



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: 15008/2023

In the matter between:

CHRISTOPHER JOSEPH KELLY

Applicant

and

**RENTAL HOUSING TRIBUNAL
PETER DOUGLAS HART**

First Respondent
Second Respondent

Coram: Janisch AJ
Heard: 16 March 2026
Delivered: 30 March 2026

ORDER

The court makes the following order:

1. The Applicant's review of the Tribunal's determination that an unfair practice was established succeeds, but that determination is substituted with a finding that the Applicant committed an unfair practice in the form of a breach of paragraph 4(1)(d) of the Unfair Practices Regulations.
2. The question as to the relief to be granted pursuant to the substituted determination of an unfair practice is remitted to the Tribunal for reconsideration in accordance with sections 13(4) to 13(6) of the Rental Housing Act.
3. There is no order as to costs.

JUDGMENT

JANISCH AJ:

Introduction

- [1] The First Respondent ("*the Tribunal*") is an entity established for the Western Cape Province under section 7 of the Rental Housing Act 50 of 1999 ("*the Rental Housing Act*"). Its central duty is the resolution of complaints lodged with it, *inter alia*, by a tenant or landlord in respect of alleged "*unfair practices*" as envisaged in that Act.
- [2] The establishment of the Tribunal gives effect to one of the purposes of the Rental Housing Act, as expressed in the preamble thereto, namely "*to introduce*

mechanisms through which conflicts between tenants and landlords can be resolved speedily at minimum cost to the parties”.

- [3] On 30 June 2023, pursuant to a complaint lodged with it by the Second Respondent (as tenant), the Tribunal ordered the Applicant (as landlord) to pay to the Second Respondent the sum of R120,000, plus interest at 10,5% per annum until the date of payment if the amount was not paid within ten days.
- [4] In essence, the Tribunal's ruling involved the grant of a rental remission in favour of the Second Respondent in the sum of R5,000 per month for the entire 24-month period of the lease. The agreed rental was R75,000 per month, and the ruling effectively reduces it to R70,000 per month.
- [5] The Applicant applies to this Court to review and set aside the decision of the Tribunal.

Authority to launch these proceedings

- [6] The Applicant is a natural person. The attorneys of record filed the papers under a notice of motion reflecting that they act for him. The founding affidavit was however deposed to by a rental agent who had acted as Managing Agent on behalf of the Applicant from well before the dispute arose. He alleged that he was authorised to depose to the affidavit on the Applicant's behalf in that capacity.
- [7] The Second Respondent in his answering affidavit denied that the deponent was authorised to depose to the answering affidavit in the absence of a written power of attorney. In his supplementary answering affidavit, he repeated this

denial and further denied that the agent was authorised to “*bring this application on behalf of*” the Applicant. I note, however, that the agent had at no stage averred that he had brought the application on behalf of the Applicant, merely that he was authorised to depose to an affidavit on the Applicant’s behalf.

- [8] The Second Respondent in oral argument contended, purely on the strength of these denials, that the application should be dismissed for want of proof of authority to launch it.
- [9] Rule 7(1) of the Uniform Rules provides that a power of attorney need not be filed, but that the authority of anyone acting on behalf of a party may within ten days or with the leave of the court after a longer period be disputed, whereafter the person may not act unless he has satisfied the court that he is so authorised.
- [10] The reference in Rule 7(1) to the person “*acting on behalf of a party*” is to the attorney of record. It does not refer to a person deposing to an affidavit in support of an application, who may be a complete stranger to the proceedings (*cf. Mall (Cape) (Pty) Limited v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 350G-H) and whose authority to do so need not be demonstrated (*Ganes v Telkom Namibia Ltd* 2004 (3) SAS 615 (SCA) in paragraph 19).
- [11] In *Mall (Cape)* (*supra*), the Full Bench of this Court said the following (at 351A-C) regarding a challenge to the authority of an attorney to act for a natural person:

“Where a notice of motion which is issued in the name of an individual is complete and regular on the face of it and purports to be signed by an attorney acting for the applicant, then, in the absence of anything to show that the applicant has not in fact authorised the attorney to issue the notice of motion on his behalf, the Court will presume that the attorney was duly authorised to do so. An attorney is an officer of the Court and it must be presumed in the absence of any evidence to the contrary that he has satisfied himself that he has authority from the applicant to commence proceedings before doing so. By appending his signature to the notice of motion he in effect certifies that he has authority to act on behalf of the applicant. I say that the Court will presume the attorney's authority in the absence of evidence to the contrary, for it is of course always open to a respondent, if he has reason to believe that the proceedings have not been properly authorised by the applicant, to file an opposing affidavit setting out the grounds of his belief, in which case a triable issue of fact arises. I do not think that, in the case of notice of motion proceedings brought by an individual, the mere failure to file a power of attorney or a statement under oath showing that the applicant has conferred authority upon the attorney, renders the proceedings open to objection.”

- [12] There is controversy as to whether, where the authority of a person to institute proceedings is challenged, this can be done in answering papers or whether a formal notice in terms of Rule 7(1) must be given. The most recent word on this in this Division is the judgment in *Minister of Water and Sanitation v Clackson Power (Pty) Limited* 2024 (5) SA 280 (WCC), where Joubert AJ held that such authority – at least in relation to a juristic person – can be challenged on the papers and need not be done under Rule 7(1) (see the discussion in paragraphs 34 to 50). It is however not necessary for me to decide whether to treat that judgment as binding, both because the present matter involves a natural person, and because – as stated – there has in fact been no challenge to the authority of the attorneys of record in bringing the application (as opposed to the agent).

[13] In the circumstances, the Applicant's *in limine* objection based on lack of authority cannot be sustained.

The nature of the review

[14] In terms of the notice of motion, the review is brought under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The Applicant contends that various grounds of review enumerated in section 6(2) of PAJA are engaged by the Tribunal's ruling, warranting it being set aside, alternatively remitted to the Tribunal for reconsideration.

