as a precious tenant.

Lastly, it must be noted that the anti-discrimination clause in the RHA is similar to section 9 of the Constitution yet the former does not contain a provision providing for possible “fair discrimination” as the latter does. The RHA does, however, contain the word “unfairly” when referring to the prohibited discriminatory conduct of the landlord. It is submitted that the inclusion of the word “unfairly” indicates that discrimination may be considered fair and legal, in certain circumstances. The extent of this, however, is not known.

3 6 1 3 Foreign law on anti-discrimination

In Australia, discrimination by the landlord is considered to be unlawful when people are treated unfairly on the basis of their race, sex, marital status, age, disability (physical, intellectual or psychiatric), sexuality (e.g. trans-sexuality) or sexual preference. The following Acts prohibit these mentioned grounds of discrimination: The Racial Discrimination Act (Commonwealth Act);\(^{184}\) Sex Discrimination Act (Commonwealth Act);\(^ {185}\) Disability Discrimination Act (Commonwealth Act);\(^ {186}\) and the Anti-Discrimination Act (NSW Act).\(^ {187}\)

With regards to tenancies in Australia, the landlord cannot discriminate against a prospective tenant when rental accommodation is advertised, when a prospective tenant enquires about the availability of advertised accommodation, or when the

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\(^{184}\) Act 52 of 1975.
\(^{185}\) Sex Discrimination Act 4 of 1984.
prospective tenant applies.\textsuperscript{188} However, there are certain exceptions to these anti-discrimination laws in the case of shared accommodation depending on the type of discrimination, whether the tenant is living with the owner or their close relative and how many people the tenant is sharing with. According to all of the four Acts mentioned above, discrimination is not unlawful in relation to accommodation if the tenant is sharing with the owner or their close relative.\textsuperscript{189} In terms of the Sex Discrimination Act and Disability Discrimination Act, exceptions to the anti-discrimination laws only apply in relation to accommodation if it is for no more than three people,\textsuperscript{190} and for no more than six people under the Anti-Discrimination Act.\textsuperscript{191} Furthermore, it is to be noted that the New South Wales Residential Tenancies Act contains no specific provision restricting the landlord from discriminating on grounds of financial status or character.

Bradbrook\textsuperscript{192} maintains that the current anti-discrimination provisions in nationally applicable residential tenancy legislation in Australia are unsatisfactory because they do not include all forms of discriminatory practices commonly found in the context of residential tenancies. For example, section 6 of the New Zealand Residential Tenancies Act 1986 extends protection to the unemployed, and Article 1899 of the Civil Code of Quebec protects applicants who are pregnant or who are discriminated against on the sole ground that they have exercised their rights under the Code. Bradbrook submits, “that the Australian state residential legislation should similarly be extended to protect these groups of potential tenants.”\textsuperscript{193}

In Ontario, Canada, a landlord cannot discriminate in tenancies based on a person’s race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance. Exemptions from this include when tenancies are reserved for people aged

\footnotesize{\textsuperscript{188} Racial Discrimination Act s 12 & s 16; Sex Discrimination Act s 23 & s 86; Disability Discrimination Act s 25 & s 44.  
\textsuperscript{189} Racial Discrimination Act s 12(3); Sex Discrimination Act s 23(3)(a)(i); Disability Discrimination Act s 25(3)(a)(i); Anti-Discrimination Act s 20(3)(a).  
\textsuperscript{190} Sex Discrimination Act s 23(3)(a)(ii); Disability Discrimination Act s 25(3)(a)(ii).  
\textsuperscript{191} Anti-Discrimination Act s 20(3)(b).  
\textsuperscript{192} Bonython Professor of Law, Faculty of Law, University of Adelaide and part-time Member of the South Australian Residential Tenancies Tribunal.  
\textsuperscript{193} Bradbrook ‘Residential Tenancies Law-The Second Stage of Reforms’ 1998 Sydney Law Review 17.}
fifty-five or older, disabled individuals and when the tenant shares a bathroom or kitchen with the owner of the rental unit.\textsuperscript{194} Ontario Regulations titled \textit{Business Practices Permissible to Landlords in Selecting Prospective Tenants for Residential Accommodation},\textsuperscript{195} specifically state that the landlord may request credit references and rental history information from a prospective tenant, including authorization to conduct credit checks.\textsuperscript{196} The landlord may also request proof of income but only after first asking for credit references and rental history information.\textsuperscript{197} The tenant may, however, refuse to give the landlord this information as the landlord is entitled to select or refuse the prospective tenant based on the information given.\textsuperscript{198} The landlord can circumvent this situation by requesting the information on the basis of determining the prospective tenant’s eligibility for rent according to an amount geared-to-income and then using the income information for that purpose only.\textsuperscript{199}


\textsuperscript{195} The Ontario Human Rights Commission approved a report titled ‘Policy and Guidelines on Discrimination because of Family Status’ which serves as a policy and guideline that sets standards for how individuals, employers, service providers and policy makers should act to ensure compliance with the code. While this Code and other similar Codes are not binding on the Human Rights Tribunal or on courts, is often has persuasive value, applied to the facts of the case before the court, and quoted in the decisions of these bodies (www.ohrc.on.ca (accessed 2008-07-30)).

\textsuperscript{196} Ontario Regulation 290/98 s 1(1).

\textsuperscript{197} S 1(3).

\textsuperscript{198} S 1(2).

\textsuperscript{199} S 3. With regards to the minimum income criteria for tenant selection, the Ontario Human Rights Commission Report by Hulchanski titled ‘Discrimination in Ontario Rental Housing Market: The Role of Minimum Income Criteria’ (March 1994) presents evidence that demonstrates that use of minimum income criteria is “not a valid measure of ability to pay and, as such, no harm is done to landlords if they ceased to use it. The continued use of the measure, however, does clearly cause harm to the tenant’s household to which it is applied and face rejection from apartments for failing to meet the criteria. The use of minimum income criteria is directly perpetuating and exacerbating the hardships endured by the already disadvantaged groups and individuals that human rights legislation seeks to protect. It does not matter to these disadvantaged households whether the criteria is being applied in honest belief that it is valid or dishonestly as the excuse for discrimination. To these households, discrimination against them is the result. Landlords exclude them from accommodation they feel they can afford. […]Minimum income criteria automatically define all higher than average households as part of the “better” pool of tenants while all lower than average income households are labeled as part of an “inferior” pool of tenants. Having a lower than average income does not automatically make a person better or worse, more or less responsible, more willing or unwilling to pay the rent, than someone with a higher than average income”. 56, (www.ohrc.on.ca (accessed 2008-07-31)).
3 6 1 4 Evaluation

An examination of foreign law of Australia and British Columbia reveals that a major criticism of the South African RHA’s anti-discrimination section lies in the fact that it appears to be unconditional in so far as there is no provision for certain exceptions or exemptions regarding the discrimination of prospective tenants or tenants, which can be found in the foreign law discussed above. Such unconditional anti-discrimination severely infringes the landlord’s right to contract freely. To solve this issue, the researcher submits that the RHA be amended to provide for exemptions regarding application of the anti-discrimination section. Such an amendment would mean that discrimination may be justifiable in certain circumstances and legislation should provide for such circumstances. It is submitted that in order to allow the landlord more contractual freedom with respect to choice of tenant, the anti-discrimination section of the RHA should contain similar exemptions or exceptions to that of the foreign jurisdictions discussed above. Alternatively, a relevant law commission should be appointed to investigate possible exceptions applicable to a South African setting.

3 6 2 Subletting and cession

3 6 2 1 Common law

The landlord’s right to contract freely also embraces his/her right to disallow subletting of the premises and cession of the lease. A sub lease is a lease agreement concluded between the tenant and a person other than the landlord concerning the same subject matter (the premises). A new landlord/tenant relationship is established between the original tenant and the new (subletting) tenant.200 The relationship between the original landlord and tenant remains in place and is unaffected. No rights and duties arise between the original landlord and the sub tenant. In other words, the subtenant’s right of recourse is against the tenant and not the landlord.201 However, when the original

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200 Kerr The Law of Sale and Lease (2005) 445. Two distinct contracts exist: one between the landlord and tenant, and another one between the tenant and subtenant with the tenant becoming the landlord of the subtenant.

201 Sweets from Heaven (Pty) Ltd and Another v Ster Kinekor Films (Pty) Ltd and Another 1999 (1) SA 769 (W).
lease terminates, the landlord may evict the sub tenant if he/she remains in occupation.  

Cession or assignment involves a third party taking over the tenant's rights and duties under the lease. The rights and duties are transferred in the process. A tripartite agreement is needed between the landlord, tenant and third party in order for this to come about. In both subletting and cession, a third party enters the landlord/tenant relationship. Unfortunately, the situation may become undesirable for the landlord, with the result that the landlord requires the right to disallow such subletting and cession to protect his/her interests.

At common law, it is trite that the landlord has the right to choose whether the tenant can or cannot sublet the premise or cede the lease. The landlord's right to grant the tenant the right to subletting is an element of the landlord's right to choice of tenant. A bad sub tenant occupying the premises may damage the property, which in turn could affect the value of the premises. In other words, the landlord's investment may be compromised if there is no restriction on subletting. Restrictions on subletting protect the landlord's rights and interests in that the landlord will have control over tenants occupying his/her property.

Landlords invariably include clauses in their lease agreements to prevent some of the undesirable consequences flowing from subletting and cession. These clauses specify that the landlord has the right to withhold consent for the tenant to sublet or cede the premises, but such consent must not be unreasonably withheld. In *FW Knowles (Pty) Ltd v Cash-in (Pty) Ltd*, it was held that such a proviso in subletting clauses effectively constitutes an undertaking by the landlord to consent to an assignment of the lease, unless there is good reason for refusing it. Therefore, the landlord can validly

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204 1986 (4) SA 641 (C).
refuse to sublet or assign if his/her rights are affected. Furthermore, it was found in *Bryer and others NNO v Teabosa CC t/a Simon Chuter Properties* that the landlord’s refusal must relate to either the personality of the subtenant or the planned use of the premises.

The approach used in the *Bryer* has not found favour with all landlords and in practice many landlords now include a clause in their lease agreements totally prohibiting subletting. The effect is that if the tenant wants to sublet, the lease needs to be amended. The landlord can refuse to amend on any ground, but may agree to the subletting if it suits him/her. In other words, the landlord is enjoying complete freedom of contract in this instance. If the lease contains a prohibition against subletting and the tenant nevertheless sublets without the landlord’s consent, the tenant commits material breach of contract. The landlord will then have the right to cancel the lease, and thereby protect his/her interest.

### 3 6 2 2 Rental Housing Act

The RHA does not contain a section dealing with subletting or cession, but all the provincial UPRs contain a uniform regulation that states “[a] tenant may not cede his or her rights, assign his or her obligations or sublet the dwelling or any part thereof to any other person without written consent of landlord.” Thus, on the face of it, it appears that the UPRs give the tenant the right to sublet or cede with the landlord’s consent. In other words, the UPR seem to imply that the tenant has the right to request subletting or cession of the premises, and such right the landlord must at least consider or give reasonable grounds for refusal thereof. The crucial question is whether the landlord can take away a tenant’s right by totally prohibiting subletting by means of a clause in a lease agreement. This question was discussed and examined in paragraph 3 4 1 which dealt with restrictions on the landlord’s right to contract freely in general.

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205 *Supra.*
206 1993 (1) SA 128 (C)
208 Free State UPR reg 10(2)(a); Gauteng UPR reg 14(2)(a); Kwazulu-Natal UPR reg 21(2)(a); Mpumalanga UPR reg 19(2)(a); North West UPR reg 14(2)(a); Western Cape UPR reg 9(2)(a).
In paragraph 3.4.1, it was found that in terms of the UPRs, the landlord is forbidden from "inducing" the tenant to contract out of his/her rights under the RHA, the UPRs and any other law.\textsuperscript{209} Therefore, since it appears that the UPRs give the tenant the right to sublet or cede with consent, the UPRs prohibit the landlord from inducing the tenant to sign a lease agreement that totally forbids the tenant from subletting altogether. If the landlord does so, he/she commits an unfair practice.\textsuperscript{210} Consequently, the landlord's common law right to forbid the tenant from subletting or ceding has been taken away by the RHA, and the landlord \textit{must} consider the tenant's request to sublet the premises regardless. The researcher submits that the RHA needs revision in this regard as this is detrimental to the landlord's interests.

\section*{3.6.2.3 Foreign Law}

The law of subletting or assignment in the United Kingdom is similar to the position in South Africa in that the tenant may only sublet subject to the landlord's consent.\textsuperscript{211} However, there is a great deal of reform in this area with the Law Commission suggesting that a general rule be applied when the landlord's consent is needed:

``Where the contract requires that the landlord's consent be obtained before something can be done, including [transferring of] the contract, the Bill sets out a general rule. That rule is that while the landlord may give consent subject to conditions, he or she may not unreasonably refuse consent (or give consent subject to unreasonable conditions). The rule applies unless the contract:
(1) explicitly excludes the clause setting out the general rule; [or]
(2) makes inconsistent provision with the general rule...''\textsuperscript{212}

Evidently from the use of the word "may", the landlord has the right to refuse the subletting or cession, however the refusal must be reasonable. Furthermore, the landlord is not restricted from including a clause in the lease agreement that excludes the tenant's right to transfer the lease (subletting or cession) with the consent of the landlord.

\begin{footnotes}
\item[209] In paragraph 3.4.1, the researcher examined the possible meaning of "induce" which she found to be vague. The researcher also discussed the scope and meaning of "any other law".
\item[210] See paragraph 3.4.1.
\item[211] Landlord Tenant Act 1988 Chapter 26 s 1(1).
\end{footnotes}
3.6.2.4 Evaluation

The landlord’s right to disallow subletting and cession is an element of the landlord’s right to choice of tenant. It is essential that the landlord be allowed to contractually prohibit a tenant from subletting or ceding the premises, and thus prevent a potentially unscrupulous tenant from occupying the premises.

At common law, landlords are able to better protect their interests by including a clause in their lease agreement to this effect. However, the RHA has changed this position by giving the tenant the right to request subletting or cession of the premises, which imposes a duty on the landlord to at least consider the request and provide reasonable grounds for refusal. The most ideal situation for the landlord would be to prohibit subletting and cession outright by including a clause in the lease to that effect. However, the RHA does not allow for this. Consequently, the landlord’s right to contract freely is restricted.

The United Kingdom promotes freedom of contract by allowing the landlord to exclude tenant’s right to sublet or cede by means of a clause. Furthermore, the United Kingdom intends to codify the law in this regard. In other words, the United Kingdom embraces the South African common law position of the landlord regarding subletting and cession. This position provides the landlord with the best protection from potentially unscrupulous tenants. Accordingly international trends promote the landlord’s right to contract freely whereas the RHA does not in this regard. It is submitted that for adequate protection of the landlord’s rights, the United Kingdom or South African common law approach be followed.

3.7 Legal termination of contract by landlord

Part of the landlord’s right to contract freely is the right to lawfully end the lease agreement. If the law restricts the landlord’s right to end a lease, it restricts the landlord’s right to contract freely.
The grounds on which a lease may be legally ended are the grounds on which contracts, in general, may be terminated, namely: performance; merger; effluxion of time; agreement; cancellation; notice; death; and insolvency. Each type of common law means of termination of contract will not be discussed as it falls outside the scope of this research. However, what will be discussed is the termination by cancellation or notice clause that is commonly included in a lease agreement and is used to safeguard the landlord’s interests.

3 7 1 Termination by cancellation

Cancellation is often used as a remedy for breach of contract. Generally, a party is entitled to cancel a contract if the other party is in *mora* (when time is of the essence), has materially breached an essential term of the contract, or has repudiated the contract. Usually notice of cancellation is required, unless the notice requirement has been excluded by means of contractual provisions.

The use of cancellation clauses by the landlord at common law was discussed in paragraph 3 5 2 above under the topic pertaining to the RHA’s regulation of specific clauses in lease agreements. In the following paragraph, the researcher will discuss termination by cancellation when a tenant defaults, as well as cancellation clauses in general.

3 7 1 1 Rental Housing Act

Various questions regarding termination by cancellation by the landlord have been identified through the research process. The answers to these questions will determine the extent to which the landlord is restricted in his right to lawfully terminate the lease agreement and also restricted in his/her bigger right to contract freely. The questions are as follows:

a) can the landlord include a cancellation clause giving him the right to cancel on whatever ground he/she wants?;

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213 See paragraph 3 5 2.
b) can the landlord cancel on grounds not specified in the lease?; and

c) is notice required before the landlord may cancel? If so, can the landlord insert a clause excluding the duty to give notice?

In answer to the first question, section 4(5)(c) of the RHA allows the landlord to terminate the lease “on grounds that do not constitute an unfair practice and [such grounds] are specified in the lease”.\(^{215}\) Upon a closer analysis of this section, the researcher submits that the landlord is indeed entitled to include a cancellation clause and terminate the lease based on the grounds specifically provided for in that clause. Furthermore, the RHA does not prohibit the landlord from formulating the grounds for cancellation.

However, it must be noted that the grounds for cancellation must not constitute an unfair practice. An “unfair practice” is defined as:

> “(a) any act or omission by a landlord or tenant in contravention of this Act; or

> (b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord.”\(^{216}\)

The UPRs, however, do not support section 4(5)(c) of the RHA, and in fact contradicts this section. A regulation that features in all the provincial UPRs states:

> “A landlord may only –

> (a)…

> (b) cancel the lease and repossess the dwelling, without being liable for damages in terms of the lease, the Act, these Regulations or any other law, in circumstances where the dwelling is in a dilapidated condition or cannot safely be inhabited and must as a result thereof be rebuilt, reconstructed or demolished.”\(^{217}\)

As there is no authority regarding the interpretation and meaning of this section, the researcher can only speculate as to its meaning and extent. Accordingly, when one considers the pro-tenant nature of the RHA and the literal interpretation of this provision,

\(^{215}\) S 4(5)(c).

\(^{216}\) Rental Housing Amendment Act 43 of 2007 s 1.

\(^{217}\) Free State UPR reg 5(1)(b); Gauteng UPR reg 8(1)(b); Kwazulu-Natal UPR reg 17(1)(b); Mpumalanga UPR reg 5(1)(b); North West Province UPR reg 8(1)(b); Western Cape UPR reg 5(1)(b).
it is submitted that this regulation totally disallows the landlord from cancelling the lease except when the building is uninhabitable. This literal interpretation is evident from the words "may only cancel the lease...in circumstances where...".\textsuperscript{218} It is further submitted that this is so whether the landlord exercises his/her rights in terms of a cancellation clause or whether cancellation is made without a cancellation clause for the reason that the UPRs make no distinction in this regard. In other words, if a landlord cancels the lease in circumstances where the building is habitable, then the landlord is still liable for damages as a result of the cancelling of the lease in terms of the lease, the RHA, the UPRs or any other law. This interpretation, however, contradicts the RHA that provides for cancellation on grounds specified in the lease. Therefore the answer to first question cannot be ascertained as the RHA and UPRs contradict each other.

The answer to the second question is clearly the landlord cannot cancel on grounds not specified in the lease for the reason the neither the RHA nor the UPRs allow the landlord to cancel the lease on grounds not specifically mentioned in the lease, despite the apparent contradiction of the RHA and UPRs regarding legal termination by cancellation. In fact, in terms of section 4(5)(c), the RHA specifically mentions that the ground for termination must be provided for in the lease agreement.

The answer to the third question is that neither the RHA nor the UPRs regulate the issue of notice as a requirement for cancellation of the lease. There are no provisions in the RHA or UPRs that make the use of such notices compulsory either. Thus, the landlord is not obliged to give notice to the tenant before cancellation in terms of the RHA or UPRs. It can only be assumed that the common law remains unchanged regarding cancellation for notice. Following on from this lies the answer to the last question, namely whether the landlord can exclude notice requirements in the lease agreement. As the RHA and UPRs contain no restrictions in this regard, the common law applies. According to common law, the parties can regulate the requirements for notice in terms of a clause, specifically known as a forfeiture clause in lease.\textsuperscript{219} Thus,

\textsuperscript{218} Own emphasis.
\textsuperscript{219} Ibid.
the landlord can be excluded from his/her duty to give notice before cancellation for breach of contract if there is a clause in the lease agreement.

3 7 1 2 Foreign law
In British Columbia, the use of a cancellation clause in a lease agreement is not necessary because section 47 of the Residential Tenancy Act\textsuperscript{220} codifies the benefits and the effect of a cancellation clause by giving the landlord the right to cancel the lease if the tenant fails to do, \textit{inter alia}, the following: pay the rent;\textsuperscript{221} pay rent on time and consistently; pay the security deposit; adhere to the rules regarding the number of occupants occupying the premises; occupy the premises in a peaceful manner; take care of the premises; repair damage to the premises and sublets or assigns the premises without obtaining the landlord's consent.\textsuperscript{222} It must be separately noted that the landlord may cancel the lease if the tenant fails to comply with a material term of the lease, and has not corrected the situation within a reasonable time after the landlord gives written notice to do so.\textsuperscript{223} In such instances, the landlord may end a tenancy by giving notice.\textsuperscript{224}

The landlord may include a cancellation clause giving him the right to cancel on the grounds of section 47 as well as on whatever grounds if there has been a material breach by the tenant. In fact, a cancellation clause is not necessary as these are the grounds for cancellation in law which is broad and which takes into account the landlord's rights and interests. However, the Act is very clear in that notice is required to be given before the landlord may cancel the lease, although it does not specify notice requirements. Thus, one can assume that the landlord enjoys full contractual freedom subject to his/her conduct in terms of unfair practice.

\textsuperscript{220} 2002 Chapter 78. \\
\textsuperscript{221} This falls under s 46. \\
\textsuperscript{222} S 47(1). \\
\textsuperscript{223} S 47(1)(h). \\
\textsuperscript{224} S 47(1).
3713 **Evaluation**

The section of the RHA dealing with termination by cancellation is fair whereas the UPRs contradict this section with more stringent provisions that severely restricts the landlord's right to contract freely. On the other hand, the foreign law described clearly states specific and general grounds regarding the landlord’s entitlement to cancel when the tenant has breached. These laws recognize the landlord’s right to termination by cancellation. In fact the situation is regulated to such an extent that the use of a cancellation clause is not necessary. This regulation may be considered extreme if it were not for the provision entitling the landlord to cancel if the tenant materially breaches the lease.

Thus, if the section of the RHA were to prevail, the landlord's right to contract freely would be protected for the reason that the section recognizes that the landlord needs to include a contractual provision in the lease dealing with termination. The only rider to this freedom is that the ground for termination may not constitute an unfair practice.

372 **Termination by notice**

3721 **Common law**

At common law, the landlord may legally end a lease by giving the tenant notice to terminate the lease by following the prerequisite notice period and other requirements formulated in the lease agreement. Termination by notice and notice as a prerequisite for termination by cancellation are distinguishable as the latter entails breach of contract by the tenant. Thus, the position at common law regarding termination by notice is that if either party gives notice that is not based on well-founded grounds, then the aggrieved party may consider the notice as repudiation of the contract and cancel the lease forthwith. In other words, termination by notice is only valid if it is based on well-founded grounds.

Traditionally, a clause in a lease agreement prescribes notice requirements and grounds. Likewise, the notice period and further requirements for a valid notice to be

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226 Varalla v Jayandee Properties (Pty) Ltd 1969 (3) SA 203 (T) 206E-G.
served, for example in writing and hand delivered, are for the parties to decide when concluding the contract. In situations where there is no clause regulating notice, the duration of the lease is also important in determining the requirements for valid notice. If the duration of the lease is undefined and there is no notice provision in the parties' lease agreement, then it can be terminated by reasonable notice being given to the other party.\textsuperscript{227} In the case of a lease entered into for an indefinite period with the rent paid monthly (periodical lease), giving a due notice can terminate it. For example, if a lease runs from month to month, then one month's notice is valid\textsuperscript{228}.

\textit{3 7 2 2 Rental Housing Act}

According to the RHA, the landlord may terminate the lease "on grounds that do not constitute an unfair practice and are specified in the lease".\textsuperscript{229} Thus, the landlord cannot terminate the lease at his/her discretion. It appears that the landlord is only legally allowed to terminate the lease if his/her reasons for termination are stated in the lease and the reason does not constitute an unfair practice.\textsuperscript{230} Furthermore, the landlord cannot terminate on grounds, even though valid, that are not covered in the lease agreement. On the one hand, the landlord is not prohibited from terminating by notice. On the other hand, the landlord's right to contract freely is restricted somewhat in that the landlord is confined to terminating it on grounds specified in the lease agreement.

More pertinently, the RHA mentions that the \textit{grounds} must be stated in the lease, not the requirements for notice. In other words, the RHA does not regulate or impact on the landlord's traditional use of clauses that specify the requirements concurring notice for termination.

