



THE IMPACT OF COVID-19 ON RESIDENTIAL LEASE AGREEMENTS

During the course of the last few months, many have opined and much has been written in regard the impact of COVID-19 and the National Lockdown on commercial agreements, but very little information is available regarding their impact on residential lease agreements. The ambit of this article is therefore confined to a discussion concerning the impact of the pandemic and National Lockdown on the residential letting sphere only.

Simply put, a residential lease agreement is a contract concluded by and between a landlord and tenant in respect of the hiring of a dwelling for housing purposes.

More often than not, the lease agreement is reduced to writing, which is mandatory in circumstances where the tenant has requested it. This will in due course become a peremptory requirement (with some exceptions), whether requested by the tenant or not. Typically therefore, most of the respective parties' rights and obligations are catered for in the lease agreement. There are however extraneous provisions governed by statute and the common law that find application, whether such provisions are expressly contained in the lease agreement or not. Examples of such provisions can be found in the Consumer Protection Act (68 of 2008) and the Rental Housing Act (50 of 1999, as amended).

As indicated above, the underlying basis for a residential lease agreement is the provision by the landlord to the tenant of the residential premises in question, in exchange for the payment of rental.

Under the National Lockdown, there are a few different scenarios which have emerged, although to date these issues have not yet been extensively tested in court. As a result, there is a degree of uncertainty as to how the courts will treat these scenarios. With that said, there are two in particular that require consideration:

1. Where the parties have concluded a residential lease agreement and the tenant is in occupation of the premises in question:

- 1.1. In these circumstances, the tenant is obliged to make payment of rental in accordance with terms of the lease agreement, while the landlord, in turn, is obliged to grant free and undisturbed occupation of the premises to the tenant.

- 1.2. It may be that the tenant has experienced financial hardship as a consequence of the National Lockdown, but this in no way detracts from his/her obligations to pay rent. If parties were able to wriggle out of their contractual obligations by virtue of economic hardship (which is often unforeseen), written agreements would have little value, the rule of law would be compromised, and financial lending institutions would have no incentive to advance credit.
2. Where the parties have concluded a residential lease agreement and the tenant has been precluded from taking occupation of the premises in question due to the regulations issued in terms of Section 27(2) of the Disaster Management Act, Act 57 of 2002 (“the Regulations”):
 - 2.1. This scenario is more complicated and is encountered far less frequently.
 - 2.2. Where beneficial occupation of the premises in question has been precluded by the regulations (e.g. the premises is in another province, so tenant is not able to travel there), this amounts to a supervening impossibility of performance – namely where performance by the parties was possible when the contract was initially concluded, but thereafter became impossible through no fault of the parties.
 - 2.3. If the impossibility is only temporary, the parties’ contractual obligations are not extinguished, but may well be suspended. If, for example, it is not practically possible for the tenant to take occupation of the premises for a period of time, the tenant would ordinarily be entitled to a remission of rent in respect of the period during which the premises cannot be accessed or enjoyed. However, the terms of the lease agreements should always be consulted, given that the parties might have agreed to something different.
 - 2.4. If performance in terms of the agreement is rendered permanently impossible, then the parties’ respective contractual obligations are extinguished, as if the contract were never concluded.

If a landlord is faced with tenants who are unable to pay rent but nevertheless refuse to vacate the leased premises, the landlord would ordinarily have the right to apply to court for the eviction of the tenants. The eviction process is governed by the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, which ensures that the tenant is fairly treated and not unfairly discriminated against.

However, under the National Lockdown evictions are no longer there for the asking. Initially, the Regulations provided that *“no person may be evicted from their place of residence, regardless of whether it is a formal or informal residence or a farm dwelling, for the duration of the lockdown”*. This “lockdown” period ran from 26 March to 30 April 2020. With the arrival of Alert Level 4, the position changed, inasmuch as courts were permitted to grant eviction orders – provided however that any order of eviction would be stayed and suspended until the last day of Alert Level 4 (unless the court decided that it was not just and equitable to do so). The position is the same under Alert Level 3.

There is no question that COVID-19 has affected landlord and tenant alike, and that the economic fallout will be felt for months to come. Ideally therefore, contracting parties should work to resolve contractual disputes amicably and without the need for lengthy, costly litigation. A suitable compromise, whether in the form of a temporary “rent holiday” or some other relaxation of the terms of the lease, will often achieve better results in the long term than letters of demand and months of legal wrangling. Having said that, the parties should take appropriate legal advice to ensure that their rights are preserved, particularly in cases where alterations to, or a relaxation of, the terms of the lease agreement have been proposed.

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