[15] While the Applicant confined its case on review to PAJA, it must be pointed out that section 17 of the Rental Housing Act provides as follows:

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

[16] The existence of this express statutory power in the Rental Housing Act raises the question as to its relationship with PAJA, which was enacted a year later and which gives effect to the constitutional right to lawful, reasonable and procedurally fair administrative action in terms of section 33(1) of the Constitution (*Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) in paragraph 22).

[17] This issue arises because of the recognition, well before the constitutional era, that there are various different pathways to judicial review. In *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 114-117, Innes CJ distinguished between (1) review of the decisions of inferior

courts for grave irregularities or illegalities, (2) the common-law review of decisions of public bodies, and (3) reviews provided for in statutes which are meant to give the courts “far wider” powers than those in the other two categories, in which case the court may act as a court of review and a court of appeal with the ability to deal with and decide the matter *de novo*.

- [18] In *Nel and Another NNO v The Master (Absa Bank Ltd and Others Intervening)* 2005 (1) SA 276 (SCA), it was acknowledged that the statutory power of review of a decision of the Master under section 151 of the Insolvency Act 24 of 1936 read with section 339 of the Companies Act 51 of 1973 constituted a review of the third type identified by Innes CJ in *JCI*. In that regard, the Court stated as follows (in paragraph 23):

“Thus, when engaged in this third kind of review, the Court has powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality has occurred. However, while it is sometimes stated that the Court's powers under this kind of review are 'unlimited' or 'unrestricted', this is not entirely correct. The precise extent of any 'statutory review type power' must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review. A statutory power of review may be wider than the 'ordinary' judicial review of administrative action (the 'second type of review' identified by Innes CJ in the *Johannesburg Consolidated Investment Co* case), so that it combines aspects of both review and appeal, but it may also be narrower, 'with the court being confined to particular grounds of review or particular remedies'.”

- [19] In that case, it was held that the review power was akin to that involved in the judicial review of a taxation, where in exercising this wider degree of supervision, the review court can depart from the taxing master's view where

the latter “*differs so materially from [the court’s] own [view] that it should be held to vitiate his ruling*” (see *President of the Republic of South Africa v Gauteng Lions Rugby Union* 2002 (2) SA 64 (CC) in paragraph 13). This envisages something more akin to an appeal, although the SCA held (in paragraph 25) that in questions involving the quantum of remuneration, the court should be slow to interfere with the decision of the entity under review.

[20] In *Nel (supra)*, the issue arose as to whether the introduction of PAJA meant that a statutory review of the Master’s decision now had to be accommodated under PAJA (and accordingly that there was no longer scope for a wider appeal-type review). The Court said (in paragraphs 28 and 29) that there may be merit in this view, given how PAJA sought to place the control of administrative power largely on a statutory footing. However, it did not decide the point because it concluded that the appellants had not made out for review in the matter before it, whether in terms of the requirements of PAJA or on a wider “appeal-type” review.

[21] There seems little doubt that the decisions of the Tribunal amount to “administrative action” as envisaged in section 33 of the Constitution and section 1 of PAJA. The Tribunal constitutes an “*organ of state*”, being a functionary or institution exercising a public power or performing a public function in terms of any legislation, and its decision (such as that in the present case) adversely affects the rights of the Applicant and has a direct, external legal effect, giving rise to an enforceable debt. Moreover, its decisions do not fall under any of the exceptions enumerated in the PAJA definition of

“administrative action”. In particular, the Tribunal is not a court and does not exercise judicial functions.

- [22] This conclusion finds support in *Young Ming Shan CC v Chagan* NO 2015 (3) SA 227 (GJ), where the following was stated (in paragraphs 45 and 46):

“Although the functions of the tribunal resemble those of courts of law in some respects, it is not a court of law. The mere fact that its ruling is deemed to be an order of the magistrates' court in terms of the Magistrates' Courts Act, and is enforced in terms of that Act (s 13(13)), does not make the tribunal a court of law and does not make its adjudicative actions judicial acts. There are similar provisions in the LRA with regard to arbitration awards of CCMA commissioners or arbitrators, but that has not affected the administrative nature of those acts. The tribunal is, nevertheless, a state organ exercising public power. Its functions are essentially administrative in nature and its proceedings are expressly made reviewable, and its rulings are not appealable. It is appropriate that the rental tribunal be held to the standards espoused by the Constitution in s33, namely lawfulness, reasonableness and procedural fairness. When all the facts and circumstances are taken into account, its functions, including those of an adjudicative nature, constitute 'administrative action' as contemplated in s33 of the Constitution.

PAJA does not exclude the proceedings and functions of the rental tribunal from its sphere of application. It expressly excludes those of courts of law and specific tribunals but not the proceedings of the rental tribunal established in terms of the Act. Since PAJA is the legislation contemplated to give effect to the rights contemplated in s 33 of the Constitution, it is applicable to the proceedings of the rental tribunal.”

- [23] The Court in *Young Ming Shan CC* (*supra*) did not expressly consider whether the provisions of section 17 of the Rental Housing Act justify review of a decision of the Tribunal on a wider basis than PAJA offers. In my view, it is not obvious that the promulgation of PAJA necessarily narrows the scope of the special statutory review under section 17. As in *Nel* (*supra*), however, it is not necessary to decide this issue, since (1) the ambit of the Applicant's review was

expressly limited to PAJA grounds, and (2) in any event, for the reasons that follow, the review must succeed on one or more of those grounds.

The statutory framework

[24] In terms of the definitions in section 1 of the Rental Housing Act:

- (a) a "lease" means "*an agreement of lease concluded between a tenant and a landlord in respect of a dwelling for housing purposes*";
- (b) a "tenant" means "*the lessee of a dwelling which is leased by a landlord*";
- (c) a "landlord" means, as far as is here relevant, "*the owner of a dwelling which is leased and includes his or her duly authorised agent*"; and
- (d) a "dwelling" includes "*any house ... or similar structure which is leased, as well as any store room, outbuilding, garage or demarcated parking space which is leased as part of the lease*".

[25] The application of the Rental Housing Act is not subject to a monetary threshold or limit. It applies to all leases of dwellings for housing purposes, including high-value dwellings such as that with which this case is concerned.