\textsuperscript{227} Kerr \textit{The Law of Sale and Lease} (2005) 277.
\textsuperscript{228} If a lease is periodical, notice must be given to terminate the lease at the end of one of the periods. The notice must run for a full period and it is the terminal date that matters, not the date on which the notice was given (\textit{Fulton v Nunn} 1904 TS 123; \textit{Moyce v Estate Taylor} 1948 (8) SA 822 (A) 839).
\textsuperscript{229} S 4(5)(c).
\textsuperscript{230} An "unfair practice" is defined in the Rental Housing Amendment Act 43 of 2007 as any act or omission by a landlord or tenant in contravention of this Act; or a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord.
3.7.2.3 Foreign law

Sections 46 and 47 of the British Columbia Residential Tenancy Act described in paragraph 3.7.1.2 above, stipulate specific and exclusive reasons for termination of a lease by the landlord. These sections stated that the landlord must give notice to end the tenancy if one or more of the specified grounds are applicable. The landlord may *only* end the lease on those grounds and he/she *must* give notice to end the lease.

The British Columbia Act contains extensive provisions regarding the requirements for termination by notice.\(^{231}\) A landlord must serve notice on the tenant using the appropriate Notice to End Tenancy as formulated in the Act which lists all the valid reasons as well as the period of notice the landlord must give.\(^{232}\) Generally, a landlord must give one or two months’ notice to a tenant, depending on the reason prescribed by the Act. Where the tenancy is for a fixed-term, the notice cannot take effect before the end date specified in the tenancy agreement.\(^{233}\)

3.7.2.4 Evaluation

Currently, South African landlords enjoy extensive freedom of contract relating to termination by notice as the RHA recognizes the landlord’s right to terminate the lease based on grounds specified in the lease agreement. The landlord and tenant are, thus, entitled to negotiate and draft their own grounds and requirements for valid termination by notice thereby entitling the parties to exercise their right to contract freely. There is a limit, however, to the landlord’s freedom in this regard in that the grounds for termination may not constitute unfair practice,\(^{234}\) which is defined as any act or omission by a landlord or tenant in contravention of the RHA, or a practice prescribed as a practice that unreasonably prejudices the rights or interests of a tenant or a landlord.\(^{235}\)

The foreign law discussed provides a structured system of exclusive notice grounds and corresponding requirements. These may infringe on the landlord’s freedom to terminate

\(^{231}\) 2002 Chapter 78.
\(^{232}\) See s 46.
\(^{233}\) S 49(2)(c).
\(^{234}\) S 4(5)(c).
\(^{235}\) Rental Housing Amendment Act 43 of 2007 s 1.
by notice in that certain pre-requisites must be met before the landlord may legally terminate by notice. Therefore, it is submitted that the section of the RHA dealing with termination does not unfairly restrict the landlord’s freedom to terminate by notice. The RHA’s approach is preferred as the foreign law position of structured notice grounds and requirements may, depending on the circumstances, infringe on the landlord’s right to contract freely.

3.8 Conclusion

The general principles of contractual freedom were initially laid out in this chapter to serve as a backdrop to the discussion that followed in that these principles inform the landlord’s right to contract freely. The main influence on these principles, especially the maxim of *pacta sunt servanda*, is the Constitutional Court decision of *Barkhuizen v Napier*\(^{236}\) which defined contractual freedom as having limits in that the maxim is not absolute in its application and must yield to public policy notions of fairness, justice and reasonableness, which are constitutional values. In addition to general principles, specific principles regulating unfair contract terms were discussed, the main authority on this topic being the Consumer Protection Act 68 of 2008, which was compared with the foreign law on this topic. These principles were discussed not only to serve as a backdrop to the main discussion of the chapter but also to show that contractual freedom is limited if regulated by certain statues. The landlord’s right to contract freely may be restricted, by the RHA and the extent of this restriction was investigated in this chapter.

Broadly, the researcher found, through her own interpretation (as there is no authority on the subject), that the RHA does indeed restrict the landlord’s right to contract freely, in that all the UPRs contain provisions that prevent contracting out of the RHA, the UPRs *and* the common law. By means of a practical example it was concluded that contracting out of the common law restricts the landlord’s right to contract freely and the landlord is severely limited when formulating his/her own contract terms. When this restriction was compared to foreign law, it was found that foreign law does not have a

\(^{236}\) 2007 (7) BCLR 691 (CC).
law that restricts the contracting out of common law. Furthermore, when one considers the fact that the landlord is currently a consumer in a weaker bargaining position in the landlord/tenant relationship, the landlord needs the right to contract out of common law to protect his/her interests.

Regarding the regulation of specific contract clauses that the landlord uses to protect his/her interests, the researcher further found that the RHA with regards to the use of an exclusion clause is both generally and specifically different from the laws of England. The Gauteng and North West Province UPRs do not clearly provide for the landlord’s right as a consumer to contract freely via effective use of an exclusion clause. Gauteng and North West Province UPRs should be amended to allow the landlord the full use of exclusion clauses to protect his/her interests. General principles, like those formulated in the Barhuizen v Napier and the Consumer Action Act decision, regulating unfair contract terms should be included to determine whether or not a contractual term is unfair. After a discussion relating to the use of an exclusion clause by the landlord, it was found that such use is justified when parties are not free to negotiate the terms of the contract and where an equal bargaining relationship does not exist between the parties. Accordingly, the landlord needs to include an exclusion clause in a lease agreement in order to effectively contain damage or to effectively allocate the risks of the contract. However, the Gauteng and North West Province UPRs, ban the use of such a clause outright. This is unfair to the landlord in the current rental housing market circumstances and foreign law does not support this stance. A general legislative test to determine the unfairness of an exclusion clause is a just way of dealing with potentially unfair clauses. The landlord’s right to contract freely would, therefore, be adequately protected should the RHA adopt such an approach.

The landlord’s right to choice of tenant is restricted by the RHA’s anti-discrimination section. The RHA is different to the foreign law discussed in the matter of discrimination of tenants in Australia and Canada. The latter laws provide exemptions from the application of the anti-discrimination legislation whereas the RHA appears absolute. Despite this shortcoming, the RHA does not prohibit the landlord from excluding a
prospective tenant on the grounds based on financial status or on previous status as a tenant. These grounds are crucial for the landlord when choosing a tenant. However, the argument remains that the anti-discrimination provision of the RHA is too wide and, consequently, the landlord’s right of choice of tenant is infringed upon.

The landlord’s right to disallow subletting and cession is as important as the right to choose a tenant as it allows the landlord to prevent a potentially unscrupulous subtenant or tenant from occupying the premises. The RHA has changed the common law position by forbidding the landlord from including a clause in the lease that totally forbids the tenant from subletting and ceding. Consequently, the landlord’s right to contract freely is restricted. At common law, the position is that the landlord can completely exclude subletting and the United Kingdom law supports cession without limitation. Affording the landlord the right to totally prohibit subletting and cession entitles the landlord to more contractual freedom, and thus the common law approach should be adopted by the RHA.

The landlord’s right to terminate the lease, by means of cancellation and termination notice were explored. The provisions for termination by cancellation stated in the RHA and the UPRs contradict one other. The RHA enforces contractual freedom whereas the UPRs completely restrict it. The foreign law analysed was in line with the provisions of the RHA, both of which support the landlord’s right to contract freely. Thus, if the UPRs were disregarded, the section of the RHA would provide the landlord with extensive contractual freedom in that he/she is entitled to include a clause in the lease specifying grounds for termination. However, this freedom is not absolute in that these grounds may not constitute an unfair practice. The RHA regulations for termination of contract of this aspect need to be reconsidered by the relevant authorities in order to clarify the landlord's legal position.

Generally, South African landlords enjoy extensive freedom of contract relating to termination by notice as the RHA recognizes the landlord’s right to terminate the lease based on grounds specified in the lease agreement. There is no further regulation of
the position in this regard. The foreign law analysis provided little insight into possible solutions regarding better regulation of this aspect, and in fact the foreign law discussed imposes more stringent duties on the landlord. Accordingly, the same argument regarding termination by cancellation applies in that the landlord and tenant are, thus, entitled to negotiate and draft their own grounds and requirements for valid termination by notice thereby entitling both parties to exercise their right to contract freely. There is a limit, however, to the landlord's free hand in this regard in that the ground of termination may not constitute an unfair practice. Therefore neither the South African law nor the foreign law discussed effectively affords the landlord total contractual freedom regarding the right to terminate by notice.

Overall, the argument is made that the RHA does not give full expression to the landlord's right to contract freely as every right discussed is limited somehow by the RHA or UPRs. However, one must bear in mind that general contractual freedom is never absolute in that the laws will in almost every circumstance limit it to a certain degree depending on the bargaining power between the parties. However, the law is obliged to protect a party in a weaker bargaining position and as the landlord is the weaker party in the current landlord/tenant relationship, the law should allow the landlord more leeway in his/her right to contract freely. The RHA fails to meet this obligation.
4.1 Introduction

Landlords’ right to safeguard their financial interests entails both the right to payment to receive payment of rental and the right to protect the return on their investment. In the current economic downturn this right needs more protection than before as bond rates and other costs associated with property investment have substantially increased.

As discussed in Chapter 2, the general consumer right to choice equates to the specific landlords right of choice of rental amount. This includes the right to determine the initial rental amount and the right to increase that rental amount, and the landlord's right to safeguard his/her financial interests informs both these rights. Furthermore, the general consumer right to be informed entails the landlord’s right to be informed about all the details of the tenant he/she intends on contracting with, in other words, the process of qualifying prospective tenants. Lastly, the consumer right to redress for the landlord means the right to recover arrear rental from the tenant as speedily and inexpensively as possible. At common law various laws and practices developed to protect this landlord right. These are, notably, the requisite payment of a deposit, the landlord’s tacit hypothec and the traditional use of clauses protecting this right, such as “self-help” clauses.

The objective of this chapter is to determine to what extent the RHA restricts these landlord consumer rights. Firstly, the common law position will be discussed and thereafter, the RHA and the UPRs will be analyzed to determine whether it, in fact,
actually recognizes and protects the landlords’ right to safeguard their financial interests. Lastly, foreign legislation with regards to these rights will be discussed and compared with the RHA.

4.2 The right to receive payment of rental

The RHA in express terms acknowledges the landlord’s right to receive prompt and regular payment of rental or any charges that may be payable in terms of a lease.\(^{237}\) Thus, the landlord’s basic right to payment of rental is specifically recognized and protected under the RHA. However, the matter does not end there as the acknowledgment of this right does not automatically result in the tenant paying the rental in full and on time. In order to safeguard their financial interests, landlords have developed traditional ways and means to protect this right, in particular the following:

- a) the practice of screening prospective tenants;
- b) exercising their rights in terms of the landlord’s tacit hypothec;
- c) the requesting of a deposit from the tenant to cover arrear rental; and
- d) the inclusion of “self-help” clauses in the lease agreement.

Each of these protection measures will be discussed next.

4.2.1 Qualifying prospective tenants

Inadequate screening of prospective tenants is likely to result in the landlord contracting with a tenant who will most probably pay the rent late, or not at all, and who will likely damage the property. Thus, it is vital that landlords conduct thorough screening procedures before contracting with a tenant. Before choosing tenants, landlords should check with the prospective tenant’s previous landlords as to his/her previous status as a tenant, as well as obtain other references in this regard. Furthermore, the landlord should verify the prospective tenant’s income, employment, bank account information, and obtain the tenant’s credit report. The credit report is especially important because it will indicate whether a particular person has a history of paying late or if he/she has a good or bad credit rating, as well as if any judgments have been taken against his/her

\(^{237}\) S 4(5)(a) & (b).
Choosing a tenant is probably the most important decision a landlord will have to make because if the tenant is unable to pay or if he/she has a history of destroying the premises, the landlord may suffer considerable financial harm as he/she is the property owner and is liable for all payments connected therewith as well as obligations to maintain the property.

At common law, there is no restriction on the landlord’s right of choice of tenant. The landlord would choose the tenant he/she considers most suitable based on factors such as the tenant’s financial status or lifestyle. Moreover, the landlord could base his/her decision on his/her own personal prejudices. Currently however, the RHA restricts the landlord’s right to choice of tenant by means of the non-discrimination provision of section 4(1). As explained in Chapter 3, this section is absolute with no justifications or exceptions from its applicability. To that extent, the section is not in the interests of the landlord.

However, in Chapter 3, it was found that at least the RHA does not expressly prohibit the landlord from exercising his/her right to choose a tenant based on the important consideration of financial status or previous status as a tenant. From that perspective, the RHA does not impact negatively on the rights of the landlord. It must be clear, though, that the landlord is basing his/her selection on the tenant’s financial status and not actually on the tenant’s race, gender, sex, pregnancy or marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth. An in depth discussion of this aspect can be found at paragraph 3.5 of Chapter 3.

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238 § 4(1) states the following:
"[I]n advertising a dwelling for purposes of leasing it, or in negotiating a lease with a prospective tenant, or during the term of a lease, a landlord may not unfairly discriminate against such prospective tenant or tenants, or the members of such tenant's household or the visitors of such tenant, on one or more grounds, including race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth".
4.2.2 Rental deposit

4.2.2.1 Common law and practice

The issue of deposits with regards to lease agreements is one of most contentious issues in practice, especially regarding the refunding of the deposit amount.239 Most complaints that reach the Western Cape Rental Housing Tribunal are about deposits, with the number of hearings based on this increasing annually.240

A landlord will usually request the tenant to pay a deposit before moving into the premises. The purpose of a deposit is to cover arrear rental, damage caused by the tenant during occupation of the premises, cost of the replacement of lost keys, and any outstanding amount owing to the landlord.241 Thus, the deposit acts as financial security and as a reserve sum of money. The landlord may be in the position where the reserve has been exhausted before the end of the lease. So, the practice has developed whereby landlords insert clauses into their agreements stipulating that the tenant must "top-up" this reserve and pay a further deposit during the lease in anticipation of further damage and/or rental arrears and in the event that the landlord has had to deplete the deposit.

At common law there is no regulation of deposits, and parties are free to create their own terms in lease agreements.242 The predecessor to the RHA, namely the Rent Control Act 80 of 1976, did not deal extensively with deposits, although it did stipulate that the deposit paid by the tenant had to be invested in a bank or building society or invested in a savings account at the post office.243

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239 Unstructured interview with Vivien Marks, Western Cape Rental Housing Tribunal (2007-03-09).
240 Western Cape Rental Housing Tribunal Annual Report 2006-2007 20 (http://www.capegateway.gov.za/Text/2007/10/rht_annual_report_06_07.pdf). Generally, landlords do not know about all the rules regarding deposits despite an increased focus on education of landlords affiliated to organized bodies. A further indication of landlords’ ignorance on this topic is observance of a trend where landlords include illegal and enforceable terms in their lease agreements stating that a tenant would forfeit their deposit when certain conditions are not met.
241 Delport South African Property Practice and the Law (2007) 252. If a tenant leaves without giving notice, the rent is still payable until the lease expires. In this case a landlord can choose to use the deposit to cover the rental during this period.
243 S 37(2).
4.2.2.2 Rental Housing Act

The RHA contains extensive provisions regarding the deposit, the interest earned thereon and the refunding of it to the tenant. It is submitted that the rationale for such extensive regulation is that if no legal limitations are imposed on the landlord with regards to the return of a deposit, the unjustifiable use of the deposit may constitute a self-help remedy for the landlord. Without laws regulating when and why the landlord may use the deposit, a fully paid up tenant may unfairly find that the landlord has spent the deposit without the tenant's consent or without his/her knowledge. Thus, the law has progressed in such a way that the interests of the tenant are safeguarded regarding deposits. However, if the law contains too many stringent and onerous provisions in this regard for the landlord, legislation may actually infringe upon the landlord’s right to safeguard his/her financial interests. Accordingly, a balance must be struck between tenants’ and landlords’ interests.

Firstly, section 5(3)(c) of the RHA states:

"the landlord may require a tenant, before moving into the dwelling, to pay a deposit which, at the time, may not exceed an amount equivalent to an amount specified in the agreement or otherwise agreed to between the parties."

Notably, the RHA does not prescribe the maximum amount for a deposit. This is purely a matter for agreement between the landlord and tenant, and the amount cannot change unless by agreement.\textsuperscript{244} In this regard the common law position, as it was before the Rent Control Act of 1976, remains. It is submitted that the non-regulation of the deposit amount is entirely beneficial to the landlord because he/she is able to vary the amount from tenant to tenant based on the tenant’s credit history and references. By requesting a higher deposit amount, a better quality tenant is attracted. Thus, the landlord is able to protect his/her financial interests in anticipation of damage and rental arrears. However, he/she is limited by the amount a tenant is willing and/or able to pay, as well as market considerations.

\textsuperscript{244} The RHA’s predecessor, the Rent Control Act 80 of 1976, stipulated that the deposit may not be more than an amount equal to one month’s rent (s 37(2)(b)).
Although the RHA does not prescribe a maximum deposit amount, it does impose on the landlord a number of specific duties relating to the deposit.\textsuperscript{245} Once the landlord has received the deposit, he/she must:

\begin{itemize}
  \item[a)] give the tenant a written receipt for the amount received;\textsuperscript{246} and
  \item[b)] invest the deposit in an interest-bearing account with a financial institution with the interest accruing to the tenant (the interest rate may not be less that the rate applicable to a savings account with a financial institution).\textsuperscript{247}
\end{itemize}

The RHA further states that once the lease period has come to an end, the landlord has fourteen days to return the deposit, plus interest, to the tenant.\textsuperscript{248} The landlord may deduct the outstanding amounts owing under the lease from the deposit and return the remaining amount to the tenant. If there are no amounts to be deducted from the deposit then the full deposit, plus interest, must be returned to the tenant within seven days.\textsuperscript{249}

The landlord must invest the deposit in an interest bearing account with a financial institution and, if there are no deductions from the total amount of the deposit the landlord must pay the tenant such interest. The interest rate may not be less than the rate applicable to a savings account with the financial institution in which it is invested.\textsuperscript{250} In other words, if the landlord chooses to invest the deposit with ABC Bank, the interest rate must be according to a savings account with ABC Bank and not according to the rate with XYZ Bank. Effectively, therefore, the RHA bars the landlord from including a clause in the lease agreement that fixes an interest rate that is different from the rate of the financial institution where the deposit is held.

By obliging the landlord to invest the deposit with a financial institution, certain problems prevail, most notably the bank charges that accrue to the landlord. The RHA does not

\textsuperscript{245} S 5.
\textsuperscript{246} S 5(3)(a)-(b). The receipt must be dated, with full address of the premises and specification that payment has been made for the deposit.
\textsuperscript{247} RHA s 5(3)(d) with Rental Housing Amendment Act 43 of 2007 s 3(b).
\textsuperscript{248} S 5(3)(g).
\textsuperscript{249} S 5(3)(i).
\textsuperscript{250} N 11.
expressly stipulate which party is responsible for the payment of bank charges of the investment of the deposit and ostensibly, there is no ban on the parties agreeing that the tenant must pay the bank charges. However, the position is not entirely clear. A landlord with a large property portfolio may have to incur large amounts for bank charges, as he/she will have many deposits. So, an agreement that stipulates that the tenant pay for the bank charges relating to his/her deposit, seems fair. The regulation of this aspect is, therefore, important. Obviously, the most beneficial position for the landlord would be to incorporate into the RHA a section that expressly renders the tenant liable for bank charges.

A further criticism of the RHA entails issues regarding the legal position of the landlord and his/her right to use the deposit during the lease. Is the landlord during the lease, legally entitled to deduct from the deposit compensation for damage to the premises caused by the tenant? Furthermore, is the landlord legally entitled during the lease to deduct arrear rental from the deposit if the tenant defaults? The RHA states that the landlord is entitled to use the deposit for damage to the premises and/or arrear rental, but it is stipulated that this must be done at the end of the lease. The RHA makes no mention of the landlord being entitled to use the deposit during the lease. Thus, it is unknown what the legal situation is in this regard and one can only infer from the provisions of the RHA that the landlord is legally entitled to use the deposit only "on the expiration of the lease". The lack of provision allowing the landlord to use the deposit during the lease has a huge financial impact on the landlord in that he/she is out of pocket until the end of the lease (which could last for months, sometimes years depending on the duration of the lease).

Furthermore, criticism lies in the fact that the RHA, by implication, does not allow for the payment of a "top–up" deposit, as the RHA states that "before moving into the dwelling" the landlord may request a deposit from the tenant. Thus, from this provision one can assume that the RHA allows for the payment of a deposit only before the tenant moves in. However, there is no express provision that prohibits the landlord from including a

\[251\] S 5(3)(g).
contractual stipulation allowing for a “top-up” deposit. Thus, the situation is that, by implication, the RHA does not allow for a “top-up”, yet it does not expressly prohibit it either. This unclear position needs serious rectification.

Another practical concern with regard to the deposit is the issue of the joint inspection requirements of the RHA. These legislative provisions are discussed in depth in Chapter 5 where it is found that they are onerous for the landlord and also not in his/her interests. For present purposes it needs to be mentioned only that the RHA prohibits a landlord from deducting any amount from the deposit if the required inspections have not been carried out. It must be noted that the joint inspections are aimed at comparing the condition in which the tenant received the premises and the condition in which the tenant returned it to the landlord. Accordingly, the sections of the RHA regarding the joint inspection and return of the deposit should relate to the deposit in respect of damage to the premises, not arrear rental. Yet, it is submitted, the RHA prohibits a landlord from deducting any amount (including arrear rental) from the deposit if he/she has not carried out the joint inspection in accordance with the RHA. Effectively, the landlord forfeits his/her right to deduct arrear rental from the deposit when no inspection has been carried out. It is submitted that it is nonsense that the landlord should be prohibited from recovering arrear rental from the deposit simply because he/she did not carry out the inspection. The non-payment of rental has nothing to do with the condition of the premises, and arrear rental and damage to the premises are unrelated. Such a prohibition is nonsensical, unfair, and it offends one’s sense of justice. In this way the RHA has severely disregarded the landlord’s right to use deposit to safeguard his/her financial interests and serious rectification is needed.

4.2.2.3 Foreign law

In Australia there is a separate Act dealing with rental deposits (called a “bond”), namely the Landlord and Tenant (Rental Bond) Act of 1977, which establishes a Rental Bond Board whose function is to act as the independent custodian of rental bonds paid by tenants to landlords for residential tenancies.\textsuperscript{252} The landlord is not obliged to charge a

\textsuperscript{252} Landlord and Tenant (Rental Bond) Act 44 of 1977.
bond to the tenant, but if he/she requests one to be payable, a maximum rental bond is prescribed by law.\textsuperscript{253} The Act contains no restrictions relating to when and how frequently the deposit must be paid, and thus, one can assume that the requesting of a "top-up" deposit is permissible. The landlord or agent must send any bond that is paid by the tenant to the Office of Fair Trading.\textsuperscript{254} The bond is held by the Rental Bond Board of the Office of Fair Trading where it accumulates interest until the end of the lease.\textsuperscript{255} Joint inspections before and after the lease are vital for the return of the deposit. At the end of the tenancy, after the final inspection, before the deposit can be refunded, the landlord can claim the deposit plus interest by submitting a "Claim for Refund of Bond Money" form to the Office of Fair Trading. The landlord can then deduct outstanding amounts owing in terms of the lease from the deposit that was claimed.\textsuperscript{256}

\textit{4224 Evaluation}

At common law, there is no regulation of deposits and lease agreements. The RHA has changed the common law position quite extensively for the landlord with a thorough regulation of this area. These laws were created to protect the tenant from unscrupulous landlords who exploited the use of deposits, and from the landlord's perspective, may be perceived as being too unreasonably restrictive and unfairly onerous for the landlord. The RHA, in fact, recognizes the importance and necessity of a deposit for the landlord. However, the landlord is obliged to comply with strict laws

\textsuperscript{253} This is either four weeks rent for unfurnished premises, six weeks rent for fully furnished premises with a rent of $250 or less per week, and an unlimited amount if the rent for fully furnished premises is more than $250 per week. This bond amount (if any) must be included in the written lease agreement (s 12) and must be in the form of money and not as a guarantee (s 9).

\textsuperscript{254} S 8(2) & s 10(1). The landlord must do so within seven days by using the prescribed lodgment form. Each lodgment form has a unique barcode obtainable from a local Office of Fair Trading. These forms cannot be downloaded or copied. After the bond is lodged, all parties should receive an advice of lodgment that includes the unique rental bond number. It is an offence for a landlord/agent to request a rental bond from their tenant and then not lodge it with Fair Trading (s 16).

\textsuperscript{255} S 11.

\textsuperscript{256} S 3(a). With regards to dispute resolution over the refunded deposit amount, any disagreement should first be discussed between the parties. If agreement cannot be reached, either the landlord or tenant may send a "claim for refund of bond money" form to the Office of Fair Trading without the signature of the other party. The bond will not be refunded straight away. A letter will be sent to the other party advising them of the claim and giving them fourteen days to apply to the Consumer, Trader and Tenancy Tribunal to dispute the claim. If no reply is received within fourteen days the bond will then be paid out. The landlord always bears the onus of proving a claim to the bond.
regarding the deposit. Accordingly, the position in Australia is similar to the RHA in that there are strict rules that the landlord must comply with once he/she has been given the deposit from the tenant.

