IMPARTIALITY A CRUCIAL VALUE

Any perception of prejudice diminishes credibility of the RHT

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LAST WEEK we looked at the mediation process of the provincial Rental Housing Tribunal (RHT).

A requirement is for the mediator to remain impartial. The mediator does not take sides and conducts her / himself in a professional manner with all the skills required, avoiding any suspicion of a bias.

An RHT member (commissioner) often mediates, but as a mediator, is a third party neutral without being able to give a ruling or make a decision.

Should the mediation fail, the complaint is referred to the RHT for a hearing.

The mediator, being privy to the "evidence", does not form part of the panel of commissioners and does not provide any information to any party, not even the RHT, except that the mediation has failed.

The mediators, commissioners and support staff of the RHT must be trained and must have a thorough knowledge of the laws relating to residential tenancies.

The public does not distinguish between the staff, mediators and members, considering all of them as constituting the RHT. Any bias, prejudice or misconduct may tarnish the neutrality and objectives of the RHT.

A tenant who was given a 48 hours notice recently could not lodge a complaint with the RHT because of the perception of bias on the part of the RHT.

The context of this perception reveals that, in fact, the mediator, who is also a commissioner, did indeed violate the fundamental principles of mediation and the rules of natural justice.

Accordingly, the mediator compromised the impartiality of the RHT (refer to Schulte v Van der Berg and Others NNO 1991 (3) SA 717 (C) and ABSA Bank Ltd v Hoberman and Others NNO 1998 (2) SA 781 (C)).

The tenant lodged a complaint of an unfair practice relating to a notice to vacate that was given telephonically. The notice emanated from a dispute about the payment of rates, in addition to the monthly rental.

The mediator had to get parties to focus on the nature of the dispute, the underlying reason for the conflict and to guide parties on the legal principles and the relevant provisions of the law, e.g., the Rental Housing Act, common law and the law of contract.

A successful conclusion would result in a mediation agreement signed by the disputants; the mediator's signature would be that of a third party neutral. In this particular instance, an agreement was concluded but seriously compromised the RHT.

The agreement should have dealt with the issue of the payment of rates and that the notice to vacate was therefore valid or that it did constitute an unfair practice.

Under common law, it is the owner's responsibility to pay rates and other municipal service charges but in terms of a written contract, the tenant may agree to pay a portion of the rates or the total amount.

The tenant / complainant signed a mediation agreement that contained one paragraph recorded by the mediator to the effect that the landlord issued a proper notice in his presence.

The notice was drafted by the landlord and handed over to the tenant on the apparent advice of the mediator.

The mediator thus became a party - a biased party, a witness - and acted indirectly as a "sheriff".

The tenant was confused but signed the agreement. Two days later, the tenant was given a 48 hours notice for not paying the rates. She was reluctant to approach the RHT. The mediator did not resolve the dispute nor referred it on to the RHT for adjudication.

The support staff, mediators and members of the RHT, in pursuing the objectives of the Rental Housing Act, must act as a magistrate or a judge who does not enter the fray, but conducts herself / himself as an objective, third party neutral.

Van Zyl J in ABSA Bank Ltd v Hoberman and Others NNO 1998 (2) SA 781 (C)
at page 796 states, "It follows that, if a commissioner should conduct his enquiry in a partial or biased manner, he would be acting in conflict with the aforesaid precepts and would ordinarily be disqualified from continuing to exercise his functions as a commissioner.

"This is the case not only where he has demonstrated actual bias or a lack of impartiality, but also where his conduct provokes a reasonable suspicion thereof. In such cases he may justifiably be requested to recuse himself."

"Should he fail or refuse to do so, a Court may be approached to remove him by terminating his appointment as a commissioner."

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