

# THE PI GROUP

*The biggest player in the commercial property sector*

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**The Coronavirus crisis has elicited government response, of which we are all aware.** However, in the private sector, certain organised responses have also been observed. During the week of 23 March 2020, the major representative bodies for real estate in South Africa – namely the South African Real Estate Investment Trust (SA Reit) Association, the SA Property Owners Association and the SA Council of Shopping Centres – formed a collective, which has been coordinating its response to the Covid-19 pandemic, and specifically the economic effects of the lockdown, which at the time had been gazetted for an initial period of 21 days.

The newly formed Property Industry Group (“The PI Group”) says that it represent the commercial real estate sector in South Africa, which includes the country’s large property owners.

Naturally, with the lockdown provisions prohibiting almost all retail services, and with retailers being heavily dependent upon monthly cash flows which have now largely stopped, the PI Group has realised that, if it does not assist such retailers, the majority of them will not survive as tenants. Regardless of the legal right to recover rental not paid, practically if tenant businesses fail then landlords will not be paid. As will be seen below, though, the PI initiative also seeks to protect the jobs of those persons working in the retail sector.





The tables below illustrate the relief packages to be rolled out by commercial landlords.

**SMME RETAILERS** (categorised by the DTI as having annual turnover of up to R80 million)

Category	Basic assistance and relief	Interest-free deferment recovery period
<b>Level 1:</b> Highly impacted retailers (e.g. companies selling time and services such as restaurants, hair-dressers, travel agents, takeaways, etc.)	<b>April 2020</b> • 35% to 100% of April 2020 rental and further potential relief could be in the form of rental deferrals  <b>May 2020</b> • up to 50% of May 2020 rental and further relief could be in the form of rental deferrals	Over six to nine months from 1 July 2020
<b>Level 2:</b> Medium impacted retailers (e.g. companies selling product that doesn't have a limited shelf-life, etc.)	<b>April 2020</b> • 35% to 50% rental discount and further potential relief could be in the form of rental deferrals  <b>May 2020</b> • up to 25% of rental discount and further relief could be in the form of rental deferrals	Over six to nine months from 1 July 2020
<ul style="list-style-type: none"> <li>• Tenants' financial position and strength of balance sheet to be assessed by the landlord to classify in an impact category.</li> <li>• Landlords have flexibility and discretion. on a case-by-case basis, to adjust parameters; however, minimums are set as the base guideline.</li> <li>• Normal or better trading assessed considering rent-to-sales ratios, balance sheet, stock availability, etc.</li> </ul>		

**NON-ESSENTIAL GOODS & SERVICES**

Category	Basic assistance and relief	Deferment recovery period
SOE and government tenants	No relief offered – 100% of rent payable (excl. temporary testing, laboratories and healthcare services housed free)	N/A
All retailers with annual turnovers above R80 million (including local and international listed/publicly-traded retailers and large unlisted retailers)	<b>April 2020</b> • 35% rental discount and 15% rental deferrals  <b>May 2020</b> • 15% rental discount and 35% rental deferrals	Over six months from 1 July 2020





ESSENTIAL GOODS & SERVICES		
Category	Basic assistance and relief	Deferment recovery period
Retailers offering more than 75% essential services	No relief offered – 100% of rent payable	N/A
Retailers offering essential services but electing to close	No relief offered – 100% of rent payable	N/A
Retailers offering partial essential services, less than 75%	<ul style="list-style-type: none"> <li>• Essential goods – 100% of rent payable</li> <li>• Non-essential goods &amp; services – as per retailers with annual turnovers above R80 million</li> </ul> Pro-rated by essential goods & services turnover vs non-essential good & services turnover (or gross lettable area if specifically agreed)	For non-essential goods/services portion over six months from 1 July 2020

According to the PI Group, the initiative targets preserving jobs for retailers, their suppliers and service providers, and in order to qualify for the relief benefits, retail tenants will need to undertake to refrain from retrenching staff during the relief period. There is therefore a clear intention to protect jobs as well as to preserve the viability of tenant businesses.

