

## PERSONALISED LEGAL ASSISTANCE

Professional legal and property consulting

### **SONNENBERG & ASSOCIATES PROPERTY AND LEGAL ADVICE NEWSLETTER # 10**

#### **1. Legal Quotes**

"Lawyers are like rhinoceroses: thick-skinned, short-sighted, and always ready to charge."  
[David Mellor, British Conservative politician]

"The first thing we do, let's kill all the lawyers." [Shakespeare, Henry VI, Part 2]

"The trouble with the legal profession is that 98% of its members give the rest a bad name."  
[unknown]

#### **2. Legal short**

A man is innocent until proven broke.

#### **3. Around the world**

President Jacob Zuma received a standing ovation in Washington DC after suggesting Israel and Palestine should take advice from South Africa about resolving their violent conflict.

US President Barack Obama has signed a bill granting an additional \$225 million in US tax payers money for Israel's Iron Dome missile defence system. This allows Israel's military to shoot down incoming rockets or mortars headed towards major population centres in Israel, with a success rate of up to 90%.

A tremor measuring 5,3 on the Richter scale was felt in Johannesburg and other parts of the country shortly after midday on Tuesday this week.

#### **4. Inspiring quotes**

"The power of imagination makes us infinite." [John Muir]

"Sometimes life is about risking everything for a dream no one can see but you." [unknown]

"Twenty years from now you will be more disappointed by the things you didn't do than by the things you did do. So throw off the bowlines. Sail away from the safe harbour. Catch the trade winds in your sails. Explore. Dream. Discover." [Mark Twain]

#### **5. Latin sayings**

"Age. Fac ut gaudeam. " (*sounds good, doesn't it?*) ["Go ahead. Make my day!"]

"Non omne quod nitet aurum est." ["Not all that glitters is gold."]

"Obesa cantavit." ["The fat lady has sung."]

#### **6. Early termination of lease agreements**

The Consumer Protection Act, No 68 of 2008 ("the Act"), which came into being on 1 April 2011, has brought about fundamental changes to the law governing lease agreements.

Prior to the promulgation of the Act, the landlord's rights in the case of a breach by a tenant, were covered by the law of contract (i.e. the lease agreement and the conditions contained therein) and our common law. The terms of most lease agreements were heavily weighted in favour of the landlord. [The landlord had the right, on a breach of the agreement by the tenant, to sue for damages \(as per the agreement or common law\) or to claim specific performance \(i.e. to hold the tenant to the terms of the lease agreement\).](#)

Lease agreements entered into before the coming into being of the Act (the Act is only applicable on lease agreements entered into after 1 April 2011) regularly contained penalty clauses for breach, such as late payment or arrear rental. These penalty clauses were governed by the Conventional Penalties Act and the National Credit Act ("NCA"), which prescribed the rate at which the landlord could penalise the tenant for a breach. The maximum interest rate allowed by the NCA was 2% a month.

The court in the case of ***Absa Technology v Michael's Bid a House 2013 (3) SA 426 (SCA)*** concluded that the **NCA was not applicable to leases of immovable property**. The effect of this judgment is that the parties to a lease agreement (which is not subject to the Act) can agree on what interest rate will be levied in the case of a breach by the tenant, to a maximum of 15.5% per annum as prescribed by the Prescribed Rate of Interest Act.

As stated above, section 14 of the Act brought about radical changes to leases, including

- A lease may not exceed 24 months (unless expressly agreed to with the tenant and the landlord can show a demonstrable financial benefit to the tenant for the extension beyond 24 months);
- The tenant may cancel the lease agreement by giving 20 business days notice to the landlord;
- The landlord may similarly cancel the lease agreement with 20 business days notice, but must show material failure by the tenant in complying with the agreement and that the tenant was placed in breach and failed to timeously remedy same;
- The landlord is obliged to give the tenant notice of the expiry of the lease agreement not more than 80 days and not less than 40 days prior to the expiry of same;
- On expiry, lease agreements will automatically be renewed on a month to month basis unless the tenant agrees to a further fixed lease period or instructs the landlord to cancel the lease;
- The landlord can impose a reasonable cancellation penalty should the tenant cancel the lease as contemplated above.

**It is important to note that not all leases are subject to the Act** (which is now weighted in favour of the tenant). *The Act applies only to natural people, not companies, close corporations and trusts. The landlord must also be acting in the ordinary course of his business* (i.e. the landlord did not rent out the premises on a purely once-off basis).

Where the tenant cancels the lease agreement by giving the landlord 20 business days notice, this is not seen as a "breach," but rather an "**early termination of lease.**" In such instances the landlord cannot charge the tenant a cancellation fee which has the effect of negating the tenant's rights to cancel; the landlord is entitled to charge a "reasonable cancellation fee." The tenant remains liable for all amounts due in terms of the lease until the 20 business day period has expired.

*But what is a reasonable cancellation fee?*

The Act prescribes that a number of factors have to be taken into account, including

- the rental amount which the tenant still owes the landlord up to the date of cancellation;
- the value of the lease transaction up to the date of cancellation;
- the duration of the lease agreement as initially agreed upon by the parties;
- the length of notice of cancellation provided by the tenant;
- the reasonable potential of the landlord, acting diligently, to find an alternative tenant;
- and any general practices relating to the relevant industry.

It may be of interest to note that the draft regulations to the Act contained a clause stipulating that the cancellation penalty was not to exceed 10% of the value of the consideration the tenant would have paid had the lease agreement run until its expiry. This provision was however excluded from the final regulations promulgated with the Act.

So, what can the landlord hold the tenant liable for? **He may hold the tenant liable for all his reasonable financial losses incurred as a result of the tenant's early cancellation**, including

- loss of rental (for the period that the premises stood empty. Note here that the landlord is obliged to mitigate his losses by finding a replacement tenant as soon as he is given notice of the tenant's cancellation);
- remedying damages to the premises caused by the tenant during the lease agreement;
- credit check and advertising costs incurred in finding a new tenant;
- commission owing by the landlord to agents in respect of the (old) lease;
- administrative costs (if any) in concluding a replacement lease;
- any other reasonable expenses incurred by the landlord as a result of the tenant's cancellation which can be proved.

The cancellation fee cannot be arbitrary and cannot be a penalty amount charged upfront. It must be based on actual financial damages (and as such can only be properly determined when a new tenant is found). It follows that it is doubtful whether lease agreements containing an advance cancellation penalty will hold up in court.

It is suggested, however, that lease agreements contain a clause stipulating the landlord's entitlement to the maximum permitted cancellation fee and that the tenant is required to continue paying rental until a replacement tenant is found.

It also seems likely that landlords will favour tenants who are juristic persons.

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