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Consumer Protection Act 68 of 2008

Marlon Shevelew specializes in the Consumer Protection Act ("the Act") and has conducted seminars on this Act and its applicability to the Rental industry to numerous managing agents in Cape Town, Durban and Johannesburg.

Marlon has been further privileged to have had the newly elected Chairman of the Consumer Protection Act Tribunal (Western Cape) as a guest in his seminars.

"Click" to read the the latest news from the Dept. of Trade and Industry on the Consumer Protection Act Regulations, 2010.

Is the Act applicable to the leasing industry?

The Consumer Protection Act is an extensive new piece of legislation which will have far reaching and expansive consequences for persons doing business in South Africa.

It was enacted by the legislator in order to promote and protect the economic interests of consumers and it will require businesses to ensure that all their dealings with consumers are transparent, fair, reasonable and honest.

In order to comply with provisions and spirit of the Act, businesses will have to implement changes to their business policies and administration to transform the way in which they interact with consumers.

Does the act apply to lease agreements?

The Act applies to every transaction within South Africa, unless exempted.

The definitions of importance for the leasing industry are as follows:

Transaction includes an agreement between persons for the supply of goods or services in exchange for consideration.

Service includes the provision of access to, or use of, any premises in terms of a rental.

Rental is defined as being an agreement which provides for temporary possession, or the right to the use, of premises in exchange for consideration.

Consideration may be by way of money, property or anything else of value in the widest sense, and may be transferred directly or indirectly, say through a third party (e.g. a rental managing agent).

Supplier is defined as a person who either promotes or supplies any goods or services. Both rental property owners and managing agents would thus fall within this definition.

Consumer is defined as a person to whom the goods and services are marketed to, who enters into the transaction with a supplier or, if the context requires or permits, is the recipient of the particular goods or services, irrespective of whether such recipient is a party to the transaction. Thus a Tenant falls within this definition.

So, in short, the act does apply to lease agreements generally.

The Act will impact on the Rental property industry by allocating the self same, and at times, draconian provisions that are applicable to any agreement between a supplier and a consumer to a Landlord and Tenant, in other words a lease agreement thereby affording the Tenant the right of cancellation of the lease on 20 business days notice.

Various sections of the Act including s8 – Unfair discrimination, , s11 -Directing marketing, s14 -The Fixed term agreement, as well as s22 – plain and understandable language, to name but a few, will make the leasing of property, the lease itself, the rights of the Tenant to comply with the lease requirements etc subject to tremendous scrutiny. This will dissuade potential property purchases, cause panic with already belligerent Tenants and inevitably lead to acrimony between already strained relationships in many instances.

To elaborate:

Section 14 provides for a right for a Tenant to terminate a lease either during the currency of a fixed term lease or any time after the fixed term lease has ended, on 20 business days notice. This invariably will give a Landlord, managing agent or a speculative investor no security at all for secured rental. Add to that the inability to cede a rental agreement to a bank as collateral security, to secure a bond, to gear a property correctly or to even sell a property or a business with a lease in place.

Another example is an inherent duty on the Landlord to have to ensure the Tenant understands the lease agreement. S22 -The plain and understandable section as well as section 40 – the unconscionable conduct Section of the act.

These sections are open to tremendous abuse at the hand of a Tenant who may claim at inception of the lease, or during the currency thereof, that they did not understand the veracity of the agreement, were forced to sign, were influenced to sign, were harassed to sign etc thereby giving rise to potential conflict, non rental payment or even worse a Landlord finding itself before the commission, or court, trying to extricate itself from this conflict, and at the Landlord's cost.

If the various sections that are pertinent to lease agreements and the like are enacted at end March 2011, the very nature of Landlord and Tenant law will change forever.

Lease agreements will need to be watertight, if this is even possible, and people in the industry will need to guard against potential Tenants who may breach. It will be an impossible situation.

One must not forget that whilst there is a Rental Housing Tribunal to regulate residential leases and disputes, no such tribunal exists for retail, commercial or industrial leases which invariably have far greater rentals attached to the tenancies involved.

Evictions will of course still be possible as a breach is still a breach – I hope. Defences to the evictions however will be far more creative!

The Act is also pretty much silent on the relief and protection to which Landlords are entitled.

The only reference to any sort of protection for the rental industry is this "reasonable cancellation penalty" that a Landlord is entitled to upon a Tenant prematurely terminating a lease agreement.

This "penalty" is still to be defined and whereas one would hope that it would not be dissimilar to the rental that a Landlord would have received but for the breach by the Tenant, less any amounts paid and subject to mitigation of his loss, one fails to see how a consumer of an agreement would be liable to, for example, a cellular phone provider (whom is also a supplier in terms of the Act) for the entire agreement amount if the consumer cancels because the consumer wants out of the agreement.

The problem is that even if the Act is followed to the letter, the various sections can still be challenged up until a change in legislation or an unappealable judgment -in other words - only until a court of final instance has pronounced on a particular section can we have certainty on a definition in the act. Look at the National Credit Act – years later there are still disputes as to a multitude of sections and most of which cause tremendous delays to Credit providers.