

Short notes on:

## **RESIDENTIAL LEASE AGREEMENTS AND THE CONSUMER PROTECTION ACT**



### ***Introduction***

In this article, the next in a series of articles on the specific application of the Consumer Protection Act 68 of 2008 (hereafter referred to as the “CPA”), we will investigate the application thereof with regards to residential lease agreements.

Residential letting and lease agreements are generally governed by the provisions of the Rental Housing Act 50 of 1999, while the processes and procedures relating to residential evictions are governed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE” Act).

The Rental Housing Act sets out *inter alia* the basic standards (or requirements) for lease agreements, details the rights and obligations of landlords and tenants alike<sup>1</sup> and makes provision for the adjudication of certain disputes between landlords and tenants. Notwithstanding the provisions and remedies provided for in the Rental Housing Act, in cases where a tenant is in serious breach of the lease agreement the landlord may also institute eviction proceedings in terms of the PIE Act.

In addition to the Rental Housing and PIE Acts the CPA, once in operation, will have the following important effects on both commercial and residential lease agreements: it will regulate the renewal and cancellation of lease agreements; determine that lease agreements must henceforth be codified in ordinary (plain) language; prohibit unfair, unreasonable and unjust contract terms and prohibit landlords from making false, misleading or deceptive representations to tenants.

### ***Renewal and cancellation of (fixed term) lease agreements***

In terms of section 14 of the CPA the landlord must notify the tenant in writing not more than 80 days, but not less than 40 days before expiration of the agreement of its looming expiry.<sup>2</sup> In addition thereto the landlord must in sufficient detail, specify any changes to be made to the existing agreement on renewal.<sup>3</sup>

Notwithstanding this, the tenant may also at any time cancel the agreement with 20 business days written notice to the landlord and against payment of a reasonable penalty fee for early cancellation.<sup>4</sup> It remains to be seen what exactly will constitute a reasonable penalty fee. Nevertheless, in cases where the tenant cancels the agreement on expiry thereof no penalty fee or charge may be levied.<sup>5</sup>

If the tenant, however, does not cancel the agreement or renew it for another fixed term, it will automatically continue on a month to month basis subject to the amendments thereto as proposed by the landlord in writing.<sup>6</sup>

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<sup>1</sup> Section 4 and 5 of Act 50 of 1999.

<sup>2</sup> Section 14(2)(c) of the CPA. The provisions of section 14 find application to all fixed term contracts. Section 14(2)(c) of the CPA.

<sup>3</sup> Mellville 2010: 88.

<sup>4</sup> Section 14(2)(b)(i)(bb), read with sections 14(3)(a) and 14(3) (b) of the CPA.

<sup>5</sup> Mellville 2010: 88.

<sup>6</sup> Section 14(2)(d) of the CPA.

Similarly, the landlord may give the tenant written notice to correct any breach of the agreement and thereafter if he/she fails to rectify it, cancel the agreement 20 business days after such notice was given to the tenant.<sup>7</sup>

### **Ordinary language**

In terms of section 22 of the CPA, all agreements, notices, documents or visual representations etc must be written in plain language so that a consumer of the ordinary class of persons is able to understand it.<sup>8</sup> This provision will extend to anyone including - suppliers, consumers, landlords and tenants. Factors to consider in determining whether the consumer could understand the contents of the agreement will include without limitation – if it can be understood without undue effort, the context of the document, the organisation involved, vocabulary used, use of headings and illustrations.<sup>9</sup> This means that using a standard lease agreement for all tenants may not be such a prudent idea and that it may be more advisable to tailor agreements to the tenant's ability to comprehend.