[26] Section 5(3) of the Rental Housing Act, under the overall heading "[p]rovisions pertaining to leases," provides that every lease "*will be deemed to include terms, enforceable in a competent court*" as described in the sub-paragraphs that follow.

[27] These deemed terms (which cannot be waived) include, as recorded in section 5(3)(e), the following:

“the tenant and the landlord must jointly, before the tenant moves into the dwelling, inspect the dwelling to ascertain the existence or not of any defects or damage therein with a view to determining the landlord’s responsibility for rectifying any defects or damage or with a view to registering such defects or damage, as provided for in subsection (7).”

[28] Section 5(7) in turn provides that “[a] *list of defects registered in terms of subsection (3)(e) must be attached as an annexure to the lease as contemplated in subsection (2)*”. (Subsection 2 requires a lease to be reduced to writing if the tenant so requests.)

[29] Chapter 4 of the Rental Housing Act (i.e. sections 6 to 15 thereof) regulates *inter alia* the establishment, composition, procedures and powers of provincial rental housing tribunals.

[30] In terms of section 8, “*the Tribunal must fulfil the duties imposed upon it in terms of this Chapter, and must do all things necessary to ensure that the objectives of this Chapter are achieved*”.

[31] The core provisions pertaining to the duties of the Tribunal are contained in section 13. In terms of section 13(1):

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

[32] Where a dispute arises in respect of a matter which may constitute an unfair practice, and where the matter cannot be resolved through mediation, the Tribunal is required to conduct a hearing and “*subject to this section, make such a ruling as it may consider just and fair in the circumstances*” (section 13(2)(d)).

[33] Sections 13(4) to 13(6) are of particular relevance to the present dispute. It is therefore useful to set them out in full, as follows:

- “(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) rule that any person must comply with a provision of this Act;
 - (b) where it would appear that the provisions of any law have been or are being contravened, refer such matter for an investigation to the relevant competent body or local authority; and
 - (c) make any other ruling that is just and fair to terminate any unfair practice, including, without detracting from the generality of the foregoing, a ruling to discontinue –
 - (i) overcrowding;
 - (ii) unacceptable living conditions;
 - (iii) exploitative rental; or
 - (iv) lack of maintenance.
- (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) a 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).
- (6) When acting in terms of subsection (4), the Tribunal must have regard to –
- (a) the regulations in respect of unfair practices;
 - (b) the common law to the extent that any particular matter is not specifically addressed in the regulations or a lease;

- (c) the provisions of any lease to the extent that it does not constitute an unfair practice;
- (d) national housing policy and national housing programmes; and
- (e) the need to resolve matters in a practicable and equitable manner.”

[34] At the heart of the Tribunal’s powers is the concept of an “*unfair practice*.” This is defined in section 1 of the Rental Housing Act as follows:

- “(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.”

[35] The reference to “*prescribed*” means “*prescribed by regulation by the MEC, by notice in the Gazette*.” The power to make such regulations as to the existence of unfair practices is contained in section 15(1)(f) of the Rental Housing Act. Among the aspects to which unfair practices may relate are “*damage to property*” and “*maintenance*”.

[36] On 1 February 2002, the MEC for Housing for the Province of the Western Cape, acting in terms of section 15(1)(f), issued “*Unfair Practices Regulations*”.

[37] Paragraph 2 of the Regulations provides that “*a failure to comply with these regulations constitutes an unfair practice contemplated in the definition thereof in section 1 of the Act*”.

[38] Under paragraph 4(1) (headed “*Conditions and maintenance*”), it is provided that a landlord must *inter alia*:

- “(a) let a dwelling which at the commencement of the lease is –
- (i) in a condition reasonably fit for the purpose for which it is let; and

- (ii) in a condition which does not contravene the provisions of the Act, these regulations, any ordinance, health or safety regulation or any other law;

...

- (d) effect repairs for which the landlord is responsible in terms of the lease, and as identified during inspections by the landlord, or on receipt of a notice from a tenant requesting such repairs, except that if the lease makes provision to the contrary, the landlord is not liable for repairs if the tenant, a member of his or her household or a bona fide visitor brought about the state of disrepair; and
- (e) effect repairs as soon as is reasonably possible having regard to the nature of the repairs but not later than 30 days of the inspection or the receipt of the notice contemplated by paragraph (d) or such further period as may be agreed to between the landlord and the tenant.”

[39] Paragraph 9 of the regulations contains general provisions applicable to landlord and tenant. In particular, for present purposes, a landlord may not:

- (a) “*engage in oppressive or unconscionable conduct towards the tenant*” (paragraph 9(1)(d)); or
- (b) “*conduct any activity which unreasonably interferes with or limits the rights of the tenant or which is expressly prohibited under the lease, the Act and these regulations, any ordinance, health or safety regulations or any other law*” (paragraph 9(1)(f)).

The material facts

[40] I now set out the material facts which emerged before the Tribunal, most of which are also referred to in the parties’ affidavits. I do so without regard, at this stage, for whether any such fact is technically admissible or inadmissible in

relation to any exercise of contractual interpretation which may be relevant in this matter. I address those aspects at the proper place below.

[41] The lease in respect of which the dispute arises is of a residential property situated within an upmarket golf estate in Cape Town. The Applicant (“Kelly”) owns the property. At all relevant times, he has lived overseas. The property was acquired for use by his son and daughter-in-law. When they vacated it, Kelly decided that he would sell it. In the meantime, he let it out to a tenant. The rental of the property was managed by Tyson Property Rentals, represented by one Liam Mally (“Mally”).

[42] The property was advertised for sale on an estate agent’s website. The advertisement highlighted a number of attractive features, one of which was:

“Large private sun-splashed swimming pool with counter swim unit for training.”

[43] I understand that the “*counter swim unit for training*” is a device fitted to the pool which generates a current against which one may swim while effectively remaining stationary – in a sense, an aquatic treadmill. It was also referred to between the parties and before the Tribunal as the “*pool trainer system*” or “*pool training unit*”.