Pro-tenant critics maintain that for the most part, these laws, foreign and local, are harmless to the landlord as long as they are not detrimental to the landlord, and prevent future disagreements between landlords and tenants and promote good business practice for landlords, such as the laws requiring the landlord to invest the deposit in a bank or other financial organization. On the other hand, pro-landlord views are that the RHA’s requirement that the landlord has to invest the deposit in a commercial bank in the private sector inevitably results in the landlord incurring unnecessary bank charges for which he/she is liable. Therefore, such laws are, in fact, not in the landlord’s interests. The solution to this problem would entail the RHA adopting the approach of the Australian law whereby the landlord is obliged to invest the deposit with a government organization (Office of Fair Trading) or other institution that does not charge banking fees. In this way, the landlord’s financial interests will not suffer. Alternatively, an express provision should be included in the RHA obliging the tenant to pay the bank charges.

As for the amount the landlord is entitled to charge for the deposit, the RHA does not prescribe the maximum, as is the case in Australia. The landlord’s interests are better protected by the non-regulation of the deposit amount because then the landlord and tenant are able to freely negotiate a deposit amount with the landlord basing his/her required amount on the tenant’s credit and rental history amongst many other factors. The landlord is, thus, in this manner able to protect himself/herself from having to take long and expensive legal action against the tenant should he/she breach the lease, as he/she has the deposit to cover outstanding amounts. The landlord’s right to contract freely also plays a part here with this right being protected and promoted by the provisions of the RHA regarding deposits.
The RHA does not expressly prohibit the landlord’s right to use the deposit during the lease and then demanding a “top-up” of the deposit. It is only by implication by the relevant provision in the RHA that one can draw the conclusion that the landlord may only request a deposit at the start of the lease. The foreign law of Australia does not restrict the time period that the landlord may request a deposit. The RHA’s non-recognition of the landlord’s right to demand a top-up deposit means that the RHA does not take into account the reality in practice of occasions where the landlord may need to use the deposit during the lease owing to the tenant’s conduct or default, thus, leaving the landlord without a reserve at the end of the lease. This important practical aspect has not been duly considered by the legislature and the RHA needs to be amended to provide for such a possibility where the landlord may be extremely prejudiced.

One of the most severe inroads on the landlord’s right to safeguard his/her financial interests is the fact that the RHA disallows the landlord from recovering arrear rental if he/she fails to comply with the joint inspection requirements. This restriction is unjustifiable, as the joint inspections relate to the condition of the premises to ascertain damage thereto, and are completely unrelated to arrear rental.

4.2.3 The landlord’s hypothec

4.2.3.1 Common law

At common law the landlord has a tacit hypothec over movable property belonging to the tenant that is on the leased premises, even if the landlord does not know that the property is there. The hypothec is over the tenant’s *inventa et illata;* fruits of the property which the tenant is entitled to collect; and improvements which the tenant is entitled to remove. This hypothec is security for arrear rental and arises *ex lege,* meaning that the landlord and tenant do not need to agree on the operation of the hypothec. As a form of real security created by law, the tacit hypothec of the landlord is an important mechanism to secure and safeguard the payment of rental that has

257 *Winterton v Allhusen* 1925 CPD 190.
258 *That is, the goods and articles that the tenant has brought on to the property leased.*
260 *Supra* 384.
become due and payable and is in fact, a speedy and effective remedy.\textsuperscript{261}

The underlying rationale for the hypothec is that, firstly, it prevents a non-paying tenant from disappearing, as people do not want to part without their property; and secondly, so that the landlord is not without a remedy in law.\textsuperscript{262} The hypothec, which is a real right over the property, does not become effective however, until the landlord attaches and removes the tenant’s movable property by means of a court order.\textsuperscript{263} If the landlord removes the tenant’s goods without a court order, he/she loses the hypothec over these goods.\textsuperscript{264} This reiterates the legal point that landlords may not resort to self-help methods in acquiring arrear rent.\textsuperscript{265} The hypothec operates only as long as the rent is in arrear and only if the property is on the premises.\textsuperscript{266} However, not all movable property on the premises is subject to the hypothec and so, the hypothec is useful only if the tenant has movable property falling under the hypothec on the premises.\textsuperscript{267}

\textsuperscript{262} Alp ‘A Hypothetic Matter: an End to the Landlord’s Sleepless Nights’ 1995 (3) Juta’s Business Law 17.
\textsuperscript{263} Webster v Ellison 1911 AD 73; Eight Kaya Sands v Valley Irrigation Equipment 2003 (2) SA 495 (T) 502C; Frank v Van Zyl 1957 (2) SA 207 (C) 201C-D; Ina Knobel evaluates the practical effect of the latter judgment and investigates the nature of the landlord’s hypothec before attachment in ‘The Tacit Hypothec of the Lessor’ 2004 THRHR 687.
\textsuperscript{264} Smith Eviction and Rental Claims: A Practical Guide (2009) 8-17.
\textsuperscript{265} See 4 2 4 below.
\textsuperscript{266} Kerr The Law of Sale and Lease (2005) 401, Frank v Van Zyl 1957 (2) SA 207 (C) 201C-D.
\textsuperscript{267} Firstly, all movable property that the tenant has brought on to the premises falls under the landlord’s hypothec, even if the landlord did not know about the movable’s existence (Mackay Bros Ltd v Eaglestone 1932 TPD 301 305). Secondly, a subtenant’s property is also subject to the hypothec, but only to the extent that the subtenant is in arrears with rental owing to the tenant, and not to which the tenant owes the landlord (Kerr The Law of Sale and Lease (2005) 393; Smith v Dierks 1884 (3) SC 142; Ex parte Aegis Assurance and Trust Co Ltd 1909 EDC 363; Reinhold & Co v Van Oudtshoorn 1931 TPD 382 388). Thirdly, legislation has excluded two types of movable property from the hypothec under the Security by Means of Movable Property Act 57 of 1993, that is, property hypothecated by a notarial bond which is in the possession of a person other than the person in whose favour the notarial bond has been granted, and property relating to an installment sale as defined in the Credit Agreements Act 75 of 1980. Lastly, property not belong to the tenant or subtenant, but a third party, only falls under the hypothec if certain requirements are met, namely if: the goods were brought onto the premises with the knowledge and consent of the owner of the goods (the third party); the third party intended that the goods would remain there indefinitely; that the goods would be for the use of the tenant; the owner of the goods failed to give notice of his/her ownership to the landlord; and the landlord is unaware that the goods do not belong to the tenant (See Mackay Bros v Cohen (1894) 1 OR 342; Fresh Meat Supply Co v Standard Trading Co (Pty) Ltd 1933 CPD 550; Bloemfontein Municipality v Jacksons Ltd 1929 AD 266 271). See also Sher ‘The Landlord’s Security for Payment of the Rent: How Does it Operate Against Third Parties?’ 1997 Juta’s Business Law 114 117; Eight Kaya Sands v Valley Irrigation Equipment 5011-502A; Steven ‘The Landlord’s Hypothec in Comparative Perspective’ 2008 Stellenbosch Law Review 279 291.
benefits of the hypothec for the landlord are obvious and function as security for arrear rental in so far as the tenant has sufficient movable goods to cover the arrears.

4 2 3 2 Rental Housing Act
The RHA does not codify the landlord’s tacit hypothec, but it does stipulate that the landlord may recover unpaid rental or any other amount due and payable after obtaining a ruling by the Tribunal or other court of law.²⁶⁸ Furthermore, section 4(3)(c) of the RHA expressly gives the tenant the right not to have his/her possessions seized, except in terms of a law of general application and having first obtained a court order. In terms of the latest amendment to the RHA, the Tribunal has the power to issue attachment orders with the result that a landlord will be able to obtain a final attachment order for the hypothec easily and speedily.²⁶⁹ To that extent, the RHA does protect and recognize the landlord’s tacit hypothec. However the landlord cannot carry out the Tribunal order in person, as the sheriff of the court must execute all court orders.²⁷⁰ Furthermore, attachment of the goods alone is not enough, as the goods must be removed to be of use to the landlord. In practice, and in terms Magistrates’ Courts Rules of Court, only the clerk of the court can endorse the removal of the goods.²⁷¹ The RHA is silent regarding the removal of the goods, and it is not known if the Tribunal has the power to endorse this. Accordingly, criticism of the RHA regarding the hypothec lies

²⁶⁸ The Magistrates’ Court Act 32 of 1944, on the other hand, does give the hypothec adequate statutory recognition. The Magistrates’ Court Act s 32(1) provides for the conditions and procedure for the attachment of property in the security of rent, and s 31 of the Act codifies a remedy for the landlord in terms of an “automatic rent interdict”. This is the most commonly used remedy for arrear rental. When the landlord issues summons against the tenant for arrear rental, he/she may include a notice prohibiting any person from removing any of the tenant’s goods from the premises, which are subject to the landlord’s hypothec. This prohibitory interdict remains in place until the court has made a final order with regards to the rent arrears claim. Alp mentions the advantages of this remedy in that it kills two birds with one stone: the landlord can sue for arrear rent, and perfect his/her hypothec (n 25). Regarding the hypothec in practice, landlord complaints regarding tenants’ arrear rentals and claims for compensation have increased over the years. The trend is that rental agents (and landlords) are now using the Tribunal as a free debt-collecting agent, which could cause a backlog of hearings if this continues, but it is an unforeseen consequence of the RHA 50 of 1999 (Western Cape Rental Housing Tribunal Annual Report 2006-2007 32 (n 4)).

²⁶⁹ RHA s 13 read with Rental Housing Amendment Act 43 of 2007 s 6(b).
²⁷⁰ Rental Housing Amendment Act s 6(b).
²⁷¹ This is in terms of Rule 42(3) read with Rule 41(7)(a) and other provisions of Rule 41. Rule 42(3) provides: “The method of attachment of property under section 32 of the Act shall mutatis mutandis be the same as that of attachment in execution.” This is indeed the case in practice as experienced by the researcher as a candidate attorney at Friedman Scheckter in Port Elizabeth.
in the fact that the order by the Tribunal is of no use, as only the clerk of the Magistrates’ Court can endorse the removal of the goods from the premises. Thereafter, only the sheriff of the Magistrates' Court can attach and remove the goods because only a sheriff can execute an order of court. Waiting for endorsement by the clerk of the Magistrates’ Court and subsequent execution by the sheriff could delay the process substantially, thus, depriving the landlord of a speedy and effective remedy for payment of arrear rental. This issue needs to be addressed by the RHA.

4 2 3 3 Foreign law

In some foreign jurisdictions, the landlord’s hypothec is known as “distress for rent”. In the United Kingdom, a residential landlord, in person or by a bailiff, may enter the premises and seize sufficient items of the defaulting tenant to meet the rent. In other words, it is not imperative that a bailiff executes the court order, as the law permits the landlord to do so in person. However, the landlord must approach the courts for an order to take possession of the goods, as no distress may take place without a court order. Distress is only available for arrear rent and not for other money owing in terms of the lease. However, distress for rent in the United Kingdom is currently under review and the Law Commission has recommended that it be completely abolished for the reason that it is considered to be draconian in nature in so far as the landlord distrains without a court order.

272 Martin Landlord and Tenant Law (1994) 102. The distrainable property is movable, tangible items on the premises at the time. Seizure requires a clear indication of the property to be seized, for example, by pointing at it. Distress for rent is currently under review in the United Kingdom with suggestions of it being abolished completely, but only in so far as the landlord distrains without a court order. It is considered by authors to be a remedy that is draconian in nature and should be abolished (Law Commission No 297 ‘Renting Homes: The Final Report Volume 1’ Report May 2006 7); Loveland ‘Distress for Rent: An Archaic Remedy?’ 1990 vol 17 Journal of Law and Society 363-383; Law Commission No 194 ‘Distress for Rent’ 199; Travers ‘Distress for Rent: Will Landlords Lose Their Rights?’ 1991 Property Management 208 – 211; Pennicott ‘Distress and Forfeiture as the Property Manager’s Options’ 1993 Property Management 1993 48 – 52. During the Royal Institute of Chartered Surveyors Parliamentary briefing on Commercial Rent Arrears Recovery, distress was described as “an ancient remedy that enables landlords to recover rent arrears without going to court, by taking goods from the let premises and either holding them until the arrears are paid or selling them. Existing procedures need updating as they potentially do not comply with Human Rights legislation.” (www.rics.org/Newsroom/Positionpapers/RICSviewCRAR.html (accessed 2008-08-26)).

273 Supra.

274 Ibid. It is good practice to list the items distrained upon, and for the landlord to ask the tenant to sign the list as confirmation.

275 N 35; Steven ‘The Landlord’s Hypothec in Comparative Perspective’ 2008 Stellenbosch Law Review
In British Columbia distress for rent is regulated under a separate Act called the Rent Distress Act. This Act establishes guidelines that both tenants and landlords must follow once rent is in distress. This regulates aspects regarding, *inter alia*, what personal property may be seized by distress for rent, whether a tenant can protect his/her property from being seized, and the recourse available should property be wrongfully seized.

The Kenyan Distress for Rent Act specifically regulates this topic by permitting the landlord personally, not a court official, to seize the tenant's possessions if the tenant is unable to pay rent.

### Evaluation

There is no provision in the RHA that has an impact on the common law principles of the landlord’s hypothec. However, the law in this regard is not codified either. The common law position, thus, remains with the added benefit of the landlord being able to approach the Tribunal for an attachment order.

A criticism of the RHA entails the fact that it only provides for orders for the attachment of the goods and is silent regarding the removal thereof. Furthermore, only the sheriff, and not the landlord, is permitted to attach (and remove) the goods. Suggested solutions to these criticisms entail the adoption of the foreign law position regarding the landlord’s hypothec: the United Kingdom common law and Kenyan Rent Distress Act allows the landlord to hypothecate the goods. However, by permitting the landlord to do so, even with a court order, it may be considered draconian and may give the landlord a free hand to remove what he/she pleases. Yet, it has been noted (by the English Government when commenting on abolition of distress) that the removal of the distress

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279 285.
276 1996 Chapter 403.
277 S 2 & 3.
278 S 4.
279 S 5.
280 Chapter 293 Distress for Rent Act.
281 S 4(1).
"would mean that landlords would have to resort to recovering arrears through the courts, which is more costly."\(^{282}\)

A better solution to protect and improve the procedural side of the landlord's hypothec would be for the Rental Housing Tribunal to be afforded the powers to allow an official of the Tribunal to accompany the landlord when he/she removes the tenant's goods, after having obtained a court order for the removal of the goods. After all, the Tribunal is the designated body for the resolution of landlord/tenant disputes and there is no reason why the Tribunal cannot have a mechanism in place to assist the landlord with the removal of the tenant's goods in terms of his/her hypothec. The Tribunal should also deal with any subsequent interpleader proceedings. Such an approach would ensure a speedy remedy for the landlord and thus, safeguard his/her financial interests in that he/she may not be "out of pocket" for longer than necessary.

4.2.4 Relying on "self-help" clauses in lease agreements

4.2.4.1 Common law

The screening of prospective tenants is vital for a landlord, but it does not always guarantee that the tenant will be exemplary. Choosing quality tenants based on financial considerations will ensure prompt and regular payment of rental to some extent only, as there will always be the risk that he/she may default on payment. If and when a tenant does default, it can cause the landlord problems. Arrear rental issues are serious matters for the landlord and require immediate action. When the situation gets out of control and tenants fail to communicate properly in an arrears situation, the landlord is left with no option but to take drastic action, usually involving cancellation of the lease, followed by eviction if the tenant refuses to leave.

Landlords, of course, can approach the courts for judgment against the tenant for outstanding arrear rentals and other loss, but this is easier said than done as the court process is backlogged and can put the landlord "out of pocket" until the judgment debtor

\(^{282}\) Steven 'The Landlord's Hypothec in Comparative Perspective' 2008 *Stellenbosch Law Review* 279 297.
tenant is able to pay the judgment debt and legal fees. A judgment debt or an 
attachment order in terms of the landlord’s hypothec is not the answer if the tenant 
cannot be found and leaves no goods behind. Furthermore, a judgment debt does not 
equal an eviction order and further legal proceedings will have to be instituted by the 
landlord to remove a tenant from the premises.

For the reasons above, landlords are tempted to include certain provisions in lease 
agreements that give the landlord the power to take specified action should the tenant 
default with rental payments without recourse to the courts. These are known as “self-
help” clauses. This specified action usually results in the landlord taking the law into 
his/her own hands in order to prevent having to approach the courts for relief thereby 
preventing unnecessary expenses.

Examples of self-help clauses include those that give the landlord the power to, inter 
alia: forcibly eject the tenant;\textsuperscript{283} remove the tenant’s movable property from the 
premises; barricade the entrance to the premises; change the locks; unscrew the door 
to the premises;\textsuperscript{284} cut off the electricity or water or cause such to become erratic.\textsuperscript{285} 
Basically, these examples of clauses fall into three bigger categories, namely: those that 
entitle the landlord upon breach by the tenant without a court order to remove any party 
on the premises or to prevent any person from entering the premises’, deprive the 
tenant of the use and enjoyment of the premises in order to coerce him/her into paying 
rent, and to gain access to the premises by whatever means stated in order to gain 
possession of the tenant’s goods and remove same without a court order.\textsuperscript{286}

Whatever form a self-help clause takes at common law, the inclusion of such a clause is 
unlawful and of no force or effect for several reasons. Firstly, a person who claims to 
have a real right to property in another person’s possession should approach the courts

\textsuperscript{283} Blomson \textit{v} Boshoff 1905 TS 429. 
\textsuperscript{284} Lazarus \textit{v} Ndimangele 1913 CPD 732. 
\textsuperscript{285} Ntshiqa \textit{v} Andreas Supermarket 1997 (3) SA 60 (TkSC). 
\textsuperscript{286} Delport "Self-Help" Clauses in Lease Agreements’ August 2000 \textit{Agent} 14.
and not resort to self-help.\textsuperscript{287} Secondly, a clause that gives a landlord the right to do something which only a court can legally authorize the landlord to do, is unlawful.\textsuperscript{288} If the landlord resorts to self-help without a court order, it is void for the reason that it offends public policy.\textsuperscript{289} These reasons have been confirmed in case law many times over the past one hundred years, and the tenant has been able to approach the court and obtain re-possession of the premises by means of the \textit{mandament van spolie}.\textsuperscript{290} In other words, the landlord has not been legally able to rely on self-help to force a tenant to pay the rent at common law. And, if self-help clauses were included in the lease agreement, they were illegal from the outset. If in the past (and still today) the landlord has been able to get away with locking out a tenant or taking the tenant’s goods without a court order, it is because the tenant did not know his/her rights in this regard. Landlords nevertheless rely on such clauses in a desperate attempt to immediately obtain rent from the tenant or remove them from the premises.

\textbf{4.2.4.2 Rental Housing Act}

The RHA has various restrictions on “self-help” clauses. Firstly, clauses that entitle the landlord to gain possession of the tenant’s goods without a court order are prohibited. Section 4(3)(c) of the RHA expressly gives the tenant the right not to have his/her possessions seized except in terms of a law of general application and having first obtained a court order. The landlord also has the right to recover unpaid rental or any other amount that is due and payable. However, this right arises only once the landlord has obtained a ruling by the Tribunal or an order of a court of law.\textsuperscript{291} A contravention of these provisions is an offence.\textsuperscript{292} In other words, it is an offence if the landlord attempts to recover arrear rental or any amount that is due and payable without a court order or

\textsuperscript{287} A tenant deprived of possession of the premises by the landlord’s self-help methods is entitled to return of the premises by the \textit{mandament van spolie}. Possession will be temporarily restored to the tenant (even if he/she has no right of possession) until the landlord takes legitimate action for restoration of the property to him/her (Badenhorst, Pienaar, Mostert, van Rooyen \textit{Silberberg and Schoeman’s The Law of Property} (2002) 268).

\textsuperscript{288} Self-help by the landlord to restore possession of the premises to him/herself is not recognized at common law (Yeko \textit{v Qana} 1979 (4) SA 735 (A)).

\textsuperscript{289} Chapter 3 of this dissertation contains a discussion of freedom to contract and public policy.


\textsuperscript{291} S 4(5)(b).

\textsuperscript{292} S 16(a).
order from the Tribunal and resorts to self-help. It is, furthermore, an offence if the landlord unlawfully locks out a tenant or shuts off the utilities to the premises, as recently promulgated in section 8 of the Rental Housing Amendment Act.\textsuperscript{293} This section prohibits the landlord from using these self-help means to coerce the tenant into paying the rent by criminalizing such conduct.

Effectively, section 8 has confirmed the common law position by categorically prohibiting the landlord from using self-help to obtain rental payments from the tenant. This means that the only door that the landlord had to get the tenant to pay rent has now been closed by means of the criminalization of the self-help form of shutting-off utilities to the premises. The problem, however, is that the RHA has not put in place other means for the landlord to obtain rental, but has simply taken away the landlord’s only effective means. One could argue that the landlord may approach the courts for relief, but this is not the speediest option as speedy access to justice is a problem in reality. Thus, there is no adequate protection of the landlord’s right to payment of rental.

With regards to the UPRs, all the regulations forbid the landlord from causing the non-supply or the interruption of the tenant’s municipal services without a court order, except in an emergency, or after reasonable notice to the tenant to do maintenance, repairs or renovations.\textsuperscript{294} Furthermore, the Regulations stipulate that the landlord may not cause the services to be cut-off by withholding payment to the service provider when such payment becomes due. However, this regulation is only applicable insofar as the tenant has actually made payment to the landlord in respect of the amounts due for such services.\textsuperscript{295} The full regulation reads:

“A landlord who is obliged by law or in terms of the express or implied term of the lease to provide services to a tenant must

a) ...”

\textsuperscript{293} S 8.
\textsuperscript{294} Free State UPR reg 8(1)(b); Gauteng UPR reg 13(1)(b); KwaZulu-Natal UPR reg 20(1)(b); Mpumalanga UPR reg 9(1)(b); North West Province UPR reg 13(1)(b); Western Cape UPR reg 13(1)(b).
\textsuperscript{295} Free State UPR reg 8(1)(c); Gauteng UPR reg 13(1)(c); KwaZulu-Natal UPR reg 20(1)(c); Mpumalanga UPR reg 9(1)(c); North West Province UPR reg 13(1)(c); Western Cape UPR reg 13(1)(c).
There is no authority on the meaning and effect of the above regulation. It is submitted that the section effectively allows the landlord to withhold payment to service providers if tenant does not pay for the services. In other words, the regulation prohibits that landlord from instructing the service provider to cut off the services, insofar as the tenant has made payment to the landlord for these services. In practice, the service provider will simply look to landlord as owner to pay the arrears by means of issuing of summons. Thus, the landlord will be liable for the municipal services that the tenant has consumed and will have to foot the tenant’s bill for municipal services in order to avoid judgment being taken against him/her. Accordingly, since the landlord is prohibited from causing the non-supply or the interruption of the tenant’s municipal services without a court order (except in an emergency, or after reasonable notice to the tenant to do maintenance, repairs or renovations), how else can the landlord force the tenant to pay for rent in the situation where the latter has paid the municipal services account? In practice, landlords would use this method, or threaten the use thereof, in order to force the tenant to pay the rent. The landlord’s position has not been adequately considered by the Act, with the point being that the landlord is not entitled to resort to self-help to force the tenant to pay the rent.

One could argue that the landlord is given certain rights in that he/she is at the very least entitled to withhold payment to service providers if the tenant has not paid the landlord for such services. However, such a supposed right is superficial as the non-payment of the services may force the supplier to disconnect the services to the premises. The non-supply of services to the landlord’s property means certain problems for the landlord, for example, the non-supply of water to the premises will result in damage to the garden and the devaluation of the property, and certain hygiene and health risks. Furthermore, if the service provider does choose to disconnect the

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296 Own emphasis.
services, the service provider will not turn to the tenant but will hold the landlord liable for any overdue accounts, including the reconnection fees.

Furthermore, may the landlord request the tenant pay the reconnection fees? The RHA states that the landlord has the right to prompt and regular payment of any charges that may be payable in terms of a lease. Thus, the RHA does entitle the landlord to recover reconnection fees from the tenant, as it is submitted that "any charges" could refer to the reconnection fee charged by the service provider, and that the landlord is entitled to recover from the tenant any amount due and payable by approaching the Tribunal or a court of law. After all, it is the tenant that caused the disconnection by his/her non-compliance with the lease, so it is right that the landlord be able to recover these connection fees from the tenant.

The UPRs prohibit the landlord from changing any locks providing access to the premises unless it is necessary due to fair wear and tear or other reasonable causes and then, duplicate keys must be provided immediately upon such changing of locks. In other words, locking out a tenant as a means to coerce him/her into paying rent is strictly prohibited in terms of the UPRs. Furthermore, the Rental Housing Amendment Act that criminalizes the landlord’s conduct of locking out a tenant and shutting off utilities to the premises can be considered an extension of the regulation prohibiting the landlord from changing the locks. Consequently, self-help by means of locking out is prohibited on a national level.