### **Prohibited contract terms**

A supplier is prohibited from incorporating in agreements, contract terms that are unfair, unreasonable or unjust.<sup>10</sup> In terms of section 48 of the CPA a *landlord (hereinafter any reference to landlord will mean a landlord who is also a supplier)* must not require a tenant to waive any rights, assume any obligation or waive the liability of the landlord on terms that are unfair, unreasonable or unjust.<sup>11</sup> Furthermore, agreements that are generally: one sided; or contain a contract term that is so adverse - it is inequitable; or instances where the consumer relies on something which is false, misleading or deceptive will automatically constitute an unfair, unreasonable or unjust term or agreement, and will thus be void.<sup>12</sup>

In addition to this, the legislator will promulgate a "grey list" of contract terms or clauses automatically deemed to be unlawful. Accordingly, existing lease agreements should be reviewed with the assistance of an attorney to ensure that no such terms mentioned in section 48 or included on the "grey list" are present.

### **Voetstoots clauses and disclosure**

The term *voetstoots* is "descriptive of a sale without guarantees where the thing is sold as is or with all its faults."<sup>13</sup> Therefore, although *voetstoots* clauses are generally only used in contracts of sale, rather than lease agreements, however pseudo *voetstoots* clauses are often found in lease agreements. By virtue of these clauses the leased property is let as is and the landlord will not bear any obligation to remedy such defects. Although such a term is clearly unreasonable and the effects thereof somewhat unpredictable, to say the least, many tenants do not know their rights and accept these without question. It is important to note that the incorporation of these pseudo *voetstoots* clauses does not extinguish or limit the landlord's obligation to maintain the leased premises in good order. Moreover, in terms of the provisions of

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<sup>7</sup> Section 14(2)(b)(ii) of the CPA.

<sup>8</sup> Section 22(2) of the CPA.

<sup>9</sup> Melville 2010: 74.

<sup>10</sup> In terms of section 1 of the CPA a *supplier* is: "in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration."

<sup>11</sup> Section 48(1)(c) of the CPA.

<sup>12</sup> Section 48(2) of the CPA.

<sup>13</sup> <http://en.wiktionary.org/wiki/voetstoots>: accessed 23 November 2010.

the Rental Housing Act, aggrieved tenants may approach the rental housing tribunal to adjudicate any dispute related to the condition of the leased property for an appropriate order.<sup>14</sup>

However, the CPA in addition thereto, may also provide remedies to aggrieved tenants, given the broad application thereof to the benefit of consumers.<sup>15</sup> The provisions of section 55 of the CPA in particular stipulates that a tenant (consumer) has the right to receive goods that are: “are reasonably suitable for the purposes for which they are generally intended; are of good quality, in good working order and free of any defects; will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply...”<sup>16</sup> Thus, even though the rights associated with letting and hiring are not of the same degree as those acquired through sale and purchase, the tenant is still entitled to the full use and enjoyment of the leased premises he/she is paying for.

Furthermore, a landlord may not engage in any conduct that is unconscionable, misleading or deceptive<sup>17</sup> and in terms of section 41 of the CPA the landlord may not make any false, misleading or deceptive representations (by words or conduct), thereby inducing a consumer to enter into an agreement with him/her. Therefore, not disclosing (in full) the defects of the property to be leased, or not disclosing the true state of affairs, or attempting to evade obligations by incorporating “pseudo” or prohibited contract terms - may all be grounds for the agreement in its entirety, or parts thereof at the very least, to be void.

### **Conclusion**

Thus, it is very important that landlords observe the consequences of the CPA in addition to that of the Rental Housing Act and PIE Act. It is also essential that existing lease agreements and structures are reviewed with the assistance of an attorney in order to incorporate these changes in the most effective manner.

It is further equally important that tenants (consumers) know their rights.

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<sup>14</sup> An order equivalent to a Magistrates Court order.

<sup>15</sup> Section 2 – 5 of the CPA.

<sup>16</sup> Section 55 (2) (a) - (c) of the CPA and <http://www.fin24.com/Money/Property/No-longer-as-is-for-voetstoots-law-20100718>: accessed 23 November 2010.

<sup>17</sup> Mellville 2010: 50.