[44] The fact that the property was available to rent came to the attention of the Second Respondent (“Hart”) and his life partner, Meredith Ellis (“Ellis”). They were interested in leasing the property, and Ellis contacted him via text message. Kelly indicated that a rental was a possibility, and directed Ellis to the property website for more information about the property.

- [45] Following further text messages, Kelly told Ellis that *“if you would go to R75 [i.e. rental of R75,000 per month], you can have it”*.
- [46] Hart and Ellis viewed the house. They sent an email to Kelly on 21 April 2021, stating that they would like to *“move forward with a fair offer, based on the current rental market both within and outside of [the estate]”*. They said they believed that a rental of between R70,000 and R75,000 per month was fair in the current market, but proposed that the home *“be in full working order”* before the move-in date. This was stated to include, but not to be limited to, ensuring that an indoor gas fire was working, a leaking roof was repaired, various items of furniture were removed and *“repair of the swim training system in pool (current tenant mentioned that this is not in working order)”*. Confirmation was requested that the lease would include golf membership, pets being permitted and that a pool service and garden upkeep were included. A further requirement was the installation of a battery inverter.
- [47] Following telephonic discussions with Kelly, Hart and Ellis sent a further email to him recording that it had been agreed to *“move forward with our lease.”* They recorded that the agreement would be as per the email referred to in the previous paragraph, save that Kelly would not be moving furniture out, *“but you will ensure that the house is in full working order, including the battery inverter on the basis as discussed with [Hart] on the phone”*.
- [48] Mally was then tasked with drawing up a lease agreement. He presented it to Hart who signed it on 26 April 2021.
- [49] Relevant terms of the written lease agreement were as follows.

(a) The property was leased for two years commencing on 1 September 2021, at a rental of R75,000 per month;

(b) It was recorded as a special condition that:

“Property mentioned in 1.4 of the Lease is rented as an (sic) Fully Furnished Property, which includes furniture, fittings and furnishings, which will be attached as an Annexure to this Lease Agreement.”

(c) There was a further special condition that:

“The landlord undertakes to ensure that the inverter is in working order and batteries are supplied and connected to the inverter by occupation date of this lease agreement”.

(d) Clause 14 deals with the inspection of the premises. Relevant provisions are as follows:

“14.1 The Tenant and the Landlord or the Agent ... will inspect the Premises together, before the Tenant takes occupation of the Premises, to determine whether there is any existing damage or defects to the Premises. Any damage and/or defect will be recorded in Writing, signed by the Landlord or the Agent (as the case may be) and the Tenant, and attached as an Annexure to this Lease Agreement. The Tenant, by way of this inspection, acknowledges that the Premises is fit for beneficial occupation.

14.2 The recordal of any defect or damage in Writing does not constitute an acknowledgement by the Landlord to have the defect or damage remedied. The Recordal is simply an acknowledgement that defect or damage exists, and that the defect or damage was not caused by the Tenant.”

(e) Clause 18.1 provides as follows:

“The Landlord will, at his own cost, keep and maintain, in good order and condition, except for Fair Wear and Tear:

...

18.1.2 geyser, pool pump, automated gates and doors, doors and window frames of the Premises;

18.1.3 be responsible for all maintenance repairs related to all electrical, plumbing, installations and furnishings on the Premises.”

- (f) In terms of clause 33, it was recorded that “*no addition to or variation or consensual cancellation of this Lease Agreement, including this clause, has effect unless it is in Writing and signed by both Parties*” (clause 33.1) and that the parties “*agree that this Lease Agreement is the whole agreement between the Parties in regard to its subject matter*” (clause 33.2).

[50] In a covering email to Mally which accompanied the signed lease, Hart and Ellis recorded that the lease had been signed but noted that it did not explicitly state that certain items would be in working order before they took occupation, namely the leaking roof, the “*pool water jet/current generator*” and the fireplace.

[51] In his response sent on 27 April 2021, Mally acknowledged receipt of the signed lease and stated (i) that “*regarding the points below, [Kelly] has tasked Pete to attend to all of them*” and (ii) that “*Pete will assess and affect (sic) the necessary repairs*”. Pete was a maintenance contractor who did work for Kelly. The reference to “the points below” was to the list of items which Hart and Ellis had mentioned in their covering email, as reflected in the previous paragraph.

[52] On 7 May 2021, in a further email to Hart and Ellis, Mally attached the countersigned lease agreement and stated that “*Pete ([Kelly’s] contractor) was at the house yesterday to assess and action all the work required on the house*”.

[53] The lease commencement date was 1 September 2021. Shortly before that, on 28 August 2021, an “*incoming inspection*” of the property was conducted between Hart, Ellis and Mally on behalf of Kelly. In this inspection, Mally filled out an 11-page document entitled “*rental property inspection*”. This lists various parts of the property and contains comments regarding their status or condition. It was duly signed by both parties and became Annexure B to the lease.

[54] The key part of this inspection schedule for present purposes is the following entry, which referred to the pool training unit:

“Trainer needs to be working.”

[55] On 30 and 31 August 2021, i.e. immediately prior to the lease commencement date, there was further text message correspondence between Hart and Mally. Hart had sent through a list of further “*snags*” which Mally undertook to add to the inspection report. Hart complained that the snags had not been fixed before the occupation date as Pete “*was meant to have done*”. Mally responded to say that he completely understood Hart’s “*frustration and annoyance*”, and had “*informed Pete and [Kelly] on all the snags and both myself and [Kelly] have action (sic) it with Pete*”.

[56] On 11 September 2021, Hart and Ellis emailed Mally, copying Kelly, and expressed their dissatisfaction with the lack of response to the “*outstanding*

snag list of jobs to be completed". In response, Kelly said that it was difficult for him to deal with this matter as he was living overseas, and that he *"will have to leave this to [Mally] and Pete to decide between them the way forward"*.

[57] On 17 September 2021, Hart and Ellis sent another email to Mally, recording again their *"disappointment"* inter alia that *"none of the repairs and maintenance as agreed had been carried out"*.