4.2.4.3 Foreign law

According to United Kingdom legislation, it is unlawful for a landlord to evict a tenant without a court order. Therefore, a landlord cannot contract with a tenant to the effect that he/she will take possession of the premises upon the tenant’s default. However, there are other ways in which the landlord can lawfully deal with the problem of arrear

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297 Own emphasis. RHA s 5(a) & (b).
298 Free State UPR reg 3(1); Gauteng UPR reg 9(3) & (4); KwaZulu-Natal UPR reg 15(1); Mpumalanga UPR reg 3(1); North West Province UPR reg 9(3) & (4); Western Cape UPR reg 3(1).
300 Protection from Eviction Act 1977 s 2.
rental. Firstly, there is the medieval feudal law remedy of distress for rent (the equivalent of the South African landlord’s hypothec). Secondly, a landlord can gain possession of the premises through a legal process known as “re-entry and forfeiture” by means of a clause in the contract that enables the landlord to forfeit the lease and to evict the tenant upon breach by the tenant.\textsuperscript{301}

Under the New South Wales Residential Tenancy Act,\textsuperscript{302} the landlord cannot change the locks of the premises without the consent of the tenant unless in an emergency based on a reasonable excuse.\textsuperscript{303} If the tenant does not give consent, the landlord can approach the Tribunal if changing the locks is reasonable in the circumstances. The changing of locks by the landlord to force the tenant into payment or as a means to evict the tenant is not legal, and the tenant may institute action against the landlord.\textsuperscript{304}

In British Columbia, the landlord may only restrict an essential service or facility if a notice in the prescribed form is served on the tenant at least thirty days before the intended restriction. Furthermore, the rent must be reduced accordingly during the time the essential service is restricted. Thus, landlord is totally prohibited from cutting off service utilities as a means to get the tenant to pay the rent.\textsuperscript{305}

\textsuperscript{301} Martin Landlord and Tenant Law (1994) Law 187. Re-entry is of relevance where there are no valuable goods over which to distrain. Certain formalities by way of notice may be required to give the tenant the opportunity to remedy the breach. On expiration of the required notice period, entry may be made by legal entry (by issuing eviction proceedings) or by peaceful physical re-entry (Martin Landlord and Tenant Law (1994) 188). The Housing Act 1988 as amended by the Housing Act 1996 lays down certain circumstances (grounds) under which a landlord may successfully apply to court for possession. The grounds for possession fall into two categories: mandatory - where the tenant is definitely evicted, the landlord can prove breach of contract; and discretionary - where the court can decide. The terms of the lease agreement must make provision for termination on these grounds. In respect of forfeiture for non-payment of rent, the landlord must make a formal demand for rent before forfeiting unless the tenancy exempts them from this obligation. To avoid the technicalities of a formal demand, most tenancies will provide for forfeiture if the tenant is a specified amount of time (often 21 days) in arrears (whether or not rent is formally demanded) (Martin Landlord and Tenant Law (1994) 104).

\textsuperscript{302} Act 26 of 1987.

\textsuperscript{303} S 29(3).

\textsuperscript{304} S 29(5)(c).

\textsuperscript{305} Residential Tenancy Act 2002 s 27.
4.2.4.4 Evaluation

In South Africa, many landlords do not have faith in the justice system and resort to self-help to protect their interest. Self-help clauses function as a useful tool for the landlord to protect his/her financial interests. Court processes are slow, and do not always provide an immediate solution to the problem of troublesome non-paying tenants. Thus, landlords have included self-help clauses in their lease agreements for years, even though it was frowned upon, as this was their only means to protect their interests where the system does not. If any amount is outstanding on the property as a result of the tenant defaulting, it is the landlord who is liable for these amounts, as the property is registered in his/her name. Serious legal consequences for the landlord ensue if the tenant does not perform in terms of the lease agreement. Therefore, the landlord, as a consumer, needs immediate protection from bad tenants who renege on their contracts with the landlord.

The RHA does relieve the court process somewhat by establishing the Rental Housing Tribunal that has the power to grant certain orders that are effective as a court order. This enables the landlord to obtain an order for payment and obtain an interdict or attachment order easier. However, this is not a solution for the majority of the provinces who are without a Rental Housing Tribunal. In fact, the RHA generally does not provide a quick solution for the landlord to protect his/her interests when the tenant defaults.

The RHA and UPRs clearly prohibit the landlord from resorting to self-help. It is, in essence, a codification of the common law on this topic and goes one step further by criminalizing such conduct by the landlord. The courts at common law always frowned upon self-help by the landlord. For a century, the landlord was not able to act in such a manner nor legally able to include “self-help” clauses in lease agreements, although the practice did exist. Now, the position is clear: the landlord commits a crime if he/she resorts to self-help by locking out a tenant, shutting off utilities, or unlawfully takes

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306 Local Government: Municipal Systems Act 32 of 2000 s 118(1) stipulates that a transfer of property may not be registered unless the Registrar of Deeds is provided with a clearance certificate issued by the municipality that all service fees have been fully paid. Thus, if a tenant is in arrears with electricity and water payments, the landlord will have to pay the amount outstanding in full before the municipality will issue a clearance certificate.
possession of the tenant’s goods. The foreign law examples also prohibit the landlord from resorting to various forms of self-help without a court order.

In addition, the landlord is prohibited from causing the non-supply of municipal services to the premises as a means to force the tenant to pay the rent or municipal services (which has been a valuable and effective tool for landlords in practice). This position is the same in British Columbia and thus, this law provides no solution to the landlord’s problem in South Africa. The prohibitions by the RHA leave the landlord with no option but to resort to costly and time-consuming legal action in order to get an unscrupulous tenant to pay that which he/she has freely undertaken to pay in terms of the lease. The landlord’s right to payment of rental is, thus, disregarded in this instance as the RHA has taken away the landlord’s means to force the tenant to pay the full rent promptly and has not provided the landlord with a satisfactory alternative solution.

4 3 The right to protect the return on the investment
4 3 1 Determination of initial rental
4 3 1 1 Common law
Kerr describes the landlord’s right to payment of rental in terms of the tenant’s duty “to pay the proper amount of rent in the proper commodity at the proper place and time”.307 Some authors consider this to be the most important duty of the tenant.308 For centuries, the parties could freely agree on any amount of rental. However, the Rent Control Act 80 of 1976 that enforced a system of rent control changed this. Rent control restricted the amount of rent the parties could agree on and decades later, this Act was abolished by the RHA because the rent control system in place was considered an outdated, discriminatory, “demented and unworkable scheme aimed at reserving specific buildings by declaring them rent control buildings”.309 Rent control not only caused untold damage to the prospect of diverse individuals having no access to affordable shelter, but also spawned further economic disadvantage as well as

discrimination. In addition, arguments against rent control express the view that it is the most constricting form of consumer protection in lease agreements and that it removes all freedom to contract completely by fixing the rent.

At common law, the tenant has the duty to pay the rental amount agreed upon, unless he/she is entitled to reduce this rental amount in law. This rent reduction is known as “remission of rent.” Remission of rent is based on the contract law principle of exceptio non adempleti contractus in terms of which a party to a reciprocal contract may hold back his/her own performance until such time as the other contractant performs in full and completely. A tenant is, therefore, entitled to withhold rent until the landlord provides him/her with full use and enjoyment of the premises. As was held in the recent case of Mpange and others v Sithole, a tenant is entitled to remit the rent if he/she has been deprived of his/her use or enjoyment of the premises wholly, or in part. The amount of the reduction must be proportionate to the extent by which the tenant has been deprived of the use and enjoyment of the premises at anytime.

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310 Supra.
311 For arguments against rent control see Aronstam Consumer Protection, Freedom of Contract and the Law (1979) 150; Penny 'Rent Control' 1996 SALJ 493 495; Macrot Wagons LTD v Smith 1951 (2) All ER 271 (CA).
314 Ntshiqa v Andreas Supermarket 1997 (3) SA 60 (TkSC) 8-11.
315 2007 (6) SA 578 (W).
316 Kerr The Law of Sale and Lease (2005) 350. Seligson v Alley 1928 TPD 259. This is because a lease is an agreement consisting of reciprocal obligations, and if the landlord does not perform, then the tenant is entitled to a remission of the rent. In other words, if the landlord fails to perform one or other of his/her reciprocal obligations, or if he/she uses a portion of the premises for his/her own use, or if repairs to the premises have to be made, then the tenant is permitted to reduce the rent (Ntshiqa v Andreas Supermarket 1997 (3) SA 60 (TkSC) 10; Thompson v Scholtz 1999 (1) SA 232 (SCA). The latest court judgment regarding remission of rental is the Witwatersrand High Court Decision of Mpange and others v Sithole 2007 (6) SA 578 (W). In this judgment, Satchell J extensively quoted Thompson v Scholtz 1999 (1) SA 232 (SCA) when coming to her decision: “[t]o award the landlord the full rental when he failed to give his/her tenant full occupation is to [...] deny the tenant a reduction of rental pro rata to his/her diminished enjoyment of the merx [and] is to offend against all authority sanctioning a remissio mercedis when the landlord is in breach of the lease...”(25). In Mpange, Sachwell J agreed with the Thompson (supra) decision in that there is no formula or method by which one can determine how much the rent must be reduced by. One has to look at the tenant’s reduced enjoyment or utilization of the premises by applying a subjective test that takes subjective factors into account which are specific to the tenant and which have no relevance to the actual cost of repair. “The amount of remission is to be calculated without reference to any claim for damages but by reference to what is fair in all the circumstances.” See Thompson v Scholtz 247F; Mpange and others v Sithole 29.
Furthermore, the remission of rent depends on the circumstances of the case, and there is no set formula. 317

If the tenant reduces the rent, for whatever reason, it obviously has an effect on the landlord who will be without a certain amount of income and consequently his/her return on the investment will be reduced. This situation is not desirable for the landlord as he/she has various payments to meet as property owner and financier of the premises. Therefore, in practice, landlords insert clauses into their lease agreements purporting to prohibit a tenant from withholding the rent, for whatever reason, even if a property may be uninhabitable. In this way, the landlord is able to secure prompt and regular payment and safeguard his/her financial interests by protecting the return on this investment. At common law, the use of such a clause was perfectly legal. The question is to what extent the RHA changes the common law position.

4 3 1 2 Rental Housing Act

There are no legal impediments to the landlord’s right to determine a rental amount with the tenant, as the RHA abolished the Rent Control Act. However, the RHA gives the Rental Housing Tribunal the power to determine the rental amount for the parties based on a complaint lodged by the tenant relating to "exploitative rentals". Section 13 reads:

“(4) Where a Tribunal, at the conclusion of a hearing in terms of paragraph (d) of subsection (2) is of the view that an unfair practice exists, it may_

(a) …
(b) …
(c) make any other ruling that is just and fair to terminate any unfair practice, including, without detracting from the generality of the aforesaid, a ruling to discontinue-

(i)…
(ii)…

317 Thompson v Scholtz 1999 (1) SA 232 (SCA) 274A. Satchwell J summarised the position in Mpane and others v Sithole 2007 (6) SA 578 (W) 23: “A lease is a contract of reciprocal obligations. It ought to follow from the reciprocity of the duties between lessor and lessee that where a lessee abides by a lease despite a defect in the thing let, he or she should be entitled to a reduction of the rent proportional to the diminished use and enjoyment of the thing.” According to the 2006-2007 Western Cape Rental Housing Tribunal Report, complaints relating to failure to allow remission of rent have increased and are usually connected to a maintenance problem or other issues that impacted on the tenants not having the full use and enjoyment of the properties (Western Cape Rental Housing Tribunal Annual Report 2006-2007 33-34).
(iii) exploitative rentals...

(5) a ruling contemplated in subsection (4) may include a determination regarding the amount of rental payable by a tenant, but such determination must be made in a manner that is just and equitable to both tenant and landlord and takes due cognisance of-

(a) prevailing economic conditions of supply and demand;
(b) the need for a realistic return on investment for investors in rental housing; and
(c) incentives, mechanisms, norms and standards and other measures introduced by the Minister in terms of the policy framework on rental housing referred to in section 2 (3).”

It must be noted that although section 3(5) of the RHA does specifically oblige the Tribunal to consider factors relevant to the landlord’s needs as a consumer and investor in the rental housing market, the consideration of this factor is beneficial only to the extent that the realistic return on the investment has to be considered (at the very least). Thus, criticism lies in the fact that it is not known what constitutes a "realistic return on the investment". The presiding offices of the Tribunal are not all economists and financial experts and it is submitted that it is unreasonable and unrealistic to expect them to be such experts. The definition of “realistic return” is subjective: what is realistic for one person may not be realistic for another, and a realistic return will differ from area to area. Furthermore, if the Tribunal were obliged to consider the "prevailing conditions of supply and demand", it would inevitably find that the rent is too high as there is currently an oversupply of rental housing stock and less demand than in the past. It must also be noted that none of the factors that the Tribunal is obliged to consider relates to the tenant’s financial statuses, i.e. how much rent the tenant can in fact afford.

The issue is the fact that a statutory body has been appointed to determine rental amounts and dictates what the landlord may charge for rent in a so-called free rental housing market. Furthermore, since the Tribunal's order is effective as a court order, the landlord is compelled to accept the ruling of the Tribunal if it finds that the rent is exploitative. This is in effect, a form of rent control and it contradicts one of the stated aims of the RHA, namely, to “enhance private investor confidence in the housing rental

318 S 13(4) & (5).
market by removing the perceived threat of rent control".\textsuperscript{319} Such an approach is socialistic and not according to free market principles because it is a common misapprehension that the tenant needs protection, when, in fact, it is the landlord that is the weaker party in the landlord/tenant relationship.

One could argue that this provision of the RHA is unfair to the extent that it limits the landlord’s right to safeguard his/her financial interests, especially in the instance where the tenant agrees to the rental amount, whether it is through tacit or express consent, and then renege on that agreement by submitting an “exploitative rental” complaint to the Tribunal. Ultimately, it appears that this section of the RHA gives the tenant the right to agree to a rental amount, and then turn on that agreement and ask the Tribunal for a reduction in rental. This is a desecration of not only the landlord’s right to contract freely but also the landlord’s right to protect the return on his/her investment. Besides, if the tenant considers the rent to be too high, he/she should look elsewhere for a lease that suits his/her budget as there is currently an oversupply or rental housing stock. If the rent is too high, the landlord will soon realize this as no tenants would be interested in contracting with him/her. The normal consequences of supply and demand would thus play a role and would influence the landlord in the way he/she conducts business.

As for the remission of rental, all the provincial UPRs state that a landlord may allow the tenant remission of rental for the period during which the tenant is not in occupation for the reason that the tenant has to vacate the premises for any repairs, conversions or refurbishments that are necessary and cannot be properly made while the tenant remains in occupation.\textsuperscript{320} In other words, it seems that the landlord is not obliged to reduce the rent for the tenant in such an instance. Apart from the mere mention of rent reduction this provision, the RHA does not prohibit the tenant from withholding the rent, nor does the RHA contain provisions that expressly grant the tenant the right to remission of rental, except for the fact that the tenant may lay a complaint to the


\textsuperscript{320} Free State UPR reg 5(2)(a); Gauteng UPR reg 8(2)(a); KwaZulu-Natal UPR reg 17(2)(a); Mpumalanga UPR reg 5(2)(a); North West Province UPR reg 8(2)(a); Western Cape UPR reg 5(2)(a).
Tribunal relating to exploitative rentals. Accordingly, it is submitted that the RHA does not change the common law position of remission of rental.

4.3.1.3 Foreign law

The British Columbia Residential Tenancy Act\textsuperscript{321} does not seem to limit the initial amount of rental the landlord may charge. Furthermore, this Act specifically states that during the lease period, a tenant \textit{must} pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement.\textsuperscript{322} This is so unless the tenant has a right under this Act to deduct all or a portion of the rent.\textsuperscript{323} The tenant has the right to deduct rent if the landlord terminates or restricts a service or facility, and such a reduction in rent must equate to the reduction in the value of the tenancy agreement resulting from such a termination or restriction.\textsuperscript{324} Thus, this provision of the British Columbia Act is similar to the common law position of South Africa in that the tenant is entitled to remit the rent if a service or facility, which reduces the use and enjoyment of the premises, or terminated.

In terms of the British Columbia Act, the tenant can also submit an application for dispute resolution asking for a rent reduction.\textsuperscript{325} Section 65(1) reads:

\textbf{Director’s orders: breach of Act, regulations or tenancy agreement}

- if the director finds that a landlord … has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:
  - (a) …;
  - (b) that a tenant must deduct an amount from rent to be expended on maintenance or a repair, or on a service or facility, as ordered by the director;
  - (c) that any money paid by a tenant to a landlord must be repaid to the tenant,

\textsuperscript{321} 2002 Chapter 78.
\textsuperscript{322} Own Emphasis. S 26(1).
\textsuperscript{323} \textit{Ibid.}
\textsuperscript{324} S 27(2). However, the landlord must not terminate or restrict a service or facility if (a) the service or facility is essential to the tenant’s use of the rental unit as living accommodation, or (b) providing the service or facility is a material term of the tenancy agreement (s 27(1)).
\textsuperscript{325} A dispute resolution officer may order either the tenant to deduct a different amount from the rent, or the landlord to decrease the rent by the value of the discontinued service until the landlord restores the service or facility. If the landlord fails to carry out a repair requested by the tenant, then the Tribunal may order that the tenant undertake the repair and deduct the cost from the rent, or an order to the effect that the landlord to reduce the rent to reflect the lowered value of the rental unit (s 65(1)).
(ii) deducted from rent, or
(iii) treated as a payment of an obligation of the tenant to the landlord other than rent;
(d) that any money owing by a tenant or a landlord to the other must be paid;
(e) \ldots;
(f) that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement;
(g) \ldots".

In other words, in circumstances where the landlord has breached the law or the tenancy agreement, the tenant must continue paying the full rent (except in the case where services or facilities have been restricted or terminated) until such time as the tenant has submitted the dispute relating to the breach for dispute resolution, and the dispute resolution officer had made a ruling regarding the consequences of the landlord’s breach. It must be noted that the dispute resolution officer has the power to reduce the rent by an amount equivalent to the reduction in the value of the tenancy agreement.\footnote{S 65(1)(f).}

\subsection*{4.3.1.4 Evaluation}

Local as well as foreign law discussed recognizes and protects the landlord’s right to prompt and regular payment of rental according to South African Law. However, the landlord is not free to determine any rental amount as he/she pleases as the Rental Housing Tribunals limits the landlord’s right by means of their powers to make orders relating to “exploitative rentals”. The researcher considers these powers to be contrary to free market principles and the right to contract freely, which has an impact on the landlord’s right to safeguard his/her financial interests. It is submitted that in a supposed free rental housing market the Tribunal is given the power to determine the rental amount for the parties, thus, completely disregarding the will and intention of the parties. Therefore, the determination of rentals by the Tribunals is unsatisfactory and harming towards the landlord and it is completely unreasonable and unjust in a rental housing market faced with an oversupply of rental housing stock.
It is interesting to note that the British Columbia Act does not have a provision that empowers its tribunals to determine the rental amount in the case of exploitative rentals. However, this Act does confer on the dispute resolution officer the power to reduce the rent by an amount equivalent to the reduction in the value of the tenancy agreement. The exact nature and extent of this provision is not known. Furthermore, the British Columbia Act does not list factors that the dispute resolution officer must take into account when determining the reduction in value of the tenancy agreement. Accordingly, in British Columbia there is no comparable provision relating to rent determination quite to the extent as that found in the RHA. When one considers the desecration of rights of the landlord caused by the rent determination powers of the Rental Housing Tribunals provision of the RHA, it is submitted such a power should be removed completely.

In terms of the common law, the tenant has the right to remit the rent without a court order, as was held in *Mpange v Sithole*. The RHA does not change the common law position, as the RHA does not prohibit the tenant from acting in terms of the common law. This position is unsatisfactory and detrimental to the landlord’s interests, as it is a form of self-help by the tenant who is not obliged to approach the Tribunal for a rent reduction. Yet, the RHA does not obligate the landlord to reduce the rent for the period during which the tenant is not in occupation (for the reason that the tenant has had to vacate the premises for any repairs, conversions or refurbishments that are necessary and cannot be properly made while the tenant remains in occupation). Although, one must keep in mind that the tenant may submit a complaint to the Tribunal relating to exploitative rentals and have the rent reduced in this way.

As for the foreign law discussed regarding remission of rental, the tenant in British Columbia does not have an immediate right to remit the rental and is obliged to continue paying the rent unless the landlord has restricted or terminated an essential service or facility. In this regard, the tenant’s right to remit the rent is similar to the South African common law position. However, this is the limit of this tenant’s right as any further reduction of rent has to be by means of an order by a dispute resolution officer. In such
an instance, the landlord’s right to protect the return on the investment is protected until such time as the dispute resolution officer has considered the matter and made what the researcher supposes would be a fair ruling relating to the application for rent reduction.

It is submitted that the best protection of the landlord’s right to protect his/her return on the investment would be if the RHA contains a provision that expressly excludes the tenant’s common law right of remission of rental so that the tenant would be forced to approach the Rental Housing Tribunal or court of law for the reduction in rent. In this way, self-help by the tenant would also be eliminated.

4 3 2 Rent increase
4 3 2 1 Common law
At common law, the landlord can legally increase the rent in two ways: by increasing the rent periodically, or by means of an escalation clause in the lease agreement. An escalation clause allows for an increase in rent in the event of an increase in certain costs. The benefit of an escalation clause for the landlord is to protect his/her profit margin by allowing him/her to recover cost increases in building services as a result of inflation. For example, an escalation clause may specify that the rental amount will increase with inflation, cost of municipal services, interest rates, or by a certain percentage each year.\textsuperscript{327} Thus, the landlord, as property manager and financier, is able to ensure the return of his/her investment and keep up with the costs associated with the property despite the condition of the economy.

If the lease does not have an escalation clause, the landlord is entitled to increase the rent periodically. This means that if a lease is renewed, the landlord and tenant can agree to increase the rental and the amount of such increase.\textsuperscript{328} A lease agreement may also contain a clause providing for rent increase procedure after a certain period. Such clauses usually require that the landlord give notice of a rent increase to the

\textsuperscript{328} \textit{Ibid.}
tenant. The landlord then has to comply with that clause to validly increase the rent. There is no restriction on the amount the landlord may increase the rental. However, a periodic rent increase is dependent on the tenant agreeing to the increase. Thus, even if the landlord complies with the agreed procedure notice for increase, the tenant can still reject the increase and legally terminate the contract with the landlord.

4.3.2.2 Rental Housing Act

The RHA does not prohibit the use of escalation clauses or periodic rent increases. In fact, the RHA does not prescribe what form the notice for rent increase must take, or if one is required at all. However, the Gauteng UPR regulate notice requirements by stipulating that a landlord must give a tenant at least two months written notice of an intention to increase rental. The other provincial Regulations do not prescribe notice requirements. Thus, for in most parts of the country, the parties are at liberty to decide on their own rent increase procedures.

With regards to the amount by which the rent may be increased the RHA limits the common law position by means of the provision that gives the Tribunal the power to determine the rental amount. This section of the RHA was discussed in paragraph 4.3.1.2 above and it applies to an increase in the rental too. This section gives the Tribunal the power to discontinue exploitative rentals and determine a new rental amount that is just and equitable to both tenant and landlord. The problem of exploitative rentals will occur after the initial lease period has expired, as the landlord will have them fixed a new rental, which the tenant must accept or move out. Say for example, a landlord and tenant agree on an initial rent of R10 000.00 per month for a year. After expiry of the initial period, the landlord decides that he/she wants to continue with the lease only if he/she can receive R20 000.00 per month. If he/she cannot receive this amount, he/she would rather sell the property. The question is whether the RHA allows the tenant to hold the landlord to lease by saying that R20 000.00 is exploitative? It is submitted that this is indeed the case when one considers the determination of the

\[329\] Ibid.
\[330\] Reg 6(4).
exploitative rentals provision of the RHA as discussed in paragraph 4.3.1 above, and such position is unjust and unreasonable for the landlord as a consumer.