The package stipulates that all tenants whose accounts were in good standing at the end of February “can be assured that there will not be any evictions for the next two months”. This means that the landlord is effectively waiving any right to take legal action for the two month period, thereby deferring the obligation to pay rental. This appears to be achieved as a matter of law by agreement.

Moreover, retailers prevented from trading in compliance with South Africa’s government-mandated lockdown, meaning those trading in non-essential services, and who were in good standing at the end of February, are offered some form of assistance from landlords. However, the extent of that relief depends on the severity of impact.

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It can be seen from the tables above that for the months of April and May, retail landlords will offer relief in the form of rental discounts where rental will be waived partially or fully and interest-free rental deferrals where the deferred rental will be recovered later over a period of six or nine months from July 1 this year, onwards.

Rental includes rent, operating costs and parking rental but excludes all rates and taxes recoveries and utility cost recoveries, as well as insurance, which all tenants will be required to pay in full for April and May.

The rider is this: each landlord can use their discretion in the relief and assistance that they give a retail tenant, but the property industry package stipulates the minimum that qualifying retailers can expect. Further, Landlords will, on a case-by-case basis, also consider providing relief for office, industrial and hospitality tenants where the lockdown severely impacts the tenant and where it is justified. These tenants will negotiate relief terms directly with their landlords.

In addition, the spokesperson of the PI Group has said the following: "We've seen retailers reverting to legal positions, but we don't believe that litigation provides either side with timeous solutions needed to get through this unprecedented time. We need to stand together and find workable solutions that will benefit the country, protect jobs, and sustain our businesses through this challenging time. We believe what we are offering is balanced and addresses some of the key issues on both sides. It is an equitable way to protect both industries and, very importantly, looks after the drivers of employment creation, namely the SMMEs".

He has, on a number of occasions sought to assert that this package is a demonstration of goodwill by the PI Group.

The reference above by the Chairman of the PI Group to retailers "reverting to legal positions" is of significance: taking the assistance package is as a matter of law an agreement by the entity (retailer) in question, and any retailer should carefully consider whether the PI package is in their interests or not. It might well be that a retailer is in a better position under their contract or the common law to invoke vis major, as a basis for rental not only being deferred, but not being due at all. Each entity considering this package should, before agreeing thereto, take careful legal advice as it may be worsening its own position. Alternatively, the package may be in the interests of certain retailers. This will depend upon the terms of their written agreements with their landlords.

On the face of it, it would seem as though the package announced by the PI Group is a gesture of goodwill or is generous and that it would indeed alleviate the





burden faced by commercial tenants during the turbulent times that COVID-19 has caused the sector to deal with. However, it is a waiver of existing legal rights by the retailer, and this waiver should be carefully considered. The PI package provides only a deferment of rental, and by agreeing thereto a retailer would waive their right in law to raise vis major as basis for not paying rental at all while lockdown enures.

Whilst the Pi package may be attractive in some cases, a careful consideration of the overall impact of the relief package reveals that they are deferments of payments due, which will have to be paid in due course.

Some might argue that it is only the interests of the landlords which receive adequate safeguard in the package. This is because each landlord will in due course still be required to be paid all amounts otherwise due in the normal course of business.

As pointed out earlier, allowing Tenants to defer rental is materially distinct from rental discounts, remissions of rental or waivers of rental, and this distinction must not be ignored. This is especially so since many tenants may be in a position to achieve rental discounts or remissions on the basis of force majeure.

Incidentally, the announced package seemingly fails to adequately account for the fact that in most cases, the lockdown significantly impacts the income and revenue streams of commercial tenants even after the lockdown provisions may have been lifted. The effect of this reduction in income will be an inability to meet expenses like rental now and in future, as the economic effect will likely be devastating and require a long period of time for any recovery to take place. What the package does, in effect, is increase the indebtedness of tenants and offer repayment terms that are largely unfavourable.

At the time of announcement, the PI Group assumed the lockdown would last for 21 days. Such period has since been extended. It will be interesting to observe how this relief package is effected in the coming months and how it will be received by commercial tenants nationwide. Retailers or other parties considering taking this relief package would be well-advised to take legal advice before doing so (especially before signing anything). Whilst the relief package may be in one retailer's interests, it may also not be in another's.

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