[58] On 20 September 2021, Mally sent an email to Hart and Ellis attaching an *"Excel spreadsheet of the issues"* for their comment. He stated that *"[t]here are only a few items inside the house that requires attention and the rest will be outside"*.

[59] The attached Excel spreadsheet contained a long list of maintenance items throughout the property. In respect of each, it was indicated *"whom will be attending,"* a *"date attend / assess"* and *"date completed"*.

[60] The first item on the spreadsheet is *"pool swim trainer"*. Under the heading *"whom will be attending"* is the name *"Yuri"*. Under the heading *"date attend/assess"* is 14 September 2021, and under *"date completed"* appears *"TBC"*. I understand *"TBC"* to mean *"to be confirmed"*.

[61] On 17 October 2021, Hart and Ellis sent a further email to Mally following a meeting that they had held some 10 days earlier. Apparently, Mally had suggested that they could vacate the property if they were dissatisfied, but they had confirmed that they preferred to stay, *"with the understanding that the outstanding issues as agreed to prior to our moving in would in fact be*

completed". They complained that nothing had been done in the meantime. There is no record of a response to this email.

[62] At around the same time, Kelly received a quote from a contractor for the repair of the pool training unit at a cost of some R63,000. He indicated to Mally that he was not prepared to pay this amount of money to fix the unit. Mally conveyed this to Hart and Ellis.

[63] In early February 2022, Hart lodged three complaints with the Tribunal. These were as follows:

(a) A complaint entitled "*failure to do maintenance.*" The specific maintenance problem was described as "*[u]nrepaired pool training system*". It was stated that the problem had arisen in April 2021 and that it had been undertaken that the system "*would be repaired BEFORE we moved into the property*". It was also stated that "*[w]e agreed to rent the premises and pay a higher rental on the proviso that the house was in full working order PRIOR to us moving in. The swim training unit being in working order was specifically identified as a provision of the rental*".

(b) A complaint entitled "*claim for remission of rental*". Hart recorded that "*[w]e also agreed to pay a higher rental on the proviso that ALL repairs and maintenance were complete PRIOR to our moving in, specifically the swim training unit*". The rental remission claimed was R5,000 per month, being "*the extra rent we are paying*". This was justified on the basis that "*[w]e believe we should be compensated the difference*".

between what we offered to pay R70,000 & what we agreed to pay R75,000 on the basis that all was working”.

- (c) A complaint entitled “*unilateral changes to agreement.*” Here, reference was made to the repair of the swim training unit, as well as a “*swapping out of golf cart, provision of weekly garden and pool service*”.

[64] The matter proceeded to a hearing before the Tribunal. The proceedings were lengthy, being held over three separate days (20 July 2022, 22 February 2023 and 30 May 2023). Hart and Ellis represented themselves, with Kelly being represented by attorneys. Kelly did not attend in person but Mally testified on his behalf. Hart and Ellis had an opportunity to cross-examine Mally, and they were cross-examined by Kelly’s attorney.

[65] On 30 June 2023, the Tribunal made its ruling. As stated, it directed Kelly to pay an amount to Hart by way of a remission of rent of R5,000 per month for the two-year lease period, i.e. a total amount of R120,000 plus interest on late payment.

[66] Kelly launched the present review proceedings against the ruling on 31 August 2023. The parties agreed an interim order suspending execution of the ruling until determination of the review. A transcript of the proceedings before the Tribunal was obtained and formed part of the record.

[67] The Tribunal does not oppose the present review application and abides this Court’s ruling.

The content of the ruling

- [68] It is convenient at this point to set out the essential content of the Tribunal's ruling, against which the review is directed.
- [69] It was first recorded that Hart was seeking a reduced rental because Kelly or his agent failed to repair an essential item that was a key element to the lease, namely the pool trainer system. It noted that the tenants' son was a provincial water polo player, and that the property was leased with a pool trainer. Hart had testified that there were various undertakings to have this item repaired. Reference was made to the ingoing inspection report and to the Excel spreadsheet with the pool trainer being the first item on the list. Hart had said that he agreed to pay "that specific monthly rent" on the understanding that the pool trainer was essential to the occupants. He had also referred to the sale advertisement which mentioned the pool trainer.
- [70] In relation to Kelly's case, it was recorded that he never intended to have the pool trainer repaired, and that he had no legal duty to do so. As regards the email correspondence about the trainer, he said that the intention was merely to assess the condition of the item and consider the quotes. Reliance was placed on clause 14 of the lease which did not contain a warranty that the unit would be in working order, and on the contention that the lease was never varied in writing.
- [71] The Tribunal then set out its findings, commencing from the premise that it had wide powers to come to a just and equitable decision. It had to consider all factors including the unfair practice regulations, the common law and the lease terms.

[72] The Tribunal referred to the Consumer Protection Act 69 of 2008 (“the CPA”) and highlighted the protections in that Act against false or misleading advertising. It stated that *“the advertisement, the ingoing inspection, the correspondence between the agent, the tenant and the landlord, as well as the defects list spreadsheet all indicate the fact that the pool trainer had to be attended to.”* It regarded the sale advertisement as *“a binding promise by the Landlord to execute the promise when entering into the agreement (as per the CPA)”*.

[73] The Tribunal then held that the position was the same with the Rental Housing Act. Relying on the Constitutional Court judgment in *Maphango v Aengus Lifestyle Properties (Pty) Limited* 2012 (3) SA 351 (CC), it expressed the view that a Tribunal has wider powers than simply to interpret agreements, and that *“a [rental housing tribunal] may disregard the terms and conditions of a lease if it finds those to be ‘unfair’ and finds a practice as a practice unreasonably prejudicing the rights or interests of a tenant or landlord”*.

[74] Having held that Mally (as agent) was also subject to the duties of a landlord under the Rental Housing Act, and was responsible to address the Tribunal on Kelly’s responses and arguments, and having stated that this was in line with the CPA that holds landlords accountable to the products or services offered to tenants, the Tribunal concluded as follows:

“4.11 The Inspection sheet also specifically refers to the pool training system that had to be attended to, further supporting the fact that the property was advertised and presented with a pool trainer and issues to be attended to.