4.3.2.3 Foreign law

In terms of the New South Wales Residential Tenancies Act,\(^{331}\) if the landlord wishes to increase the rent, he/she must give the tenant a written notice specifying the amount by which the rent will be increased and the day from which the increase is payable.\(^{332}\) There is no provision regulating the amount by which the rent may be increased.\(^{333}\) However, the tenant may apply to the tribunal established under the Residential Tenancies Act, if he/she considers the rent increase too excessive.\(^{334}\) The Tribunal has the power to declare a rent increase “excessive” and may set a maximum rent according to the circumstances of the case.\(^{335}\) In terms of section 48, the Tribunal may determine whether or not a rent increase or rent payable under a residential tenancy agreement or a proposed residential tenancy agreement for residential premises is excessive. It may use the general market level of rents for comparable premises in the locality or a similar locality as a standard. It may also have regard: to the value of the residential premises; the amount of any outgoings in respect of the residential premises required to be borne by the landlord under the residential tenancy agreement or proposed agreement; the estimated cost of any services provided by the landlord or the tenant under the residential tenancy agreement or proposed agreement; the value and nature of any fittings, appliances or other goods, services or facilities provided with the residential premises; the accommodation and amenities provided in the residential premises and the state of repair and general condition of the premises; any work done to the premises by or on behalf of the tenant, to which the landlord has consented; and any other relevant matter. Bradbrook maintains that the excessive rent provision of

\(^{331}\) Act 26 of 1987
\(^{332}\) S 45(1)–(2).
\(^{333}\) S 44(1).
\(^{334}\) S 46-49. S 46 states that: “A tenant under a residential tenancy agreement may apply to the Tribunal for an order declaring that a rent increase is excessive not later than 30 days:
(a) after being given notice of the rent increase, or
(b) after being given notice of a rent increase payable under a proposed residential tenancy agreement for residential premises already occupied by the tenant.”
\(^{335}\) Supra s 45A-49.
New South Wales has proved in practice to be ineffective as the legislation requires the tenant to prove the excessive nature of the increase by reference to a list of economic factors, which would normally be beyond the tenant’s competence.  

4 3 2 4 Evaluation

The current legislation is sparse regarding the requirements for rent increase with the main authority on the subject of rent increase and escalation clauses coming from the common law. After an examination of to what extent foreign jurisdictions provide for legal increasing of rent, it is submitted that the RHA is lacking in specific provisions dealing with the requirements for valid increases. Only the Gauteng UPR contains a regulation relating to the requirements for rent increase by stipulating that the landlord must give at least two months’ written notice of an intention to increase the rental. This position, thus, leaves the regulation of requirements pertaining to rent increase for the landlord and tenant to formulate in their lease agreement.

The RHA gives the tenant the right to submit a complaint relating to an increase of rent to the Rental Housing Tribunal, as the RHA gives the Tribunal the right to the determine the amount of rent if it finds that it is exploitative. As explained in paragraph 4 3 1 2, although the Tribunal is obliged to consider the need for a realistic return on investment for investors in the rental housing market, this is not enough as it is merely one factor to be taken into account relating to the landlord’s right to protect the return on his/her investment that must be taken into account. What is a realistic return on an investment is entirely circumstantial and various factors concerning all parties should be taken into account. The RHA ostensibly creates a mechanism whereby the landlord can be compelled to accept a rental, even though he/she may not be satisfied with the amount which may not cover all his/her costs associated with the ownership of the property. It is submitted that this is detrimental to the landlord’s interests.

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337 Reg 6(4).
The New South Wales Tribunal has rent increase determination powers similar to that of the South African Tribunal, yet the former Tribunal is obliged to consider a wider range of factors relevant to how much the rent may be increased by. Nevertheless, it is submitted that any forced acceptance of a rental, in whatever jurisdiction, is detrimental not only to the landlord’s right to protect the return on his/her investment and his/her right to safeguard his financial interests, but also his/her right to contract freely. Therefore the New South Wales approach should not be followed, and it is submitted that the determination of rental provision in the RHA should be removed in its entirety.

4.4 Conclusion

In this chapter, two landlord rights were discussed under the broader heading of the landlord’s right to safeguard his/her financial interests, namely: the right to payment of rental and the right to protect the return of his/her investment. Under the former right, the screening of potential tenants, the landlord’s right to a rental deposit, the landlord’s tacit hypothec, and "self-help" clauses were discussed. Under the latter right, the landlord’s right to determine the initial rental amount as well as the right to increase it was discussed. The extent of protection the RHA provides for the landlord was examined in detail with regard to each of these rights. Moreover, the position of the landlord was compared to foreign legal systems of the United Kingdom, Australia, Canada and Kenya. Various conclusions were made and these are explained in the following paragraphs.

The RHA, at the very least, recognizes the importance and necessity of the landlord requesting a deposit from the tenant as security for arrear rental and damage to the premises. However, the landlord is obliged to comply with strict laws regarding the deposit which is a problem due to the fact that the RHA indirectly obliges the landlord to invest the deposit in a commercial bank in the private sector in order for the deposit to gain interest. This results in the landlord being liable for unnecessary bank charges. Therefore, it is submitted that this is not in the landlord’s interests. It is suggested that in order to protect the landlord’s financial interests, the RHA should adopt the approach of the Australian law whereby the landlord may invest the deposit in a government
funded institution that does not charge banking fees. Alternatively, the RHA should entitle the landlord to include an express provision in the lease agreement that obliges the tenant to pay the bank charges.

The RHA does not restrict the amount of deposit the landlord may charge, whereas the Australian law does. The landlord’s interests are, thus, protected by the non-regulation of the deposit amount. In this instance, the landlord’s right to protect his financial interests are adequately recognized and protected by the RHA. However, the RHA is lacking once again regarding the landlord’s right to use the deposit during the lease. The RHA only allows the landlord to use the deposit at the end of the lease and furthermore by implication, the landlord is prohibited from demanding the tenant “top-up” the deposit. The Australian law does not contain such restrictions. The conclusion is that the RHA’s non-recognition of the landlord’s right to demand a top-up deposit is seriously detrimental to the interests of the landlord. Accordingly, the RHA needs to be amended so that the landlord is entitled not only to use the deposit during the lease period, but also to demand a "top-up" deposit from the tenant.

The landlord’s hypothec for arrear rental is an excellent tool for the landlord and is clear and defined in respect of its application in terms of the common law. However, the RHA needs to codify the rules of the hypothec as is done in terms of the foreign law in order to better protect the landlord’s interests. Many problems for the landlord exist regarding the procedural aspect of the attachment and removal of the tenant’s movable goods. The RHA and Tribunal’s position relating to the removal of the tenant’s goods and the endorsement for such removal by the clerk of the court pursuant to a court order needs to be clarified. For without such an endorsement of the clerk of the court, an order for attachment is of no real benefit for the landlord. It is submitted that the RHA should give powers to the officials of the Rental Housing Tribunal to be able to authorize the removal of the tenant’s goods and then to accompany the landlord when he/she removes the tenant’s goods, after having obtained a court order for the removal of the
goods. This is similar to the foreign law example discussed and will result in a more inexpensive and speedy process for the landlord when recovering arrear rental.

After an investigation of the common law, the use of “self-help” clauses in lease agreements was found to be illegal although landlords have been incorporating such terms into their lease agreements for decades. The position is the same in terms of the RHA and UPRs that clearly prohibit the landlord from resorting to self-help and, in fact, criminalizes such conduct. The RHA further prohibits the landlord from cutting off the tenant's supply of municipal services as a means to ensure the tenant pays the rental in full and on time. These prohibitions only entitle the landlord to go to the courts or the Rental Housing Tribunal to recover arrear rental and any other charges, which is a costly and time-consuming exercise. The foreign law discussed imposes the same restrictions on its landlords. However; perhaps the courts and Tribunals in the foreign jurisdictions discussed are more efficient than those of South Africa. Accordingly, the RHA should be amended to either allow the landlord to use self-help as a means to ensure the tenant pays, or else government should ensure speedier justice for the landlord.

The joint inspection requirements imposed by the RHA are very problematic in that they severely inroad the landlord’s right to safeguard his/her financial interests. The RHA unjustly prohibits the landlord from recovering arrear rental if he/she fails to comply with the joint inspection requirements. Thus, this provision of the RHA should be removed.

The landlord's right to prompt and regular payment of rental is not adequately recognized by the RHA in that the Rental Housing Tribunal limits the landlord's right by means of their powers to make orders relating to “exploitative rentals”. This rent determination power applies to the landlord's right to increase the rent too. Any determination of the rental amount or rental increase is detrimental towards the landlord and is, furthermore, unreasonable in a rental housing market faced with an oversupply of rental housing stock. The foreign law example does not contain a comparable provision relating to the determination of rental quite to the extent as that found in the
RHA. When one considers the desecration of rights of the landlord caused by the rent determination powers of the Rental Housing Tribunals provision of the RHA, it is submitted such a power should be removed completely and the RHA should simply allow the landlord and tenant to freely negotiate their own rental amount and increase.

As for requirements relating to the valid increase of rent by the landlord, the RHA is lacking in specific provisions dealing with the requirements for valid increases, with only the Gauteng UPR containing a regulation of this aspect. This position, thus, leaves the regulation of requirements for the landlord and tenant to formulate in their lease agreement, which is in fact beneficial for the landlord.

The RHA does not change the common law position regarding the tenant's right to remit the rental without a court order. This position is detrimental to the landlord's interests as is and in fact it is a form of self-help by the tenant, although the landlord is expressly prohibited from resorting to self-help. In addition to this, the RHA does not even oblige the landlord to reduce the rent for the period during which the tenant is not in occupation of the premises, if the tenant has had to vacate the premises for any repairs, conversions or refurbishments that are necessary and cannot be properly made while the tenant remains in occupation. In British Columbia the tenant does not have an immediate right to remit the rental and is, furthermore, obliged to continue paying the rental unless the landlord has restricted or terminated an essential service or facility. Any further situation of reduction of rent by the tenant has to be by means of an order by a dispute resolution officer in British Columbia and thus, the landlord's right to protect the return on the investment is protected until an order is made that the rent must be reduced. It is submitted that the RHA expressly excludes the tenant's right of remission of rental without a court order. In this way, the landlord's right to protect the return on the investment would be better protected.

In conclusion, the RHA fails to adequately protect the landlords' right to safeguard their financial interests with the legislation creating serious inroads on this right. What may appear to be landlord protection by the RHA, in fact, amounts to tremendous problems
for the landlord in practice and serious limitations on his/her common law rights and practices. Many aspects of the RHA need reconsideration and amendment by the legislature in order to sufficiently protect this landlord’s right.
CHAPTER 5

LANDLORDS’ RIGHT TO SAFEGUARD THEIR PROPRIETARY INTERESTS

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5.1 Introduction

Landlords’ right to safeguard their proprietary interests is significant because of the fact that complaints relating to unscrupulous tenants damaging the premises increase annually. The right comprises basic ownership principles, which entail landlords’ right to protect their property from damage. They further entail landlords’ right to protect their investment in the property by means of the preservation thereof, including preventing depreciation of the property.

In Chapter 2, three landlord rights were formulated under the broader landlord right to safeguard his/her proprietary interests, namely:

(a) the right to have the integrity of the property preserved by the tenant;
(b) the right to have the property restored in same good and condition as it was given to the tenant, reasonable wear and tear excepted; and
(c) the right to inspect the premises during the lease.

In this chapter, each right in terms of the common law will be discussed. This will include practical measures that landlords use to protect their rights. Then, each right will be examined against the RHA and the UPRs. Foreign legislation with regards to these rights will be briefly discussed and compared with the RHA and UPR in order to determine how the foreign law has dealt with the recognition and protection of these landlord rights. Lastly, evaluation and discussion of all these aspects will follow.

5.2 The right to have the integrity of the property preserved by the tenant

5.2.1 Common law

The common law position relating to the landlord’s right to have the integrity of the property preserved by the tenant entails the tenant’s duty to make use of the premises in a proper manner. The tenant’s duty to take care of the premises comprises three distinct duties. Firstly, the tenant may use the premises only for the purpose for which it

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is let, subject to an agreement between the parties relating to changing of the use of the premises. Secondly, the tenant must use the premises as a good *paterfamilias* would use his/her own property. In other words, the tenant must use the premises in the manner a reasonable person would use his/her own property. Lastly, the tenant cannot make any major structural alterations to the premises without the landlord’s consent.

Regarding the landlord’s duty to maintain the premises, the common law position is that in absence of an agreement to the contrary, the landlord is obliged to maintain the premises in a condition reasonably fit for the purpose for which it is let. This includes the repairing of structural defects that significantly interfere with the tenant’s use and enjoyment of the property. In the event that the landlord fails to maintain the premises, the tenant is entitled to repair the premises by making necessary improvements thereon. Thus, where the tenant has made necessary improvements to preserve or safeguard the integrity of the property, the tenant has an enrichment claim against the landlord for the recovery of expenses incurred for necessary improvements made for the preservation and protection of the property as well as for expenses incurred in effecting useful improvements to the property (*impensa utiles*). In addition, a tenant of urban premises who is still in possession of the premises also has an enrichment lien (*ius retentionis*) over the premises in respect of necessary and useful improvements that allows a tenant to remain in occupation of the premises until he/she has been reimbursed for these expenses. This right of retention was upheld by the Supreme Court of Appeal in *Business Aviation Corporation (Pty) Ltd and Another v*

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339 Kerr *The Law of Sale and Lease* (2006) 405. In the context of this research, it will be for residential purposes.

340 *Wides v Davidson* 1959 (4) SA 678 (W); *GA Fichardt Ltd v Leviseur* 1915 AD 182.

341 See Kerr *The Law of Sale and Lease* (2006) 406, for a detailed discussion of various examples of what constitutes “*paterfamilias*”.

342 *Protea Assurance v Presauer Development (Pty) Ltd* 1985 (1) SA 737 (A).

343 *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A).


345 *Nortje v Pool NO* 1966 (3) SA 96 (A) 131.

346 *De Beers Consolidated Mines v London and SA Exploration Company* (1893) 10 SC 359 367; *Lechoana v Cloete* 1925 AD 536 549; *Lessing v Steyn* 1953 (4) SA 193 (O) 199C-D; *Syfrets Participation Bond Managers Ltd v Estate and Co-op Wine Distributors (Pty) Ltd* 1989 (1) SA 106 (W) 110F-H.
Rand Airport Holdings (Pty) Ltd\textsuperscript{347} where it was found that a tenant of urban land does, in fact, have a right of retention, contrary to what was previously held for the past 100 or so years in various South African courts.

The law before \textit{Business Aviation} relating to the tenant’s right of retention was as follows. Owing to an apparent misuse of the tenant’s right of retention in the form of a lien, Article 10 contained in the Placaten of 26 September 1658 and 24 February 1696 sought to eliminate this tenant’s right in that at the end of the lease period they first had to vacate the property before they could institute their claim for compensation.\textsuperscript{348} The confusion lay in the fact that it was not clear whether Article 10 applied to urban and agricultural land or to agricultural land only. De Villiers CJ held in \textit{De Beers Consolidated Mines v London and SA Exploration Company} that this right applies to urban and agricultural leases of land.\textsuperscript{349} However, upon a closer analysis of the Placaten, bearing in mind the history of the introduction of Article 10 and the courts’ application and interpretation thereof, the Supreme Court of Appeal in \textit{Business Aviation} held that the Placaten applies to rural land only.\textsuperscript{350} Therefore, a tenant of urban land can, in fact, claim compensation for necessary and useful improvements to the premises, which can be enforced by retaining possession of the property.\textsuperscript{351}

The consequences of the \textit{Business Aviation} judgment will obviously have a financial impact on the landlord through the loss of rental income for the period the tenant exercises his/her right of retention. It is submitted that the principle held in \textit{Business Aviation} is definitely not beneficial for the landlord. In any case, matters relating to claims for improvements and enrichment liens usually are regulated by the landlord and tenant in their lease agreement,\textsuperscript{352} such as express provisions that more specifically regulate the rights and duties of the landlord and tenant regarding the care and/or the

\textsuperscript{347}2006 (6) SA 605 (SCA).
\textsuperscript{349}1893 (10) SC 359 367.
\textsuperscript{350}2006 (6) SA 605 (SCA) 37.
\textsuperscript{351}The consequences of this judgment will have a financial impact on the landlord through the loss of rental income for the period that the tenant exercises his/her right of retention.
\textsuperscript{352}See for example J P Naude (ed) \textit{Butterworths Forms and Precedents Part 1 ‘Leases’} 36.
repair of the property.\textsuperscript{353} Such clauses are, in effect, a contracting out of the landlord’s common law duty to maintain and repair the premises.\textsuperscript{354} If the tenant fails to make the repairs he/she contractually undertook to make, the landlord will have the usual contractual remedies at his/her disposal.

Furthermore, the common law protects the landlord from third parties who damage the premises in that the tenant is liable for the conduct of the members of his/her household.\textsuperscript{355} This includes people who live with the tenant with the tenant’s consent. As for visitors, the tenant is not liable for the conduct of guests if he/she was not negligent in permitting them entry. However, if the tenant has anticipated that the guest might be capable of damaging conduct owing to his/her knowledge of the latter’s character, then the tenant should be regarded as negligent.

5.2.2 Rental Housing Act

The RHA contains no provision relating to the landlord’s right to have the premises taken care of. However, the provincial UPRs provide much detail as to the obligations of the parties with regards to the condition and maintenance of the premises. The position differs somewhat between provinces, with the Gauteng and North West UPRs containing the most extensive and detailed rules. Regulation 7(2) of the Gauteng and North West UPRs states as follows:

“A tenant must -

(a) use the dwelling in a proper manner and for the purpose for which it is let, and in a manner which does not contravene these regulations, the Act or any other law;

(b) …

(c) maintain the dwelling in a clean, tidy and safe state of repair;

(d) use, in a reasonable manner, all electrical, plumbing, sanitary, heating, ventilating, air-

\textsuperscript{353} For example, a clause that states: “The lessee shall keep in good repair both inside and outside all buildings leased to him, and shall deliver them at expiration of the lease in good order and in a state of cleanliness, reasonable wear and tear excepted.” (\textit{Radloff v Kaplan} 1914 EDL 357).

\textsuperscript{354} Kerr \textit{The Law of Sale and Lease} (2006) 306. The landlord is expected to maintain the premises in a condition reasonably fit for the purpose for which it is let, as well as to repair structural defects that interfere with the tenant’s use and enjoyment of the premises (Delport \textit{South African Property Practice and the Law} (2007) 264-2). For a detailed discussion on the interpretation of clauses relating to repair obligations see Kerr \textit{The Law of Sale and Lease} (2006) 305-310. Basically, if there is doubt, the clause will be interpreted against the lessor.

\textsuperscript{355} Kerr \textit{The Law of Sale and Lease} (2006) 411; \textit{Brand v Kotze} 1948 (3) SA 769 (C).
conditioning, and other facilities and appliances including elevators on the premises;
(e) refrain from intentionally or negligently damaging, defacing, impairing, or removing any part of
the dwelling or common property or knowingly permitting any person to do so, who is on the
premises with the tenant’s permission or allowed access to the premises by the tenant and the
tenant is liable for the repair of such damage, fair wear and tear excluded, at the tenant’s own
cost;
(f) return the dwelling in the same condition as the tenant received it, fair wear and tear excluded;
(g) during the period of lease be liable to maintain, replace or repair electrical globes, fittings and
switches and also be liable for the maintenance, repair or making good all water-borne taps,
stoves, locks, handles, and windows where such damage has not been due to natural causes;
(h) maintain the garden, if any, and keep the same in a neat and tidy condition;
(i) …
j) maintain the swimming pool, including but not limited to, all pumps, hoses and accessories, in
good order and repair, subject to fair wear and tear.”

Evidently, this regulation recognizes the landlord’s right to have the premises taken care
of by the tenant in a detailed way. The position of the parties is, thus, clearly laid out.
This is, however, only the case in the Gauteng and the North West Province, as the
other provincial UPRs do not contain such an extensive list of duties. In fact, the
Western Cape, KwaZulu-Natal, Free State and Mpumalanga UPRs do not expressly
impose maintenance and repair duties on tenants at all.\(^{356}\)

The Free State and North West Province state that the landlord must make compulsory
house rules, which are enforceable against a tenant. However, these are only
enforceable if the purpose of the house rule is to preserve the landlord’s property from
abuse.\(^{357}\) In this way this regulation acknowledges the landlord’s right to have his/her
property taken care of insofar as the house rule to this effect is enforceable against a
tenant.

Regarding the landlord’s maintenance duties, all the UPRs stipulate that the landlord
must let the premises in a condition which is reasonably fit for the purpose for which it is

\(^{356}\) Free State UPR reg 4; KwaZulu-Natal UPR reg 16; Mpumalanga UPR reg 9; Western Cape UPR reg
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\(^{357}\) Free State UPR and North West Province UPR reg 11(2)(ii).
let; and which does not contravene the provisions of the RHA, the UPRs or any other law. Furthermore, the landlord must keep and maintain the premises in compliance with the lease or any other law.\textsuperscript{358} The UPRs stipulate that the landlord must carry out repairs for which he/she is responsible under the lease agreement, including those which have been identified during inspections by the landlord, or on receipt of a notice from a tenant to do such repairs.\textsuperscript{359}

An imperative question that comes to mind is whether the landlord is legally able to contract out of these duties imposed by the UPRs. Only the Mpumalanga UPR specifies that these duties are only obligatory if is there is no agreement to the contrary. As for the remaining provinces with UPRs in force, the contracting out of the landlord’s maintenance and repair duties is not specifically provided for. However, the common regulation found in the UPRs that prohibit the landlord from inducing the tenant to contract out of the RHA, the UPRs and any other law cannot be ignored.\textsuperscript{360} As discussed in paragraph 341 of Chapter 3, this prohibition of contracting out regulation prevents the landlord from including a clause in a lease that is contrary to the RHA, the UPRs and the common law.\textsuperscript{361} Thus, the UPRs, arguably, prohibit the landlord from contracting out of the landlord’s maintenance and repair duties in terms of the RHA, the UPRs and the common law. The same applies regarding the tenants right of retention for improvements made to the premises: the landlord may not contract out of his/her duty in terms of this right as the landlord cannot contract out of the common law.

\textsuperscript{358} Free State UPR reg 4; Gauteng UPR reg 7; KwaZulu-Natal UPR reg 16; Mpumalanga UPR reg 4; North West Province UPR reg 7; Western Cape UPR reg 4.

\textsuperscript{359} These repairs must be instituted as soon as is reasonably possible having regard to the nature of the repair but not exceeding thirty days of the inspection, or notice given by tenant, or such further period as may be agreed to between the landlord and tenant. In addition, the Gauteng and North West Province Regulations state that the landlord must do the following: maintain the common property, if any, in good order and repair; maintain the outside of the premises, including the walls and roof in good order and repair; maintain electrical, plumbing, sanitary, heating, ventilation, air conditioning systems and elevator system in good order; and repair any damage to the premises or common area caused by fair wear and tear (Gauteng UPR reg 7(1) and North West Province UPR reg 7(1)).

\textsuperscript{360} The prohibition of contracting out of the RHA, the UPRs and any other law is also found in the Mpumalanga UPR.

\textsuperscript{361} Free State UPR reg 10(1)(f)-(g); Western Cape UPR reg 9(1)(f)-(g); Gauteng UPR reg 14(1) (f)-(g); KwaZulu Natal UPR reg 21(1) (f)-(g); North West UPR reg 14(1) (f)-(g); Mpumalanga UPR reg 19(1) (f)-(g).
As for the provinces with no UPR the common law position remains with the landlord having the freedom to formulate his/her own maintenance duties in the lease agreement in a manner that best protects the landlord’s right to have the premises taken care of by the tenant. Furthermore, the landlord can exclude the tenant’s right of retention over the premises for improvements made.

5.2.3 Foreign law

The British Columbia Residential Tenancy Act\textsuperscript{362} clearly and concisely states both the landlord’s and tenant’s obligations to repair and maintain the landlord’s property under one section, namely section 32. The section reads:

“ (1) A landlord must provide and maintain residential property in a state of decoration and repair that
(a) complies with the health, safety and housing standards required by law, and
(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(4) A tenant is not required to make repairs for reasonable wear and tear.

(5) A landlord’s obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

(6) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.”

The New South Wales Residential Tenancies Act\textsuperscript{363} contains a near identical provision. With regards to improvements to the premises, this Act stipulates that, if the tenant causes damage to the premises by removing the improvement made by the tenant, he/she is obliged to notify the landlord and make the necessary repairs or compensate the landlord for reasonable expenses he/she may incur to repair the damage.\textsuperscript{364} In fact, the landlord is entitled to withhold or refuse consent to the removal of an improvement

\textsuperscript{362} 2002 Chapter 78.  
\textsuperscript{363} Act 26 of 1987.  
\textsuperscript{364} S 27(1)(d).
affixed by the tenant. The landlord must, however, compensate the tenant for the value of the fixture. The tenant, evidently, has no right of retention or lien over the property for repayment of improvements made to the premises. Thus, both of the landlord’s financial and proprietary interests are protected in this manner.

5.2.4 Evaluation

The fact that the RHA does not even mention the right of the landlord to have the premise taken care of is inadequate. Apart from the common law, there is no legislation on a national level that regulates the landlord’s right to have the premises taken care of. It is true that the UPRs are, in fact, very specific about the duties of the landlord with regards to repairs and maintenance of the premises. However, only the Gauteng and the North West Province expressly impose duties on the tenant. National recognition of the landlord’s right to have the premises taken care of is needed, as the current fragmented approach is unsatisfactory. Without national application of the landlord’s right to have the premises taken care of, those provinces without UPRs rely on the common law, which is not detailed either. The non-regulation of this landlord’s right means that the landlord may include provisions in the lease agreement regulating maintenance and repair duties of the tenant. Yet, the rental housing market is such that landlords are not in a position to bargain such contract terms in their favour. Accordingly, recognition and protection of the landlord’s right to have the premises taken care of is vital, and the RHA fails to safeguard this landlord’s right.

Recognition of this landlord right in the RHA will solve the problem of the inconsistency of laws that exists in this regard. It will also balance the rights and duties relating to the care of the premises; and put less emphasis on the tenant’s right to maintenance of the premises and more emphasis on the preservation of the property by the tenant.

The parties may, however, more specifically regulate their duties through a detailed agreement. In practice, standard form lease agreements often contain a detailed provision spelling out the parties’ duties with regards to maintenance and repairs. Such

\[365\] S 27(1)(e).
a contractual situation is ideal. However, the contracting out of the landlord and tenant duties stipulated in the RHA and UPRs is prohibited in terms of the RHA and UPRs except in Mpumalanga province. Accordingly, the RHA and UPRs, with the exception of Mpumalanga province, seem to have limited the vital rights of the landlord relating to maintenance and repair of the premises in that it has taken away the landlord’s right to contract out of the common law provision. The foreign law discussed serves as an example of legislation that has codified the landlord’s rights and tenant’s duties that better protects the landlord’s right to have the integrity of the property preserved by the tenant. It also seems to ensure that the landlord is not prohibited from contracting out of these rights and duties either. In light of the criticism of the RHA in terms of this landlord’s right, the foreign law approach seems the solution to better recognize and protect the landlord’s right to preservation of his property.

5 3 The right to have the property restored in the same good condition it was given to the tenant, reasonable wear and tear excepted

5 3 1 Common law

At common law, the tenant’s right to the use and enjoyment of the premises ends on termination of the lease. At this point, the landlord’s right to have the property restored to him/her arises.\textsuperscript{366} This entails the tenant vacating the premises, removing his/her movable property\textsuperscript{367} and restoring the premises undamaged and in the same condition it was given in.\textsuperscript{368} In absence of an agreement to the contrary, the tenant is not liable for loss or damage for which he/she is not responsible.\textsuperscript{369} However, the tenant is liable for loss or damage caused by him/her or other persons he/she is accountable for.

Loss or damage resulting from “dilapidation or depreciation which comes by reason of the lapse of time, action, weather and normal user” for example becomes the landlord’s

\textsuperscript{367} If the tenant leaves any goods on the premises which interfere materially with another person's enjoyment, then he is considered to be in occupation while the goods remain on the premises (\textit{Bourbon-Leftley v Turner} 1963 (2) SA 104 (C)).
\textsuperscript{368} Kerr The Law of Sale and Lease (2006) 415.
\textsuperscript{369} Supra 416.
liability.\textsuperscript{370} This type of loss was described in \textit{Radloff v Kaplan}\textsuperscript{371} as “reasonable wear and tear” or “fair wear and tear”. In \textit{Sarkin v Kren}\textsuperscript{372} it was also described as a deterioration resulting from poor instance “the ravages of time, age, exposure to the natural elements, including climatic conditions.” And so, it is damage of this nature that the landlord is liable for.

In practice, the landlord invariably requires the tenant to pay a deposit at the beginning of the lease. An unscrupulous landlord would use this deposit, at the end of the lease, to restore the premises in the \textit{exact} condition it was given in (including the cost of replacement of lost keys and rental arrears). In other words, an unscrupulous landlord would use the deposit to fix the damage the tenant has caused, including damage caused by fair wear and tear. Or the landlord would use the deposit to cover painting costs, amongst others, even if the walls were not damaged.\textsuperscript{373} Through this practice, an unscrupulous landlord would be able to completely cover all his/her expenses and even ensure that the tenant pay for certain depreciation costs related to the premises as well damage caused by the latter. This practice is, undoubtedly, is dishonest and the tenant is expected to pay for the depreciation costs of the premises resulting in the landlord unduly gaining.

At common law, the landlord is allowed to inspect the premises at the start and again at the end of the lease, the purpose being to determine the condition of the premises before and after the tenant’s occupation with the damage during the period of the lease then being attributable to the tenant. This method of in-coming and out-going inspections is not always foolproof and various problems may arise, the most common being the tenant claiming that the particular damage was present before he/she moved in. To even better protect his/her interests, landlords, at common law, never did inspections, but in fact ordinarily included a clause in the lease agreement to the effect that the tenant agrees that the premises are in a good state of repair with no flaws or

\textsuperscript{370} Cooper \textit{Landlord and Tenant} (2004) 218.
\textsuperscript{371} 1914 EDL 357 361.
\textsuperscript{372} 1948 (4) SA 438 (C).
\textsuperscript{373} Unstructured interview with Tatiana Vermeulen, Just Letting Port Elizabeth (2007-07-14).
defects. In other words, this will take the form of an express acknowledgement by the tenant that the premises was in good order when he/she moved in.\textsuperscript{374} In this way, the landlord is legally entitled to inspect the premises with or without the tenant at the end of the lease. He may also, thus, demand that the tenant pay for all the damage in accordance with the acknowledgment of a "condition of premises" clause in the lease agreement, unless the tenant could prove otherwise.

5 3 2 Rental Housing Act
The RHA affirms the common law position in that, on termination of a lease, the landlord is entitled to receive the rental housing property in a good state of repair, fair wear and tear excepted.\textsuperscript{375} Moreover, the RHA states that the landlord may claim compensation for damage to the premises or any improvements on the land if the tenant, a member of the tenant's household, or a visitor of the tenant has caused it.\textsuperscript{376} Thus, this landlord's right is adequately recognized and protected in legislation in that the tenant must compensate the landlord for damage to the premises that has not come about through ordinary wear and tear.

Regarding the deposit and the practice thereof, the RHA's regulation regarding the issue of the use of the damage deposit requires a closer look. The RHA stipulates that the landlord may use the deposit plus interest accrued thereon towards the tenant's outstanding amounts "including the reasonable cost of repairing damage to the premises during the lease period".\textsuperscript{377} The landlord may, however, only have the right to use the deposit if he/she has complied with the in-coming and out-going inspection of the premises requirements and return of deposit requirements in terms of section 5 of the RHA which makes it compulsory for the landlord to comply with specific

\textsuperscript{374} Such a clause does not cover structural defects (\textit{Salmon v Dedlow} 1912 TPD 971 977).
\textsuperscript{375} S 4(5)(d).
\textsuperscript{376} S 4(5)(e). The Rental Housing Amendment Act 43 of 2007 removes the word "\textit{bona fide}" from the definition of "visitors" to the premises, meaning that landlords may not discriminate against visitors. This makes it difficult for landlords to protect themselves against property hijackers and people damaging his property. This, clearly, may have severe consequences on the landlord's right to safeguard his proprietary interests.
\textsuperscript{377} S 5(3)(g).
requirements and time periods.\footnote{378}{S 5(3)(e).} The RHA introduces a compulsory system of in-
coming and out-going inspections to determine the condition of the property at the end
of the lease compared to the condition it was in at the start of the lease. The RHA
obliges the landlord and tenant to jointly inspect the premises to ascertain whether or
not any defects or damage to the premises exist before the tenant moves into the
premises. If there are any defects or damage, it must be reduced to writing and
attached as an annexure to the lease.\footnote{379}{S 5(3)(f).} This is known as the “list of defects” which
contains information in an itemized list that should be sufficient as evidence in a later
dispute when determining whether the landlord’s claim is reasonable. Then, three days
before the tenant moves out, the landlord and tenant must arrange a joint inspection of
the premises to take place within a period of three days prior to the expiration of the
lease.\footnote{380}{S 5(3)(f).} If the landlord fails to conduct any one of these compulsory inspections, with
or without the tenant, he/she looses his/her claim to the deposit and he/she is deemed
to acknowledge that his/her property is in a good and proper state of repair.\footnote{381}{S 5(3)(j).}

This peremptory section of the RHA may be problematic for the landlord because the
landlord may not be available before the tenant moves in to carry out the joint
inspection. Also, geographical constraints pose a problem for a landlord with a large
property portfolio. Take the following practical example: a tenant coming from out of
town may arrive to move into the premises the same day and may very well have a
moving truck in tow. The RHA stipulates that a joint inspection must take place before
the tenant moves in and so the pressure is on the landlord to carry out the joint
inspection, which may be a rushed job thus defeating the purpose of the exercise
because the landlord is only available on the day of inspection owing to geographical
and time constraints. A further practical example entails the scenario where the tenant
requests that the inspection be done on the 27\textsuperscript{th} of the month (the moving in date)
whereas the landlord is only available for inspection on the 1\textsuperscript{st} (the date the lease starts)
and requests the tenant only move in after that date. Both parties are not able to meet
their requested dates and the tenant moves in on the 27th anyway without an inspection taking place. Does this mean that the landlord is not complying with the sections of the RHA because he/she cannot reach an agreement with the tenant, even though both are willing to conduct the inspection? The disagreement between the landlord and tenant only relates to when it is convenient for the parties to carry out the inspection together. In such a circumstance, in terms of the RHA, the landlord looses his/her right to the deposit because he/she has not carried out the joint inspection with the tenant. Furthermore, the tenant may exploit this situation in order for the landlord to forfeit the deposit. For example he/she may agree on a certain time to carry out the inspection after having moved into the premises and then later complain that the inspection was made not within the RHA stipulated time. The point is that this section of the RHA may seem logical and simple, but in reality it is much more complicated. This is especially so for a landlord with a large property portfolio with leases all expiring on the same date. One could argue that the landlord could appoint a representative to attend to the inspection on his/her behalf. But, why should the landlord be put in this position and incur this unnecessary expense?

Supposing the landlord was able to carry out both inspections, the RHA states that the landlord may use the deposit and interest as part payment of all amounts for which the tenant is liable under the lease, including the reasonable cost of repairing damage to the premises during the lease period. The landlord must refund the balance of the deposit and interest, if any, to the tenant not later than fourteen days after the tenant has vacated the premises. If however, the tenant does not respond to the landlord’s request to carry out the out-going inspection with the landlord, the landlord must conduct the inspection himself/herself, without the tenant, within seven days of expiration of the lease. And in such a circumstance, he/she must refund the balance of the deposit plus interest, if any, to the tenant not later than twenty-one days of expiry of the lease.

382 S 5(3)(g).
384 S (5)(3)(k).
385 S (5)(3)(m).
Regarding the out-going inspection, impracticalities relating to the requirement of the stipulated time period for the carrying out of the final joint inspection exist. The section of the RHA under discussion states that at the expiration of the lease, the landlord and tenant must arrange a joint inspection of the premises at a mutually convenient time that must take place within a period of three days prior to such expiration.\textsuperscript{386} It is burdensome on both parties (and especially the landlord) for the law to expect them both to be available for the out-going inspection on a specific day. An inspection may take hours to carry out thoroughly and the landlord may not be available for this important task.

Plainly, the RHA requirements are extensive and detailed and the onus is on the landlord to comply with them and failure to do so means that the deposit cannot be used to cover the damage to the premises. In other words, he/she loses the right to have the premises restored to its original condition, fair wear and tear excepted. This is entirely detrimental to the landlord because is not always practically possible to comply with sections of the RHA, especially the requirements relating to the return of the deposit. For example, it may be impossible to comply when the tenant has caused major damage to the premises, such as severe stains or burns on the carpet or kitchen counters, or damage to the wall from the installation and removal of certain furniture units. In terms of the RHA, the landlord has fourteen days (or twenty-one days if the tenant responds to the landlord’s request for the out-going inspections) to deduct the cost of the repairs and return the remainder of the deposit plus interest to the tenant.

How this provision translates in reality is that in the period of just fourteen days (or twenty-one days) the landlord has to do the following: contact the relevant business to make the repairs; obtain quotes for the repairs; consider the quotes; schedule a day on which the carpet counter or wall can be fixed; obtain the invoice for the cost of repairs; and finally calculate the remainder amount of the deposit plus deposit after deducting the repair costs. Considering the fact that there could be poor service delivery, the landlord may, in most instances, find it impossible to do all this in just fourteen days. To add to this probable time constraint problem, the Western Cape Rental Housing

\textsuperscript{386} S 5(3)(f).
Tribunal insists that the landlord obtain three quotes for each repair.\textsuperscript{387} This makes it even more impossible for the landlord to comply with the provisions of the RHA. Landlords and letting agents have, consequently, adopted the attitude and practice of not refunding deposits at all within the prescribed periods, or the repairs are done hastily and poorly in order to get the repairs done within fourteen days. Accordingly, the time constraints imposed by the RHA relating to the return of the deposit are detrimental to the landlord in that it is his/her financial and proprietary interests that suffer. Furthermore, no rationale exists for the purpose of the fourteen day rule other than to ensure the return of the deposit to the tenant as soon as possible. This section of the RHA clearly protects the tenant’s interests at the expense of those of the landlord.

Due to the fact that section 5(3)(f) of the RHA states that the out-going inspection must be carried out three days before the lease expires, the RHA creates a “window period” of three days in which no damage to the premises is taken into account. Practically, in these three days the tenant may cause damage to the premises for instance, most obviously, by furniture removal. Accordingly, the parties will not record such damage incurred during these three days. The RHA does not state whether the landlord may deduct any damage to the premises during this three day “window period” from the deposit. Thus, one can only assume that the claim for damage to the premises is final once the parties have conducted the final inspection three days before the lease expires, as prescribed by the RHA. Obviously, the landlord is entitled to sue the tenant for this damage in court, but has to incur unnecessary costs which would clearly not be in his/her interests.

In terms of the UPRs, specific recognition of the landlord’s right to have the property restored in the condition it was given to tenant, reasonable wear and tear excepted, can be found in the Gauteng and North West UPRs. This regulation states the tenant is liable at his/her own expense for the repair of damage made by him/her or anyone he/she permits on the premises, fair wear and tear excluded.\textsuperscript{388} In addition, the

\textsuperscript{387} Unstructured interview with Vivien Marks, Rental Housing Tribunal Western Cape (2007-03-09).
\textsuperscript{388} Reg 7(2)(3).
regulation after that follows regulation 7(2)(3) provides that the tenant must return the premises in the same condition as the tenant received it, fair wear and tear excluded.\textsuperscript{389}

It must be noted that these provisions merely echo the RHA and add nothing specific to the landlord’s rights.

5.3.3 Foreign law

In British Columbia, in terms of Residential Tenancy Act,\textsuperscript{390} it is specifically stated that the tenant must leave the premises by 13h00 on the day the lease expires, unless the parties agree otherwise.\textsuperscript{391} The tenant must leave the premises “reasonably clean and undamaged except for reasonable wear and tear, and give the landlord all keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property”.\textsuperscript{392}

Regarding the joint-inspection of the premises, the British Columbia Act states that both the landlord and tenant are required to inspect the condition of the premises at the beginning and the end of the lease.\textsuperscript{393} The parties have to comply with certain prescribed formalities for a valid inspection to take place. Moreover, the in-coming inspection must be jointly done on the day the tenant moves in or at an agreed time, and a list of defects (called a “condition report”) must be signed by both parties.\textsuperscript{394} Once both inspections have taken place, both the landlord and tenant must sign the list of defects.\textsuperscript{395} The day of the final inspection must be carried out on or after the day the tenant moves out,\textsuperscript{396} or at any other mutually agreed day before the new tenant moves in.\textsuperscript{397}

\begin{footnotes}
\item[	extsuperscript{389}] Reg 7(2)(f).
\item[	extsuperscript{390}] 2002 Chapter 78.
\item[	extsuperscript{391}] S 37(1).
\item[	extsuperscript{392}] S 37(2)(a) & (b).
\item[	extsuperscript{393}] S 23.
\item[	extsuperscript{394}] S 23(2) & (5).
\item[	extsuperscript{395}] S 35(1) & (4).
\item[	extsuperscript{396}] S 35(1)(a).
\item[	extsuperscript{397}] S 35(1)(b).
\end{footnotes}
The British Columbia Residential Tenancy Regulations\textsuperscript{398} contains a specific section for the scheduling of opportunities for the joint-inspection to take place and takes the practical difficulties and time constraints of joint-inspections into account. This regulation 17 reads:

"(1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.

(2) If the tenant is not available at a time offered under subsection (1),

(a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and

(b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

(3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party’s availability to attend the inspection.\textsuperscript{399}

This Act takes into account the parties’ time schedules and possible limitations. However, if the landlord is unable to attend any joint inspection, with or without the tenant, the landlord forfeits his/her claim to the security deposit regarding claim for damage to the premises.\textsuperscript{400}

As for the return of the deposit and legislative requirements in terms of the British Columbia Act, the landlord has fifteen days to do one of the following: return the deposit amount, with applicable interest, to the tenant; ask the tenant to agree in writing to any deductions and pay the difference to the tenant; or apply for dispute resolution asking for an order to keep all or some of a deposit. The landlord may continue to hold a deposit until the dispute resolution process is complete.\textsuperscript{401}

\textsuperscript{398} Regulation 248 of 2008.
\textsuperscript{399} Own emphasis. Reg 17.
\textsuperscript{400} S 24(2).
\textsuperscript{401} S 38.
5.3.4 Evaluation

The landlord should (at the very least) be given the right to have his/her property restored by the tenant in the condition it was given in, fair wear and tear excepted, in order to protect his/her property from total destruction without compensation. The question that arises is, namely: what is the benchmark for “reasonable wear and tear”? In terms of the common law, a broad definition is given through case law. The RHA, however, provides no clear definition, and one would have to consult the common law authorities. The foreign law discussed adopts the same “fair wear and tear” phrase and also does not provide a straightforward definition in legislation. It is submitted that the UPRs should include a detailed provision containing specific examples of what constitutes fair wear and tear. For example, a provision stating that the landlord is liable for the repair of the geyser, structural defects regarding the actual building and the plumbing. Such a provision could be similar in lay-out as the maintenance and repair regulations of the Gauteng and North West Province. The latter regulation is detailed and includes specific with examples.

Some landlords are of the view that the in-coming and out-going inspection requirements prescribed by the RHA are burdensome, time consuming and generally impractical for them to comply with. These sections of the RHA impose certain practical curtailments, which are not always possible to comply with and yet, compel compliance on the part of the landlord. One practical problem includes time issues in that the landlord and tenant cannot always agree on a mutually agreeable time to jointly conduct the in-coming and out-going inspections. Moreover, these inspections generally take several hours to be satisfactorily completed. Another problem is the fact that an unscrupulous tenant may exploit the situation by intentionally avoiding the landlord or refusing the latter’s request for the joint inspection to take place on a certain day and thus, causing the landlord to forfeit the deposit. Or, there may be geographical constraints in that the landlord may be based some distance away from the premises. The foreign law discussed does not impose such time constraints, although it does require the parties to conduct an in-coming and out-going inspection. In fact, the foreign

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402 Unstructured interview with Vivien Marks, Rental Housing Tribunal Western Cape (2007-03-09).
law example takes into account the landlord and tenant’s time schedules and encourages them to reach an agreement. The RHA, on the other hand, imposes time periods which are not practical for the landlord and are, in fact, entirely detrimental to his/her financial and proprietary interests when translated into reality.

As for the requirements for the return of the deposit, the foreign law discussed seems to be not as restrictive as those requirements imposed by the RHA and also encourages the landlord and tenant to reach an agreement in this regard. However, it is submitted that the fifteen days time period in which to return the deposit is not enough time and it may be unrealistic to expect the landlord to act accordingly within this short period of time.

Accordingly, it is suggested that in order to solve these problems, the South African legislature should include a provision in the RHA that is similar to the British Columbia Residential Tenancy Act that encourages the parties to consider each other’s schedules in order to reach a compromise regarding the day and time for the in-coming and out-going joint inspections. Furthermore, the provisions regarding the return of the return of the deposit need to be less restrictive and more time should be afforded to the landlord.

5.4 The right to inspect the premises during the period of the lease

5.4.1 Common law

While the lease is in force, a landlord may need to inspect the premises to determine the damage to the property made by the tenant (if any) and/or minimize the damage in some way, and in doing so protect his/her proprietary interests. However, the common law does not give the landlord unlimited access to the premises during the tenant’s occupation. In fact, in Sofiantini v Mould403 Price JP held that the landlord is not allowed to enter the premises without the tenant’s consent and is a trespasser, if he/she

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403 1956 (4) SA 150.
Even if the landlord has a good reason for wanting to enter the premises, he/she may not do so without the tenant’s permission.\(^{405}\)

Despite the clear position of the law regarding the landlord’s entering the premises, practically, a landlord needs to access the premises during the lease period, whilst a tenant is in occupation, for a number of reasons. Most notably, he/she has not only to fulfill his/her maintenance and repair duties, but also to regularly check that the tenant is looking after the premises and is not misusing the premises.\(^{406}\) For example, the tenant may be using the premises for purposes other than residential purposes, or he/she may be damaging the property beyond the reasonable wear and tear standard.\(^{407}\) By being entitled to regularly inspect the property, announced or unannounced, the landlord is able to assess the damage caused by the tenant and take the necessary preventative measures to protect the condition of his/her property before it spirals out of control and leaving the landlord with bigger problems.

In practice, the landlord should be allowed surprise inspections of the premises, without the tenant’s consent to entry, to check on the condition of the property during the lease period. The purpose of a surprise inspection is to catch the tenant off-guard or “red-handed”. A common example is the landlord unexpectedly entering the premises on suspicion that a tenant is keeping a cat on the premises contrary to the rule prohibiting pets. Giving notice of the time and date of his/her planned inspection to the tenant defeats the purpose of the inspection, as the tenant is able to hide the cat, tidy the home, and generally give the impression that he/she is an acceptable tenant until he/she moves out and only then would the actual damage be ascertained. The benefits and aims of surprise inspections are obvious. For this reason, landlords have ignored the common law and included provisions in their lease agreements to the effect that the

\(^{404}\) 153E-F.
\(^{406}\) This is the landlord’s right in terms of the right to have the tenant take care of the premises.
\(^{407}\) See the discussion in paragraph 5 3 above.
tenant will not deny the landlord access to the premises, and the tenant waives any notice required for the landlord’s inspection during the lease period.408

5.4.2 Rental Housing Act
The landlord’s right of access to the premise whilst the tenant is in occupation is limited by tenant privacy laws expressly provided for in the RHA. The RHA gives the tenant and his/her visitors the right to privacy which includes not having his/her person, home or property searched, possessions seized (unless a court order has been obtained), or privacy of communications abused.409 Furthermore, the RHA states “the landlord may only exercise his right of inspection in a reasonable manner after reasonable notice to the tenant”.410 In other words, the landlord is allowed to inspect the premises (whilst the tenant is in occupation) thereby safeguarding his/her proprietary interests. However, the landlord is only allowed to inspect the premises during the lease if he/she gives the tenant reasonable notice of the inspection and thus, showing due regard for the tenant’s right to privacy. Therefore, the RHA only prohibits surprise inspections, not the concept of inspections altogether, as the landlord’s right to inspect the premises is specifically mentioned.

The UPRs, apart from that of KwaZulu-Natal, specifically state that reasonable notice of an inspection during the lease is required.411 This begs the question: what constitutes a “reasonable” notice? As there is no indication in the RHA or case law of the scope of “reasonable”, it is submitted that this is a vague concept and depends on the circumstances of the case. KwaZulu-Natal UPR is the only UPR that prescribes a definite notice period. Regulation 19 read with regulation 2 states that a landlord may exercise his/her or her right of inspection after giving the tenant seven days notice.412

409 S 4(3).
410 S 4(2).
411 Free State UPR reg 7(2); Gauteng UPR reg 10(2); Mpumalanga UPR reg 7(2); North West UPR reg 10(2); Western Cape UPR reg 6(2).
412 This notice must be in the prescribed format as found in Annexure G of the KwaZulu-Natal UPR (reg 2). The landlord does not have to comply with this, however, if a relevant court order has been obtained or if the premises appear to be abandoned by the tenant (reg 19(3)).
All the UPRs, excluding that of KwaZulu-Natal, stipulate that the landlord is only allowed to enter the premises based on the following reasons: for maintenance and repair duties (usually at the tenant’s request to effect the necessary repairs and maintenance); to show the premises to a prospective tenant/purchaser, purchaser, mortgagee or its mortgage agents; to inspect the premises at the start of the lease and then again at the end of the lease (or upon notification by the landlord or the tenant of the intention to terminate the lease); if the premises appear to be abandoned by the tenant; or if the landlord has a court order. Accordingly, the question that comes to mind is whether the landlord is allowed to enter the premises for reasons other than those prescribed by this regulation? More specifically, is the landlord allowed to inspect the premises during the lease? It appears that the UPRs do not provide for any of these possibilities. If this is indeed the case, then these UPRs do not adequately cater for the landlord’s needs.