...

4.13 After having considered all the facts, the merits, the interest and the law, the Tribunal finds that there was an unfair practice by [Kelly] and [Hart] is awarded remission of R120 000 for the deprivation, restricted use, and enjoyment of the rental dwelling”.

Discussion

- [75] The Tribunal, as a creature of statute, must operate within the bounds of its statutory powers.
- [76] The Tribunal’s powers to deal with complaints are prescribed by section 13 of the Rental Housing Act. The touchstone for the exercise of these powers is the presence or otherwise of an “*unfair practice*”. That is not some open-ended or undefined concept of equity. It is defined as either an act or omission by a landlord or tenant in contravention of the Rental Housing Act, or a practice prescribed by the provincial MEC to be one unreasonably prejudicing the rights or interests of a tenant or landlord.
- [77] The question as to whether something is an unfair practice for purposes of the Tribunal’s powers must therefore be judged solely by reference to the Rental Housing Act and the 2002 unfair practices regulations published in respect of the Western Cape Province.
- [78] It must follow that to the extent that something is prescribed in the Rental Housing Act or in the regulations which differs or departs from the terms of a lease agreement, the former provisions prevail over the actual content of the lease for purposes of determining whether there has been an unfair practice.

[79] This general principle was confirmed in the *Maphango* case before the Constitutional Court. That case involved the eviction of tenants from dwellings situated in Gauteng. The leases were terminable on reasonable notice by either party. The landlord had required the tenants to accept a higher rental. When they refused, the leases were cancelled on notice. It was contended *inter alia* that this amounted to an unfair practice under the Rental Housing Act. A complaint to that effect was lodged before the Gauteng tribunal.

[80] The Gauteng Unfair Practices Regulations provided at the relevant time that neither a landlord nor a tenant may “*engage in oppressive or unreasonable conduct,*” and that a landlord must not “*conduct any activity which unreasonably interferes with or limits the rights of the tenant or which is expressly prohibited under the lease, these regulations, the Act or any other law*”. Moreover, they expressly imported an obligation of good faith, providing that “[e]very obligation under these regulations, the Act, or any other law, and every act which must be performed as a condition precedent to the exercise of a right or remedy, imposes an obligation of good faith in its performance or enforcement”.

[81] Although the complainants had withdrawn their complaint before the tribunal to enable them to concentrate on opposing eviction proceedings, they continued to argue that the landlord had committed an unfair practice under the Rental Housing Act in terminating the leases.

[82] In relation to lease terminations, the Court recorded that the Rental Housing Act expressly provides that a landlord has the right to “*terminate the lease . . . on*

grounds that do not constitute an unfair practice and are specified in the lease”.

What that meant was explained as follows (in paragraph 51):

“In this way, the Act superimposes its unfair practice regime on the contractual arrangement the individual parties negotiate. That the statute considers its unfair practice regime to be super-ordinate emerges not only from the requirement that a lease-based termination must not constitute an unfair practice, but also from what the Act enjoins the Tribunal to take into consideration when issuing its rulings: these include “the provisions of any lease”, but only “to the extent that it does not constitute an unfair practice”. The effect of these provisions is that contractually negotiated lease provisions are subordinate to the Tribunal’s power to deal with them as unfair practices.”

[83] The Court highlighted (in paragraph 52) the fact that the MEC may prescribe, as an unfair practice, something “*unreasonably prejudicing the rights or interests of a tenant or a landlord*”. This is an indication that an unfair practice could extend beyond the strict ambit of contractual rights. It followed that “*the statutory scheme does not stop at contractually agreed provisions, and conduct in reliance on them. It goes beyond them. It subjects lease contracts and the exercise of contractual rights to scrutiny for unfairness in the light of both parties’ rights and interests*” (paragraph 53).

[84] The Court then returned to the Gauteng regulations, highlighting that a landlord must not “*engage in oppressive or unreasonable conduct.*” What this meant was that “*‘oppressive’ conduct might be held to entail an exercise of a landlord’s legal entitlements under a lease that oppresses or unreasonably prejudices a tenant’s interests*” (paragraph 54).

[85] The approach of the Constitutional Court in *Maphango* is therefore based on the tribunal’s powers as they appear from the Rental Housing Act and the

Gauteng regulations. It is indeed the case that the statutory unfair practices regime is superimposed on the contractual regime, so that a landlord or tenant cannot escape the consequences of an unfair practice merely because such conduct would in law be permitted under the terms of the lease. However, this does not mean that a tribunal may apply an untethered equitable approach towards a landlord's conduct. It must be able to locate the unfair practice either as a contravention of the Rental Housing Act or as a prescribed unfair practice.

[86] The Tribunal appears to have misconstrued the nature of its powers as discussed in *Maphango*. The Constitutional Court did not find, as the Tribunal did, that such a tribunal has “*unique and wider powers than to simply interpret agreements as it may determine how the ‘interests’ of a party is affected by a lease agreement*”. Nor did it hold that a tribunal may “*disregard the terms and conditions of a lease if it finds those to be ‘unfair’ and finds a practice as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord*”. What it did find was that the tribunal may have such powers to the extent that they have been prescribed by regulation. Such broad equitable powers thus do not exist purely as a result of the promulgation of the Rental Housing Act. In the case of the Gauteng tribunal, the equitable discretion was the result of the publication of the regulations rendering it an unfair practice to engage in “*oppressive or unreasonable conduct*”.

[87] The Tribunal made no mention whatsoever of the terms of the Rental Housing Act nor the Western Cape regulations and did not expressly hold that Kelly's conduct could be brought under any of the provisions thereof. It seems instead to have held that the conduct of Kelly and Mally was “*unfair*” in a general sense,

having regard to the contents of the advertisement, the inspection record, the correspondence and the post-contractual defects list spreadsheet.