As previously argued, the landlord is not always able to carry out the in-coming and out-going inspections, nor are such inspections fool-proof. Therefore, an inspection during the lease period at the request of the landlord is necessary. In this way, the landlord is able to effectively protect his/her proprietary interests by examining the premises sometime during the lease thereby mitigating further damage the tenant may cause. If a landlord sees that his/her tenant is damaging the property in some or other way during the lease, the landlord may be able to act appropriately against the tenant to prevent total destruction and deterioration of the premises. Only inspecting the premises for the first time (since the tenant moved in) at the end of the lease may be too little too late, for example, in the situation where an unscrupulous tenant badly damages or destroys the premises and then flees so that the landlord cannot sue him/her for the damage. Moreover, there is always the possibility that a tenant could be a “man of straw”. Thus, the landlord needs legislative protection from such potential situations by means of the right to inspect the premises, not just at the start and end of the lease, but at random times during the lease too.

413 Free State UPR reg 7(1); Gauteng UPR reg 10(1); KwaZulu-Natal UPR reg 19(1); Mpumalanga UPR reg 7(1); North West UPR reg 10(1); Western Cape UPR reg 6(1).
There is the possibility that the tenant may unreasonably refuse to grant the landlord entry to inspect the premises, despite the fact that the landlord has complied with the notice requirements. Theoretically, the landlord could contest the tenant’s unreasonable refusal at the Rental Housing Tribunal, but this is practically burdensome, exhausting and unnecessary when all the landlord simply wants to do is check on his/her investment, namely, the premises. The tenant’s refusal is, furthermore, a bad reflection on him/her as a tenant and contributes to bad landlord/tenant relations. Obviously, the landlord cannot unreasonably gain access to the premises during the lease, but, where he/she has complied with legal notice requirements, it should be the landlord’s right that he/she be granted entry to the premises.

5 4 3 Foreign law

The British Columbia Residential Tenancy Act specifically mentions the tenant’s right to “quiet enjoyment”. This right entails the following: reasonable privacy; freedom from unreasonable disturbance; and exclusive possession of the rental unit subject only to the landlord’s right to enter the rental unit in accordance with section 29. The latter section lays out the requirements for lawful entry by the landlord:

" (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:
(a) The tenant gives permission at the time of entry or not more than 30 days before the entry;
(b) At least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
   (i) The purpose for entering, which must be reasonable;
   (ii) The date and time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

(2) A landlord may inspect a rental unit monthly in accordance with subsection (b)."

This section evidently contains specific and detailed requirements for valid entry. It recognizes the landlord’s right to inspect the premises before, during and after the lease agreement. And it goes further to give the landlord the right to inspect the premises...
monthly. However, the section does not specify what “reasonable” purposes for entry entail.

5 4 4 Evaluation
The tenant’s right to privacy prevents the landlord from entering the premises anytime and for any reason. However, the landlord is not completely prohibited from entering the premises as he/she has a right of reasonable entry to make an inspection (but only at the start and at the end of the lease), to make repairs or show the premises to a prospective new tenant. The balance between the tenant’s right to privacy and the landlord’s right of entry can usually be reached by a fair and reasonable agreement between the tenant and the landlord. Thus in this instance, intervening legislation is not necessary. The foreign law discussed provides clearer prerequisites for the landlord’s entry than the South African law, as it expressly recognizes the landlord’s need to inspect premises on a regular (monthly) basis. The RHA does not deny this right to regular inspections during the lease, but does not expressly mention it either.

Furthermore, the RHA and UPRs, except the KwaZulu-Natal UPRs, require that “reasonable notice” of the inspection be given to the tenant. It is not known what “reasonable notice” constitutes, and it is not known what form this notice must take. The KwaZulu-Natal UPR does, however, specify a minimum notice of seven days and the notice must take the form of a prescribed format. Thus, where one UPR is highly specific, the other is vague and open-ended. Accordingly, the law is fragmented which leads to uncertainty regarding the landlord’s position. Moreover, the inconsistency of the requirements for notice throughout the different provinces is not in the interests of the landlord. The notice provisions of the RHA, regarding access to the premises during the lease, should be uniformly amended so that the landlord has clear procedural rules to follow and if complied with, the tenant is obliged to grant him/her access.

5 5 Conclusion
The landlord’s right to safeguard his/her proprietary interests is worthy of recognition and protection. Now more than ever, as a consumer in the rental housing market, the
landlord needs the recognition and protection of this right as unscrupulous tenants frequently damage the landlord’s property which reduces the value of his investment therein. In this chapter, three rights under the landlord’s right to safeguard his/her proprietary interests were discussed, namely the right to have integrity of property preserved by tenant; the right to have the property restored in the same good and condition as it was given to the tenant, reasonable wear and tear excepted; and the right to inspect the premises during the lease period.

Firstly, regarding the right to have the integrity of property preserved by tenant, it was found that the RHA and UPRs are inconsistent, mainly in terms of the UPRs that differ considerably from province to province. Furthermore, repair and maintenance duties of the landlord and tenant are considerably unbalanced and unequal in terms of the UPRs in that the tenant holds the most rights. It is suggested that a uniform provision applying to both landlords and tenants relating to their maintenance and repair duties should be included in the RHA, thus, clarifying the position for landlords on a national level. Such a provision would also ensure adequate recognition and protection of this landlord right. Such a suggestion is on par with the foreign law discussed which serves as examples of legislation that has expanded on and codified the landlord’s right to inspect the property during the lease as well as the tenant’s duties in this regard. The foreign law approach seems to recognize and protect the landlord’s right to the regular preservation of his property. Where there is no legislation regulating the rights and duties of the landlord and tenant in this regard, the landlord should at the very least be entitled to regulate the position by contract. Yet, all the UPRs, excepting Mpumalanga, prohibit the landlord from creating his/her own rights and duties relating to the maintenance and repair of the premises by the tenant or the landlord him/herself. This situation is completely inadequate and the landlord’s right to have the integrity of property preserved by tenant is disregarded in certain provinces. Accordingly, it is further suggested that the landlord be given the right to create his/her own contract terms regulating the rights and duties of the landlord and tenant regarding the maintenance and repair of the premises.
The landlord’s right to have his/her property restored in the same condition as it was given to the tenant, reasonable wear and tear excepted, is expressly provided for in terms of the RHA. Moreover, the RHA introduces the concept of in-coming and out-going inspections that did not exist in the common law. This is an internationally recognized means for the landlord to establish the extent of damage to the premises caused by the tenant, as found in Australian and Canadian legislation. At face value, these provisions of the RHA read clearly and logically but in practice, many problems arise as it in fact imposes strict requirements and time periods that the landlord must comply with or else he/she forfeits the deposit. Consequently, considerable practical problems and inconsistencies with these inspection and deposit requirements of the RHA persist, most notably with regard to the scheduling of the carrying-out of the in-coming and out-going inspection and time periods for return of the deposit. These practical problems are detrimental to the landlord. The foreign legislation discussed, namely the British Columbia Residential Tenancy Act, provides somewhat of a solution to these practical problems as it obliges the landlord and tenant to consider each other’s schedules and encourages them to reach an agreement as to the time for both inspections. The consequences of the landlord not carrying out a joint inspection are the same as that of the RHA: the landlord forfeits his/her right to use the deposit for damage to the premises. It is, thus, proposed that the compulsory time periods for the return of the deposit be reconsidered and amended by the South African legislature. In addition, the definition of the term “reasonable wear and tear” should be clearly defined by the RHA.

The right to inspect the premises during the lease is an extremely valuable tool for the landlord to verify damage to his/her property during the lease. The RHA and UPRs were found to be too vague due to the fact that the landlord must give the tenant “reasonable notice” for such entry of the premises. What is “reasonable” is not known, is entirely dependent on the circumstances and may not be to the benefit of the landlord. The same argument applies regarding the form of the notice: the RHA and UPRs do not prescribe the form and this may not be to the benefit of the landlord. The law in this regard is opened-ended leading to possible contestation by the tenant and
the declaration of an unfair practice on the part of the landlord. The KwaZulu-Natal UPRs do, on the other hand, provide a definite notice period and notice form. But, this simply highlights the inconsistency of law in this regard in that it differs drastically from province to province.

Overall the RHA fails to adequately recognize and protect the landlord’s right to safeguard his/her proprietary interests. Furthermore, practical problems and inconsistencies exist because of the RHA, and these are detrimental to the landlord’s rights and interests. The RHA, thus, needs to be accordingly amended, with the practical implications thereof and inconsistencies in mind, in order to fully and better protect the landlord’s right to safeguard his/her proprietary interests.
CHAPTER 6
LANDLORDS' RIGHT TO EVICT A DEFAULTING TENANT

6 1 Introduction
A landlord should have the right to evict, as speedily and inexpensively as possible, a defaulting tenant who remains in illegal occupation of the premises after termination of the lease. This is so because the longer it takes to evict a defaulting tenant, the more the landlord suffers financially because not is the tenant not paying the rent but the landlord’s property is being exposed to more damage by the defaulting tenant as well.

The current eviction process in South Africa is a long and expensive process for private residential landlords. Furthermore, tenants are exploiting this situation and remain in occupation of the premises unnecessarily longer than they are legally allowed to.

In this chapter, the current law of eviction will be scrutinized, criticized and the point will be made that the eviction process is indeed to the detriment of the landlord. The latest developments in this area of law will be examined and a discussion of the impact of these changes on the landlord’s right to evict a defaulting tenant will follow.

The focus of this chapter will be on the clarification of the Rental Housing Tribunal’s jurisdiction in which eviction the Rental Housing Amendment Act 43 of 2007 excluded hearing and orders from the Tribunal’s powers. An analysis of how this amendment affects the landlord is necessary and will be, therefore, considered as well.
6.2 Current law and practice

At common law, an owner of property is entitled to recover his/her property from any person who is in possession of it with or without his/her consent.\(^{415}\) This is derived from the principle that an owner cannot be deprived of his/her property against his/her will.\(^{416}\) Under common law, if a landlord of residential premises intends to eject a tenant after termination of lease, he/she will institute action under the *rei vindicatio* in order to regain possession of the premises. The *rei vindicatio* requires that the landlord must allege and prove that firstly he/she is the owner of the property,\(^{417}\) and secondly, that the tenant is in possession of property to which he/she has no right.\(^{418}\) In other words, the onus is on the tenant to prove that he/she has the right to retain possession of the property.\(^{419}\) It must be noted that in terms of the *rei vindicatio*, it is not a requirement that the landlord allege and prove that he/she has a personal right to demand that the tenant return the property or that the tenant is in unlawful occupation of the premises.\(^{420}\) However, if the landlord concedes in the pleadings that the defendant originally had possession of the property in terms of a lease agreement, the landlord must allege that the lease has terminated.\(^{421}\)

The *rei vindicatio* has been affected by section 26(3) of the Constitution\(^{422}\) which states that no person may be evicted from their home without a court order and after the presiding officer has considered all the relevant circumstances.\(^{423}\) In other words, a court must take into account the following factors: whether the landlord is the owner of

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415 Chetty v Naidoo 1974 (3) SA 13 (A) 20B.
416 Ibid. In this case, it was held that the principle of ownership entails that the landlord is entitled to the “exclusive possession of the res, with the necessary corollary that the owner may claim his/her property wherever found, from whomsoever holding it”.
417 Chetty v Naidoo 20C; Ruskin v Theirgen 1962 (3) SA 737 (A) 744; Akbar v Patel 1974 (4) SA 104 (T) 109G; Goudini Chrom (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A) 82A.
418 Chetty v Naidoo 20C.
419 Ibid.
421 Chetty v Naidoo 21; Graham v Pidley 1931 TPD 476.
423 This provision is only applicable in cases where a landlord wishes to evict a tenant following cancellation of a lease by the landlord and those circumstances are only relevant to this section if they are legally relevant. Furthermore, the personal circumstances of the tenant, should an eviction order be granted, are not considered to be legally relevant circumstances (*Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35 & 42).
the property; whether the tenant is in possession of the property; and that the tenant has no right to possession of the premises.

Section 26(3) of the Constitution led to the enactment of the Prevention of Illegal Eviction from the Unlawful Occupation of Land Act 19 of 1998 (the “PIE Act”). This Act was originally intended to protect unlawful occupiers of rural or urban land from eviction and to create a judicial process in which the rights of unlawful occupiers and landowners could be mediated. Uncertainty regarding the application of the Act was raised by various conflicting decisions in the High Court faced with the question whether the PIE Act applied also to cases of so-called “holding over” (defaulting tenants and mortgage bond defaulters).

The courts had to further consider whether section 26(3) of the Constitution changed common law rules of eviction, which would be applicable in cases where the PIE Act does not apply. In *Ross v South Peninsula Municipality*, the Cape High Court found that section 26(3) does indeed change the common law rules, so that an applicant for an eviction order, in addition to common law, had to show relevant circumstances that would entitle the court to grant the order. A contradiction to *Ross* was the Witwatersrand High Court decision of *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* that held that section 26(3) only applied to evictions by the state and not to evictions by natural or juristic persons. This conflict of decisions reached the SCA in *Brisley v Drotsky*, where the court held that section 26(3) “relevant circumstances” could only refer to legally relevant circumstances. The only circumstances legally relevant to the question whether an eviction should be granted were the requirements of the *rei vindicatio*, namely, that the evictor was owner of the land in question and that the

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424 Preamble to the PIE Act.
425 *Ellis v Viljoen* 2001 (4) SA 795 (C) where it was held that PIE Act does not apply; and *Bekker v Jika* (2001) 4 All SA 563 (LCC).
426 2001 (1) SA 589 (C).
427 596H.
428 2000 (4) SA 486 (W).
429 2002 (4) SA 1 (SCA). *Brisley v Drotsky* was delivered five months before the *Ndlovu* judgment in the same court, namely the Supreme Court of Appeal. The latter judgment did not refer to the former judgment, and it was not expressly rejected either.
evictee was occupying it unlawfully. Consequently, section 26(3) did not change the rules of common law. The majority held in *Brisley* that the section did not prescribe circumstances for the court to consider when granting an eviction order and furthermore, that the court did not have the discretion to refuse an eviction order.

However, five months after *Brisley*, the SCA in *Ndlovu v Ngcobo; Bekker & another v Jika* broadened the scope of the PIE Act in that it was found that ordinary tenants, mortgage bond defaulters and squatters who refused to vacate residential properties (cases of “holding over”) fell under the PIE Act. Thus, there is little scope left for the common-law eviction procedures condoned in *Brisley*, and the landlord has to follow the procedures prescribed by PIE Act before he/she can evict the defaulting tenant from his/her property.

It must be noted that the PIE Act does not take away any of the landlord’s proprietary rights but merely prescribes the procedures to be followed before an eviction order can be granted. The PIE Act delays the exercise of the landowner’s proprietary rights until the court has decided whether it is just and equitable to evict the unlawful occupier after considering all relevant circumstances. Nevertheless, the *Ndlovu* judgment has certain serious implications for landlords in that they will have to comply with notice and

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430 Supra 42.
431 Supra 40.
432 2003 (1) SA 113 (SCA).
433 Ibid 23; PIE Amendment Bill (B 8-2008) s 2.2.
434 In terms of PIE Act, a landlord has to obtain a court order to evict an unlawful occupier. The landlord must first obtain the consent of the court to proceed with the application for eviction. The landlord must then serve a written notice of the application on the unlawful occupier and on the Municipality having jurisdiction over the property at least fourteen days before the hearing of the application. The court will only grant an order for eviction if it considers it just and equitable to do so (s 4-6 of the PIE Act contains the procedures for eviction).
435 *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 17 & 19. The main purpose of the Act is to protect both occupiers and landowners by providing for the prohibition of illegal eviction on the one hand and procedures for eviction of unlawful occupiers on the other (Long title to the PIE Act). “The general impression is that the PIE Act is weighted in favour of tenants, however, landlords should remain confident in the knowledge that they retain all rights over their property as the lawful owner,” says Heather Briggs of Shepstone & Wylie Attorneys (Bhengu ‘Landlords Slam New Eviction Bill’ *The Sunday Times* (2008-06-03)).
436 The circumstances to be considered by a court in determining whether an eviction order will be just and equitable are outlined in 6(3) of the PIE Act.
procedural requirements that may be more time-consuming and more expensive than the procedure for eviction at common law.

The legal process in terms of the PIE Act and the rules of court begins with the launching of an application in terms of the PIE Act. The landlord will then proceed to state in an affidavit that the lease agreement was cancelled and that the unlawful occupier failed to vacate the premises on receipt of the cancellation letter. The landlord will then approach the court by means of an ex parte application for authorization to serve the eviction application on the occupiers of the premises. After obtaining such authorisation the eviction application will be served on the occupiers of the premises and the local municipality giving them fourteen days notice of the return date (being the date which they will have to appear in court to state their case). On the return date the court may grant further orders with regards to the postponement or finalisation of the eviction. After an order for eviction has been granted, it must be served on the occupiers of the leased premises. The order clearly states on which date the occupiers must vacate the premises and further more states that if they fail to vacate the premises timeously the sheriff will be authorized to remove them from the premises as of a specific date.

The RHA and the UPRs recognize the landlord’s right to repossess the premises after lawful termination of a lease and obtaining a court order. The preamble to the RHA is in many respects similar to that of the PIE in that it purports to protect a landlord’s right

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437 This is so in terms of the Magistrates’ Court Act 32 of 1944 and its Rules or the Supreme Court Act 59 of 1959 and its Uniform Rules of Court.
438 In some instances, before the application for eviction, summons must be issued for the cancellation of the lease, which results in further delays.
439 Usually it is more than fourteen days. This is the minimum notice period and the matter has to be set down on the day of the week that the court hears motion proceedings.
440 The researcher describes the eviction process from her own experience in practice as a candidate attorney at Friedman Scheckter in Port Elizabeth. The eviction process in also described in Kanescho Realtors (Pty) Ltd v Maphumulo and Others and three similar cases 2006 (5) SA 92 (D). See also Smith Eviction and Rental Claims (2009) Chapter 3; and Practice Directives of the High Court of South Africa (Witwatersrand Local Division - Prevention Of Illegal Evictions (http://www.johannesburgbar.co.za/practice_directives/pie.html (accessed 2009-07-28)).
441 S 5(d)(ii) and Free State UPR reg 6, Gauteng UPR reg 9, KwaZulu-Natal UPR reg 18, Mpumalanga UPR reg 6, North West UPR reg 9. S 13(10) of the RHA further stipulates that “nothing contained in the Act precludes any person from approaching a competent court for urgent relief under circumstances where he or she would have been able to do so were it not for this Act, or to institute proceedings for the normal recovery of arrear rental, or for eviction in the absence of a dispute regarding an unfair practice.”
to apply for the eviction of a tenant at the conclusion of the tenancy,\textsuperscript{442} and it even anticipates regulations regulating evictions.\textsuperscript{443} However, much to the disadvantage of the landlord from a cost saving point of view, the Rental Housing Amendment Act 43 of 2007 specifically excludes the power to grant eviction orders from the Rental Housing Tribunal, thus, forcing the landlord to make use of the expensive and backlogged regular court process (as prescribed by the PIE Act).\textsuperscript{444} This practical problem is highlighted in more detail in the following paragraph.

\section*{6.3 Criticism of current law}

Certain practical problems or concerns exist regarding the landlord’s right to evict a defaulting tenant as well as the current law of eviction. Firstly, a landlord would want to evict a tenant for the sole reason that the lease has come to an end, for example by mere expiration of the lease period or by cancellation as a result of breach of contract by the tenant, usually on the basis that he/she has defaulted on rental payments. The contractual relationship, thus, no longer exists between the parties and the tenant no longer has a right to be in occupation. Currently, the only manner in which a landlord can legally evict a defaulting tenant is by means of a court and order by following the process prescribed in the PIE Act, which is a cumbersome process that might lead to the possibility that landlords may be denied of their full rights of ownership.\textsuperscript{445} In fact, this process can take several months to reach the point of a legal forced removal of the tenant by the sheriff. At the end of the eviction ordeal, from a practical point of view, a landlord would have incurred many costs, \textit{inter alia}, lost rental income, legal fees and the potential cost of repairs to damaged property. Delport explains the implications of the landlord having to obtain an eviction order:

\begin{quote}
\textit{[a]n eviction order can only be granted by a court, meaning that legal proceedings must be instituted. The real nightmare now begins. The technicalities of legal procedures and long delays in}
\end{quote}

\textsuperscript{442} S 4(5)(d).
\textsuperscript{443} S 15(1)(f)(v).
\textsuperscript{444} A landlord may approach the Tribunal to seek assistance in resolving the dispute surrounding the eviction, but a court order is needed to evict the tenant. "A landlord is simply delayed in enforcing [his/her property] rights as there are a number of procedural requirements to satisfy, which can take a few months," says Heather Briggs of Shepstone & Wylie Attorneys (Bhengu ‘Landlords Slam New Eviction Bill’ \textit{The Sunday Times} (2008-06-03)).
\textsuperscript{445} Lotz & Nagel \textit{'Uitsetting van Huurders en Verbandskuldenaars en die Wet op die Voorkoming van Onwettige Uitsetting and Onregmatige Besetting van Grond'} 2003 \textit{THRHR} 164 72.
getting to court, taken with the stress, financial risk and frustration that litigation brings, are enough to sap the energy and strength of the toughest of landlords. In the end, judgment may well be granted in the landlord’s favour but by then two or three months may have gone by during which the tenant remained in occupation without paying anything. He now owes not only the arrears, but also the rental for the period during which he remained in unlawful occupation. Of course, obtaining an eviction order does not mean that the tenant will now pay all amounts due; it merely means he must vacate the premises. 446

Defaulting tenants may exploit this situation knowing that the landlord has to go through a lengthy legal procedure and a court hearing (with postponements) before the tenant is forcefully removed from the premises by the sheriff, and may delay or escape eviction by remaining in occupation under the pretext of the protection afforded by the PIE Act, despite lawful termination of the lease by the landlord. 447

Then there is the possibility that the landlord may not be successful with the application for eviction for the reason that the court may find that it is not “just and equitable” to evict the tenant based on the particular circumstances (a possibility that did not exist at common law), thus stripping the landlord or his/her ownership rights and leaving the landlord without a remedy in law. 448

This situation described above is entirely unsatisfactory for the private landlord and property investors may be reluctant to develop rental stock as a result of the eviction process, because of the compulsory procedural requirements under the PIE Act. 449

446 Delport ‘Self-Help Clauses’ 2000 Agent August 15.
448 Supra 480.
449 Richard Thatcher, National Housing Chief Director of Legal Services, explains this in a Sunday Times article by Bhengu ‘Landlords Slam New Eviction Bill’ The Sunday Times (2008-06-03).
6.4 Recommendations and reform of current law

Currently there are proposed changes to the PIE Act, most notably the elimination of the application of the Act to defaulting tenants. In other words landlords will no longer have to comply with the PIE Act for an eviction order. The Prevention of Illegal Eviction from the Unlawful Occupation of Land Amendment Bill of 2008 (“PIE Amendment Bill”)\(^{450}\) seeks to clarify the application of the PIE Act and reverse the effect of the \textit{Ndlovu} judgment. In terms of the Bill, defaulting tenants are specifically excluded from the application of the PIE Act. Section 2(2) of the Bill reads:

“\begin{quote}
This Act does not apply to a person who occupied land—
\begin{enumerate}
\item as a tenant;
\item in terms of any other agreement; or
\item as the owner of land, and who continues to occupy the land in question despite the fact that the tenancy or agreement has been validly terminated or the person is no longer the owner of the land.
\end{enumerate}
\end{quote}"

When the Bill is passed, the effect of the \textit{Ndlovu} judgment will be eliminated and the landlord will be able to evict a tenant by means of the \textit{rei vindicatio} once again. Many landlords welcome the PIE Act amendment for the reason that the common law of eviction (by means of the \textit{rei vindicatio}) will be re-instated. This will mean that the landlord will not have to follow strict procedural requirements for an eviction order and will merely have to allege and prove to the court that he/she is the lawful owner of the property and that the tenant has no right to be in occupation of the property. The matter does not end there, however, as section 26(3) of the Constitution will still have an effect on the common law of eviction in that the court must consider all the relevant circumstances before granting an eviction order. Therefore, the position before the \textit{Ndlovu} judgment will be re-instated and the decision given in \textit{Brisley v Drotsky}\(^{451}\) will become significant again.