[88] In so conceiving of the ambit of its powers, the Tribunal committed a material error of law (section 6(2)(d) of PAJA) or at the very least took irrelevant considerations into account in deciding on whether an unfair practice was established (section 6(2)(e)(iii) of PAJA).

[89] Moreover, the Tribunal appears to have considered the contents of the CPA, and particularly the provisions relating to advertising and marketing of goods and services, to be directly and independently relevant to its determination. It elevated the sale advertisement to a “*binding promise ... to execute the promise [of a working pool trainer] when entering into the agreement*”.

[90] As stated, one of the general provisions in the regulations prohibits a landlord from doing anything which is expressly prohibited under the lease, the Rental Housing Act or regulations, any ordinance, health or safety regulations “*or any other law*”. It is therefore possible in principle to conclude that a contravention of an express provision of the CPA in a matter relevant to a lease is “*unfair conduct*”, although the Tribunal did not draw this connection between the provisions.

[91] It is not certain that the CPA is applicable to Kelly’s role as a prospective landlord. Hart contends that it is, because Kelly let his property “*in the ordinary course of business*” (as required by the definition of “supply” in section 1 of the CPA), while Kelly argued that the leasing activities were *ad hoc* and temporary, and therefore did not fall under the CPA at all.

[92] But even if the CPA binds Kelly, it is by no means clear to me that his conduct contravened the provisions relied upon by the Tribunal. Whatever the sale advertisement stated, Hart was at all times aware that the pool trainer was not actually operational. It therefore cannot be said that he was misled by the advertisement in entering into the lease. None of the other documents in which the pool trainer is mentioned (e.g. the inspection report) constitutes part of the “marketing” of the property. I therefore do not think it likely that the CPA would apply to the facts of this matter, even if it were in principle applicable to Kelly as a prospective landlord.

[93] Whether the CPA is in principle relevant to the analysis of an unfair practice between Hart and Kelly through the operation of paragraph 9(1)(f) of the regulations is however, in my view, moot. As I shall show, it is clear that an unfair practice existed on a much more straightforward basis.

[94] I reiterate that in terms of regulation 4(1)(d), a landlord must “*effect repairs for which the landlord is responsible in terms of the lease.*” Failure to do so is an unfair practice.

[95] It is correct that the main body of the lease agreement does not specify Kelly’s duty to repair the pool trainer. However, Annexure B to the lease, being the inspection report, is a written document signed by both parties and incorporated into the lease.

[96] Annexure B expressly records that the “[t]rainer needs to be working.” On its plain language, this is something very different from an objective recordal of the existence of a defect (as may be the case if it simply read “*trainer not working*”).

It reflects something that “needs” to occur, i.e. something that is required to be done. In my view, this is plainly a contractual recordal in the lease that the pool trainer is required to be brought to working order.

[97] The next question is: accepting that it is agreed that the pool trainer must be repaired, on which of the parties does the obligation rest? Counsel for Kelly properly accepted that if the words do introduce an obligation to repair the device, that obligation must rest on Kelly, rather than Hart.

[98] In summary, I consider that on its plain language, the inspection report incorporates an express contractual obligation on Kelly to repair the pool trainer.

[99] Contractual interpretation is however not limited to the language in question. It is a unitary exercise in which regard is had to the context and the ostensible purpose of the provision in question. The court may have regard to material known to the person/s producing the document (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) in paragraph 18). It is in particular competent to have regard to what passed between the parties leading up to the conclusion of the contract, as context for the proper interpretation of the written memorial (*University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) in paragraphs 66 and 67). Of course, such information must be treated with caution and its scope must be limited to guiding the interpretation, rather than being employed to amend or add to the written contract in contravention of the parol evidence rule.

[100] Considering the pre-contractual history, the evidence established that from the very outset of the contractual negotiations, Hart and Ellis made it clear that the pool training unit must be in working order. Kelly never resisted this. On the contrary, Kelly (through Mally) twice indicated that a contractor would attend to the listed items, including the pool trainer, before Hart and Ellis moved in. At the time of the inspection, that had not been done. This was not satisfactory to the new tenants, and they insisted on the abovementioned statement being included in the inspection report.

[101] That factual background strongly supports the interpretation of the language in the inspection report as containing a positive obligation to repair the unit, rather than a neutral recordal that the unit was not working. Mally's contention before the Tribunal that this was no more than a recordal of a "*request*" by Hart for the trainer to be working, cannot be reconciled with the imperative language used ("*needs to be working*").

[102] It is also competent, in interpreting a contract using the *Endumeni* approach, to have regard to the manner in which the parties conducted themselves after its conclusion (*Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* [2012] ZASCA 126 (SCA) in paragraph 15). What is significant in this regard is that the pool trainer was on the top of the maintenance list produced by Mally after the tenants took occupation. The fact that once Kelly learned a month or so later how much the repair would cost him, he refused to carry out the repairs, does not detract from this.

[103] The context of the parties' engagements up until the conclusion of Annexure B (and in the period thereafter, prior to Kelly's refusal in October 2021 to repair the unit) thus supports and confirms, rather than detracts from, the impression created by the plain language of the provision that Annexure B contained a contractual obligation on Kelly to repair the pool trainer.

[104] In this context, I should address Kelly's argument that reading the highlighted words in Annexure B as introducing an obligation on him to repair the pool trainer is in direct contradiction of clause 14.2, which, as mentioned above, provides that the recordal of any defect or damage at the inspection does not constitute an acknowledgement by the landlord to have the defect or damage remedied.

[105] The difficulty with this argument is that the words are not a mere recordal of a defect or damage. They expressly incorporate a positive obligation to put the trainer into working condition. They therefore fall outside the scope of clause 14.2.

[106] Finally, Kelly also seeks to rely on the non-variation and sole memorial clauses (clauses 33.1 and 33.2) as a basis to exclude any obligation to repair the pool trainer not contained in the lease terms. However, it is common cause that Annexure B is incorporated into the lease, and in any event, it constitutes a written document signed by both parties. Neither contractual restriction therefore applies.

[107] Accordingly, the evidence before the Tribunal pointed plainly to the existence of an unfair practice for purposes of paragraph 4(1)(d) of the regulations, in the

form of Kelly's failure or refusal to repair the pool trainer as required by the lease.