The situation may well change, however, as the \textit{Brisley decision} may not survive constitutional scrutiny. The decision of the Supreme Court of Appeal in \textit{Brisley} can be

\begin{flushright}
\footnotesize
\textsuperscript{450} B 8-2008.  \\
\textsuperscript{451} 2002 (4) SA 1 (SCA).
\end{flushright}
considered conservative and narrow as its approach is simply that the landlord is the
owner and accordingly the illegal occupier must vacate. However, in terms of section
26(3) of the Constitution, the court must consider all relevant circumstances. The
approach adopted in *Brisley* may not survive constitutional scrutiny as constitutional
values must be considered by the Constitutional Court, which will in all probability lead
to a different decision as a result of section 26(3). In fact, the position with regard to
landlords and eviction may go back to the way it was under the PIE Act. Thus, the
problem for landlords and eviction may not be solved by excluding the application of the
PIE Act, as it is a matter of time before the Constitutional Court will be faced with the
interpretation of section 26(3) that may change the position adopted by *Brisley*
decision.452

Although the situation may improve for landlords when the PIE Act amendment is
passed, the landlord will still have to go through a court to effect a lawful eviction and
this may do little to reduce the costs and delays.453 What will possibly ensure a
speedier and cost effective legal eviction process for landlords is if the Rental Housing
Tribunals were given power to grant eviction orders. Currently, eviction orders are
expressly excluded from the ambit of power of the Tribunal under the recently
promulgated Rental Housing Amendment Act.454 One of the reasons for the
amendment of the RHA was to clarify the jurisdiction of the Tribunals, which was not
spelt out in the original Act. In other words, it is now clear that the Tribunals do not have
the power to grant eviction orders.455 Worthy of mention is the fact that the Tribunal has
the power to issue spoliation orders (in favour of the tenant), but not eviction orders.456
It is submitted that this allocation of power is arbitrary as spoliation is the converse of an
eviction in that the former grants possession of the premises to the tenant and the latter

454 Act 43 of 2008.
456 RHA s 13 read with the 2007 Rental Housing Amendment Act s 6(b).
grants possession of the premises to the landlord. The RHA is, thus, clearly arbitrarily pro-tenant at the expense of the landlord,\textsuperscript{457} and it is submitted that the entire position from this point of view should be reviewed.

Thus, the answer to the landlord’s problems with obtaining a court order for eviction may be to include eviction orders within the powers of the Tribunal. However, the solution is more complicated than appears at first glance. The legal reason why a mere section amendment cannot be made to the RHA to give the such Tribunal powers is because in terms of section 26(3) of the Constitution, only a court may order an eviction. This poses the question whether the Rental Housing Tribunal is a ‘court’, as determined under the Constitution.

During the debate on the RHA amendment, the Minister of Housing stated that Tribunal rulings must now be enforced in terms of the Magistrates’ Courts Act\textsuperscript{458} and a Tribunal must refer any matter that relates to eviction to a competent court. The Minister continued to say that the amendment intends to ensure that no Tribunal has a right to evict because in terms of section 26(3) of the Constitution only a court may order an eviction.\textsuperscript{459} Thus, it needs to be determined if it is constitutionally possible to give the Tribunal the power to grant eviction orders without having to amend the Constitution?

This question is answered under section 166 of the Constitution which states that the following are recognized courts in South Africa: the Constitutional Court; the Supreme Court of Appeal; the High Courts; the Magistrates’ Courts; and any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts.\textsuperscript{460} Although a ruling of the Tribunal is deemed to be an order of the Magistrates’ Court in terms of the Magistrates’ Court Act,\textsuperscript{461} and must be enforced in terms of the Magistrates’ Court Act, the Tribunal does not have the status of the Magistrates’ Court. The Tribunal’s order

\textsuperscript{457} See Van der Walt ‘Developing the Law on Unlawful Squatting and Spoliation’ 2008 \textit{SALJ} 24.
\textsuperscript{458} Act 32 of 1944.
\textsuperscript{459} N 41.
\textsuperscript{460} Constitution of the Republic of South Africa Act 108 of 1996 s 166(a)-(e).
\textsuperscript{461} RHA s 13(13)
does not constitute a court order in terms of section 26(3) and therefore, the Tribunal cannot legitimately grant eviction orders.

Thus, Constitutional amendment, alternatively extensive amendment of the RHA, would be necessary to give the Tribunal the power to grant eviction orders. However, even if the latter were effected, it does not solve the eviction problems for landlords in those provinces without Rental Housing Tribunals.

6.5 Foreign law

According to the law in New South Wales under the Residential Tenancies Act, the landlord may approach the tribunal for landlords and tenants, the Consumer Trader and Tenancy Tribunal, to legally evict a tenant who remains on the premises illegally. After the landlord has given the tenant notice of eviction proceedings, the landlord may obtain an eviction order from the Tribunal. The landlord may not enter the premises or evict a tenant until he/she has an order. A warrant may then be issued authorising the Sheriff to forcefully remove a tenant from the premises.

The New South Wales Act further stipulates that if a tenant fails to comply with an order for possession of residential premises made by the Tribunal, the tenant is liable to pay compensation to the landlord for any loss caused to the landlord by that failure and to pay an occupation fee to the landlord equal to the amount of rent that would have been payable by the tenant for the residential premises for the period the tenant remains in possession after termination of the residential tenancy agreement. The Tribunal may, on application by a landlord under this section made not later than 30 days after the day on which the order for possession took effect, order a tenant to pay to the landlord such compensation or an amount equal to an occupation fee, or both, as it thinks fit.

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463 S 75.
464 S 72.
465 S 72(1).
466 S 73(1).
467 S 74(1).
468 S 74(2).
6.7 Conclusion

Eviction law and the eviction process in South African is a concern for landlords. Although the landlord’s right to evict a defaulting tenant is recognized, evicting a tenant in practice is a long and expensive legal process that diminishes the landlords faith in the justice system. This is because the Ndlovu judgment imposed unnecessary eviction procedures on the landlord in terms of the PIE Act and lead to unavoidable financial losses. These procedures are not in the landlord’s interests. The PIE Amendment Act seeks to free the landlord from the application of the PIE Act and its procedures, thus, re-instating the common law of eviction by means of the rei vindicatio. Indeed, this will improve the situation for landlords. According to Bill Rawson, chairperson of Rawson Properties, a well-known South African estate agency, these proposed amendments will serve as an encouragement to investors to invest money in buy-to-let property. He further adds that “[m]any [landlords] have been understandably cautious of this investment opportunity, as they didn’t want to be stuck in a situation where a defaulting tenant is staying in their property and refusing to move”. 

However, the re-instatement of the rei vindicatio may be only temporary. The Constitutional Court, when faced with the interpretation of section 26(3), will in all probability change the situation for the landlord as the court must consider all relevant circumstances, and those circumstances considered by the Supreme Court of Appeal in Brisley v Drotsky in 2002 were not sufficient to withstand constitutional scrutiny.

The situation would, however, be even more ideal if the Rental Housing Tribunal had the power to grant eviction orders as is the approach adopted by the New South Wales Act. The latter Act is most ideal because the landlord can approach a tribunal as opposed to a court, for a final executable eviction order, which is expedient and cost effective way. The local Rental Housing Tribunal should also be given the power to grant final eviction orders after a formal hearing and with notice to the tenant, and thus alleviate the court process ensuring speedy and inexpensive justice for the landlord. It would be in the landlord’s interests for such a legal mechanism to be introduced thereby

469 Unknown ‘Trouble evicting your tenant?’ (http://property.iafrica.com/renting_letting/599537.htm (accessed 2009-09-06)).
protecting the landlord’s proprietary and financial interests against tenants who exploit the situation of the long eviction process. This would be a just and equitable legal solution to the problem of defaulting tenants that would make the eviction process in practice less pro-tenant at the expense of the landlord. There is no legal reason why the Tribunal cannot have this power. After all, the Tribunal already has the power to grant spoliation and attachment orders. In fact, landlord/tenant tribunals in the foreign jurisdiction of New South Wales have had the power to grant eviction orders for two decades already.

In addition to the granting of eviction orders, the tribunal of New South Wales is given the specific power to order that the tenant pay for any damages the landlord has sustained owing to the tenant’s unlawful occupation of the premises, thus, protecting the landlord’s financial and proprietary interests. The RHA does not contain a comparable provision.

The landlord’s right to evict a defaulting tenant lies in his/her basic right to ownership. If the Rental Housing Tribunal has the power to grant eviction orders, it will thereby recognize and protect the landlord’s right to evict a defaulting tenant. Until such time as the Rental Housing Tribunal is given this power, landlords’ financial and proprietary rights will continue to suffer because of inadequate justice.
CHAPTER 7
CONCLUSION

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7 1 Introduction
The aim of this study was to thoroughly investigate and ascertain the extent to which the RHA acknowledges and safeguards the interests of the landlord, especially in light of the present position in the South African rental housing market where the supply exceeds the demand of rental housing stock. The RHA currently provides adequate recognition and protection of the interests and rights of tenants. Yet it is the researcher’s submission that it is the landlord who, in fact, needs adequate recognition and protection by the RHA.
The RHA was scrutinized against the backdrop of the concept of the “landlord as a consumer” using internationally recognized fundamental consumer protection principles as a standard against which to judge the RHA’s recognition and protection of the rights of the landlord. Thus, once the landlord had been identified as a consumer in the rental housing market, general and internationally recognized consumer rights were deemed to be applicable to the landlord. In the context of the landlord/tenant relationship it was submitted that these general consumer rights form the basis of landlord specific consumer rights, namely: the right to contract freely; the right to safeguard his/her financial interests; the right to safeguard his/her proprietary interests and the right to evict a tenant. These four landlord specific rights were in turn analyzed in detail and were formulated in terms of further rights and interests.

This study has found that the saturation of rental housing stock in the current South African rental housing market has led to a possibly unsatisfactory situation for the landlord who is in a weaker bargaining position in the landlord/tenant contractual relationship. Because there is an oversupply of rental housing stock, landlords are no longer able to dictate terms and conditions to the same extent that they were able to do when the RHA was introduced and when there was a need to protect tenants from unscrupulous landlords given the superior bargaining power enjoyed by landlords as a result of the shortage of rental housing stock.

The hypothesis was put forward that legislation should now seek to protect the landlord from the possible danger of unscrupulous tenants. The RHA is now overprotective towards the tenant and therefore, disadvantageous for the landlord who along with the tenant is also a consumer in the rental housing market. The study determines to what extent the RHA needs to be amended in order to recognize and protect the landlord's rights and interests.

To achieve the aim of this study, a fourfold process was adopted as the research methodology. Step one involved the gathering of data relating to the specific rights of the landlord via an analysis: of the concept of “the landlord as a consumer”; existing
landlord contracts; and international and local literature. Step two entailed the examination of foreign law in the light of what the researcher had already found regarding landlords’ rights. Step three was the actual examination of the RHA and the UPRs in light of the principles formulated in the previous research steps.

Step one entailed an identification and discussion of the rights of the landlord in the landlord/tenant relationship in South Africa. In Chapter 2 an attempt was made to place the landlord as a consumer in the residential property market. The RHA is in fact consumer protection legislation that was originally aimed at protecting the tenant from unscrupulous landlords. The researcher drew the reader’s attention to the fact that the landlord is also entitled to this protection. The term “consumer” was defined and it was argued that this term should be applied to the landlord. Thus, the researcher extended the conventional interpretation of “consumer” and justified the basis of this research which is that the landlord is a consumer worthy of protection. In view of the premise that the landlord is a consumer in the rental housing market, general consumer protection principles were set out and applied to the landlord and, in this way, specific landlord rights were formulated. These specific landlord rights are: the right to contract freely; the right to protect financial interests; the right to protect proprietary interests; and the right to evict a defaulting tenant. The researcher further consulted common law authorities to establish which common law rights and traditional practices of the landlord are worthy of protection and to what extent these practices are supplemented by suitably worded clauses in South African lease agreements. After gathering the data, the researcher explained and discussed each of the landlord’s rights identified after an analysis of common law and practice.

Step two entailed the search for legal standards regarding the landlord/tenant relationship as exemplified in foreign legislation to reveal how those legal systems handled their particular situation regarding landlords and tenants. The laws of Canada, Australia, England, Scotland, Kenya and Uganda were briefly discussed.

The specific legislation reviewed in step three was the RHA and the UPRs. This step in
the process was an evaluation as to whether the RHA adequately protects the landlord's right and interests.

The final step entailed the submission of recommendations regarding possible solutions regarding the shortcomings of the RHA.

7.2 Findings and recommendations

This study has revealed that there are certain adequacies as well as inadequacies in the RHA regarding recognition and protection of the landlord’s rights and interests. One cannot therefore brand the RHA as being wholly biased and in favour of the tenant. At the same time, however, it has to be acknowledged that the RHA does not adequately recognize and protect the landlord’s rights and interests. These are set out below.

7.3 Adequate recognition and protection

It is submitted that the landlord’s fundamental rights are adequately recognized and protected by the RHA in that it:

- recognizes the right of the landlord to exclude prospective tenants on grounds of financial status and previous status as a tenant in so far as discrimination on these grounds are not expressly excluded by the RHA;

- mentions the landlord’s right to terminate the lease based on grounds specified in the lease agreement which entitles the landlord to exercise his/her freedom to contract with respect to termination; however, such ground must not constitute an “unfair practice” (section 4(5)(c) of the RHA read with the definition of “unfair practice” in the Rental Housing Amendment Act 43 of 2007);

- expressly mentions the landlord’s right to receive prompt and regular payment of rental or any charges that may be payable in terms of a lease (section 5(a) and (b) of the RHA);
• does not limit the amount of the deposit that the landlord may request from the tenant and so, partially recognizes and protects the landlord's right to receive payment of rental in this regard;

• entitles the landlord to formulate his/her own terms regarding requirements for a valid rent increase in so far as there is no regulation of this aspect in the RHA;

• acknowledges the landlord’s right to be compensated for damage to the premises caused by the tenant (or persons the tenant is responsible for) including damage caused by the tenant’s removal of improvements in so far as the RHA expressly mentions that the landlord may claim compensation for damage caused by the tenant, a member of the tenant's household, or a visitor (section 4(5)(e)).

7 4 Inadequate recognition and protection

It is submitted that the RHA does not adequately recognize and protect the landlord’s rights in certain aspects. These are listed below together with recommendations how these rights can be adequately recognized and protected:

7 4 1 Landlords’ right to contract freely

This study has brought to light that the landlord’s right to contract freely is not sufficiently safeguarded by the RHA, considering the following:

1) The Free State UPR regulation 10(1)(f)-(g), the Western Cape UPR regulation 9(1)(f)-(g), Gauteng UPR regulation 14(1) (f)-(g), KwaZulu-Natal UPR regulation 21(1) (f)-(g), the North West UPR regulation 14(1) (f)-(g), and Mpumalanga UPR regulation 19(1) (f)-(g) all prohibit the landlord from contracting out of the RHA, UPRs or any other law. In light of these regulations, it was found that the landlord’s right to contract freely is severely restricted in that the landlord is prohibited from contracting out of common law. Accordingly, it is recommended that the term “any other law” be deleted from these regulations.
2) Regulation 3(3)(b) of Gauteng and the North West Province UPRs prohibits the landlord’s use of exclusion clauses outright. It was submitted that this prohibition is unjustified as it undermines the landlord’s right to contract freely. Thus, the removal of the prohibition of exclusion of liability in terms of the Gauteng and North West Province UPRs would ensure adequate recognition and protection of the landlord’s right to contract freely.

3) The legal position of the landlord with regard to his/her use of a cancellation clause is unclear and inconsistent in that the RHA enforces contractual freedom whereas the UPRs completely restrict it. In order to adequately recognize and protect the landlord’s right to contract freely in respect of the use of cancellation clauses, it is recommended that the regulations prohibiting cancellation of the lease except where the building is uninhabitable as found in the Free State UPR regulation 5(1)(b), Gauteng UPR regulation 8(1)(b), Kwazulu-Natal UPR regulation 17(1)(b), Mpumalanga UPR regulation 5(1)(b), the North West Province UPR regulation 8(1)(b), and the Western Cape UPR regulation 5(1)(b) be deleted.

4) The "anti-discrimination" section of the RHA (section 4) was found to limit the landlord's right of choice of tenant in that the section does not provide for certain exceptions or exemptions with regard to discrimination against prospective tenants. Accordingly, it is suggested that certain exemptions or exceptions to the application of the anti-discrimination section 4(1) of the RHA be included as well as a provision that expressly entitles the landlord to exclude a prospective tenant from a lease based on financial status and previous status as a tenant.

5) The RHA does not contain a section relating to subletting or cession, but each UPR confirms that a tenant may not sublet or cede without written consent of the landlord. Furthermore, the landlord’s consent may not be unreasonably withheld. It was submitted that the most ideal situation for the landlord would be to prohibit subletting and cession outright by including a clause in the lease to that effect.
However, the RHA does not allow for this. It is recommended that the regulations prohibiting the landlord from disallowing subletting outright in the Free State UPR regulation 10(2)(a), Gauteng UPR regulation 14(2)(a), Kwazulu-Natal UPR regulation 21(2)(a), Mpumalanga UPR regulation 19(2)(a), the North West UPR regulation 14(2)(a), and the Western Cape UPR regulation 9(2)(a) be deleted.

7.4.2 Landlords' right to safeguard their financial interests

It is submitted that the RHA fails to adequately recognize the landlord’s right to safeguard his/her financial interests with regard to the following:

7.4.2.1 The right to receive the payment of rental

1) Section 5(3)(d) of the RHA requires the landlord to invest the deposit in a commercial bank in the private sector which is detrimental to the landlord in that he/she will be held liable for bank charges. It is recommended that either a government organization for the investment of rental deposits that does not charge banking fees be established or, alternatively, that a section in the RHA be included stipulating that the tenant must be held liable for bank charges relating to the investment of the deposit.

2) By implication, the RHA does not entitle the landlord to request a "top-up" deposit from the tenant. This position is unsatisfactory and the possibility of a "top-up" deposit has not even been considered by the RHA. Accordingly, it is submitted that the RHA should include a provision entitling the landlord to request a further deposit during the lease, if the initial deposit has been depleted owing to the fact that the tenant has damaged the premises or if the rent is in arrears.

3) Section 5(3)(j) of the RHA prohibits the landlord from deducting arrear rental from the tenant’s deposit if he/she fails to comply with the RHA’s inspection requirements. This section is one of the most severe inroads on the landlord's right to safeguard his/her financial interests. Thus, section 5(3)(j) should be
amended to ensure that the landlord's failure to carry out the joint inspections does not affect his/her right to deduct arrear rental from the tenant's deposit.

4) The RHA does not deny the landlord his/her rights in terms of common law principles of the landlord’s hypothec, as the Rental Housing Tribunal has the power to grant attachment orders. However, it is not known whether the clerk of the Tribunal has the power to order the immediate removal of the tenant’s goods as set out in the Magistrates’ Court Act and thus, it is also not known how the landlord is able to legally remove the goods without the authorization of the clerk of the Magistrates’ Court. Furthermore, only the Sheriff of the Magistrates’ Court can execute the attachment order. It is recommended that in order to protect and improve the procedural side of the landlord’s hypothec, the RHA should grant the Rental Housing Tribunals the power to allow an official of the Tribunal to accompany the landlord when he/she removes the tenant’s goods, after having obtained an order from the Tribunal to this effect.

5) Section 4(5)(b) read with section 16(a) of the RHA clearly prohibits the landlord from resorting to self-help and criminalizes such conduct on the part of the landlord. In addition to this, the Free State UPR regulation 8(1)(c), Gauteng UPR regulation 13(1)(c), KwaZulu-Natal UPR regulation 20(1)(c), Mpumalanga UPR regulation 9(1)(c), the North West Province UPR regulation 13(1)(c), and the Western Cape UPR regulation 13(1)(c) all expressly prohibit the landlord from causing the non-supply of municipal services to the premises as a means to force payment of rent, especially if the tenant has paid for such services. This prohibition on the part of the UPRs limits the landlord’s right to receive the payment of rental. It is submitted that these regulations be deleted.

7.4.2.2 The right to protect the return of the investment

1) In terms of the RHA, the parties are free to determine the rental amount, to the extent that the rental is not considered “exploitative" by the Rental Housing Tribunal, who have the power to reduce the amount of rent in terms of section
13(4) and (5) of the RHA. This limitation on the landlord’s right to protect the return of the investment was criticized as being contrary to free market principles. Thus, it is submitted that the removal of the rent determination powers of the Rental Housing Tribunal in section 13(4) and (5) of the RHA will ensure protection of the landlord’s rights.

2) In terms of common law, the tenant has the right to remit the rent without a court order, which is in effect, a form of self-help by the tenant. The RHA does not change this common law position, which is detrimental to the landlord’s interests. The recommendation that will safeguard the landlord’s right to protect his/her return on the investment is that the RHA should include a provision that expressly excludes the tenant’s common law right to remission of rental. Furthermore, the RHA should oblige the tenant to approach the Rental Housing Tribunal or a court for any reduction in rental, even if his/her services have been restricted or terminated.

3) As stated above, in terms section 13(4) and (5) the RHA, the tenant is entitled to submit a complaint about exploitative rentals to the Rental Housing Tribunal. In addition to this, the tenant is entitled to submit a complaint relating to an increase of rental to the Tribunal, under the guise of an exploitative rental complaint. In effect, the RHA compels the landlord to accept a rental determined by the Tribunal, even though the determined rental amount may be completely unsatisfactory for the landlord. It is submitted that these powers of the Tribunal should be taken away.
7.4.3 Landlords’ right to safeguard their proprietary interests

The study has revealed that the landlord’s right to safeguard his/her proprietary interests is not recognized and protected by the RHA, considering the following:

7.4.3.1 The right to have integrity of property preserved by the tenant

1) The RHA does not expressly mention the landlord’s right to have the premises taken care of by the tenant. The UPRs do, however, recognize this right to a limited extent in that the Free State UPR regulation 4, KwaZulu-Natal UPR regulation 16, Mpumalanga UPR regulation 9 and the Western Cape UPR regulation 4 all stipulate the landlord’s maintenance and repair duties. Yet, it is only regulation 7(2) of Gauteng and the North West Province that provide a list of tenant duties relating to maintenance and repair of the premises and thus, contain more recognition and protection of the landlord’s rights than the Western Cape, KwaZulu-Natal, Free State and Mpumalanga UPRs that do not expressly impose maintenance duties on tenants at all. This is, however, not the case on a national level, as neither the RHA nor the remaining UPRs mention the landlord’s right to have his property taken care of by the tenant. Furthermore, the landlord is prohibited from contracting out of landlord and tenant duties by the RHA and UPRs, except in Mpumalanga province. This inconsistency in the legislation is not in the landlord’s interests. It is, therefore, recommended that provisions applicable to both landlords and tenants regarding their maintenance and repair duties be included in the RHA together with a section entitling the landlord to exclude the stipulated maintenance and repair duties in his/her lease agreement.

7.4.3.2 The right to have the property restored in same good condition as it was given to the tenant, reasonable wear and tear excepted

1) The RHA provides no definition or standard for “reasonable wear and tear” when referring to what constitutes acceptable damage to the premises. This was found not to be in the landlord’s interests. Therefore, it is recommended that the RHA include a detailed section defining what constitutes “fair wear and tear”.

2) The RHA imposes unrealistic and unjustifiable time periods for the carrying out of the in-coming and out-going inspections and the return of the deposit. It was submitted that these time periods are not always practically possible for the landlord and are, in fact, entirely detrimental to his/her financial and proprietary interests. It is recommended that the in-coming and out-going inspection requirements in terms of section 5(3)(e) and (f) of the RHA be amended to provide for a more flexible time period in which the inspections may be carried out by means of the inclusion of the phrase "the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection". Furthermore, the amendment of section 5(3)(g), (i) and (m) of the RHA, relating to the compulsory time periods for the return of the deposit, is recommended so to provide for any practicalities the landlord may be faced with and such provisions should be formulated in such a way that the landlord has more time to act.

7.4.3.3 The right to inspect the premises during the lease

1) Although it was found that the RHA does not completely prohibited the landlord from entering the premises, the landlord's right to inspect the premises during the lease is limited in that he/she is only entitled to enter the premises under certain circumstances, such as having to make repairs. The RHA and UPRs except that of Kwazulu-Natal stipulate that "reasonable notice" of any inspection must be given to the tenant. These provisions do not clarify either what constitutes "reasonable notice" or what the requirements for such a notice are. The KwaZulu-Natal UPR, however, specifies the minimum notice period and the form that the notice must take. Where one UPR is specific, the others are vague and open-ended and such inconsistency is not in the interests of landlords who may have properties in more than one province. The inclusion of a section of the RHA that details the notice requirements that the landlord must comply with for access to the premises during the lease would protect the landlord's right to inspect the premises during the lease. Furthermore, this proposed section should stipulate that the tenant is
obliged to grant the landlord access to the premises if the notice requirements have been complied with.

7.4.4 Landlords’ right to evict a defaulting tenant
The RHA inadequately recognizes and protects the landlord’s right to evict a defaulting tenant as follows:

1) The current eviction process in South Africa is a long and expensive process for private residential landlords, who have to comply with the PIE Act. The landlord’s interests would be safeguarded by the inclusion of granting of eviction orders within the South African Rental Housing Tribunal’s powers by means of an amendment of the RHA. Accordingly, it is recommended that the powers of the Rental Housing Tribunal be reconsidered so that the Tribunal is able to effectively grant and execute eviction orders.

7.5 Final observation
Nineteen proposed amendments were listed above in light of the inadequacies of the RHA regarding the recognition and protection of the rights and interests of the landlord. These recommendations as to how the Act could be practically improved were put forward in an attempt to contribute to legal knowledge. Moreover, the researcher endeavoured to extend conventional thinking by defining the landlord in terms of a “consumer” with certain rights and interests not acknowledged or protected in contemporary South African legislation.
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