[108] The position therefore arises that although the Tribunal misconceived the nature or ambit of its powers, warranting the review and setting aside of the decision, on a proper application to the facts of the provisions of the Rental Housing Act, read with paragraph 4(1)(d) of the regulations, an unfair practice did indeed exist.

[109] This makes it unnecessary to consider whether an unfair practice could also be located under regulation 9(1)(d) which prohibits a landlord from engaging in "oppressive or unconscionable conduct towards the tenant." The notion of "unconscionable" conduct appears to involve something more serious than mere "unreasonable" conduct, which is the text of the Gauteng regulations. I cannot exclude the possibility that Kelly's conduct in refusing to have the pool trainer repaired, in the context of the role which that device played from the outset of the parties' engagements, may be viewed as "unconscionable" even if there was strictly no contractual obligation to effect the repair. But since my view is that there was a contractual obligation to repair, this need not be decided.

[110] In the exercise of its remedial discretion, this court has the power to make "*any order that is just and equitable*" under section 8(1) of PAJA, including the power in exceptional cases to substitute or vary administrative action or correct a defect resulting from the administrative action (section 8(1)(c)(ii)(aa)). A court will apply this power of substitution *inter alia* where the result would be a

foregone conclusion, rendering it a waste of time for the administrator to reconsider the question (*Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* 2015 (5) SA 245 (CC) in paragraph 49).

[111] On the present facts, I am in as good a position as the Tribunal to decide whether an unfair practice has been established in the form of a breach of an undertaking to repair the pool trainer. No further admissible evidence can realistically be presented on this point. In the circumstances, even though the Tribunal's reasoning process in deciding that an unfair practice existed was defective, it makes no sense to require the Tribunal to reconsider that issue because the result will, in my view, inevitably be the same.

[112] I point out in this regard that it was a part of Hart's case in opposing the review that the purpose of the inspection list (and especially the provision "*trainer needs to be working*") was to record the items that Kelly needed to fix, and that the inspection list became part of the lease. Hart also expressly contended that the inspection report, as part of the lease, overrides any provision in the lease to the contrary, including clause 14. The same was pressed in oral argument before me.

[113] I therefore propose to substitute for the finding of the Tribunal that there was an unfair practice (based on a wrong understanding of its powers) a different determination that there was an unfair practice, albeit in the form of a breach of paragraph 4(1)(d) of the regulations (being Kelly's failure to comply with his obligation under the lease to repair the pool trainer).

[114] But that is not the end of the matter. A finding that there is an unfair practice, while essential for the grant of substantive relief, does not itself constitute such relief. It is the gateway to the Tribunal's power to make a just and fair ruling (section 13(2)(d)) to terminate the unfair practice (section 13(4)(c)). This may include "*a determination regarding the amount of rental payable by a tenant*" (section 13(5)), which includes a rent remission.

[115] Having set aside the determination that there was an unfair practice on the basis held by the Tribunal, it must follow that the relief granted on the strength of that determination must also be set aside. And while I consider myself in a proper position to substitute the underlying determination as I have indicated above, I am not in a position to do the same in relation to the determination of the relief.

[116] This is because, in the first instance, while the power to make a rental determination is wide, the Tribunal's hand is not entirely free. Section 13(5) of the Rental Housing Act provides expressly that such a determination must be made in a manner that is just and equitable to both parties and takes due cognisance of the factors referred to in sub-paragraphs (a) to (c) thereof, including prevailing economic conditions of supply and demand and the need for a realistic return on investment.

[117] The Tribunal's ruling does not enter into any discussion as to the basis for finding that a rent remission of R5,000 per month would be fair and equitable to the parties. Nor is there any express treatment of the factors in sub-paragraphs (a) to (c) of section 13(5).

[118] In my view, the exceptional circumstances for a substitution order in respect of the quantum of any rental remission are therefore not present. The proper approach would be for the matter to be remitted to the Tribunal for it to reconsider the issue of relief, including any amount of reduced rental in accordance with the requirements of section 13(5). To that end, it is of course permitted to receive further evidence or input from the parties.

[119] This is not to say that when the Tribunal does so, it may not legitimately come to the same conclusion as to the quantum of the remission as it did before. In other words, I am not suggesting that a remission of rent by R5,000 per month (a reduction of just under 7%) will necessarily not be found to be fair and equitable to the parties. In reaching its decision, the Tribunal must however exercise its power in accordance with the applicable precepts of the Rental Housing Act, as discussed above. I cannot prejudge the outcome of that exercise.

Costs

[120] Both parties have had a degree of success in the present matter. Kelly has established that the Tribunal's decision-making process in relation to the existence of unfair conduct was defective. Hart, on the other hand, has the benefit of a ruling that there should nonetheless have been a finding of unfair conduct, albeit on a different basis. The quantum of the rent reduction remains to be determined.

[121] I am also mindful of the fact that both parties have incurred considerable costs in pursuing the litigation to date. The express statutory objective of facilitating

speedy resolution of rental housing disputes with minimal cost has not been achieved. The proliferation of costs in this sphere is to be discouraged.

[122] In the circumstances, it appears to me that the appropriate course is to make no order as to costs.

Conclusion

[123] In conclusion, I make the following order:

1. The Applicant's review of the Tribunal's determination that an unfair practice was established succeeds, but that determination is substituted with a finding that the Applicant committed an unfair practice in the form of a breach of paragraph 4(1)(d) of the Unfair Practices Regulations.
2. The question as to the relief to be granted pursuant to the substituted determination of an unfair practice is remitted to the Tribunal for reconsideration in accordance with sections 13(4) to 13(6) of the Rental Housing Act.
3. There is no order as to costs.

M W JANISCH

Acting Judge of the High Court

Western Cape Division

APPEARANCES:

For the Applicant:

L van Zyl

Instructed by:

Smith Attorneys

For the Second Respondent:

J C Tredoux

Instructed by:

Diaan Nel & Gagliano Inc