

EVICTING A NON-PAYING TENANT

A large majority of residential lease agreements contain a clause affording a landlord the right to summarily cancel the lease agreement, without further notice to the tenant, should the tenant fail to pay rental when it is due. This is, however, not allowed where the CPA and PIE Act are applicable, and in the below paragraphs we briefly explain what the correct procedure is.

Tenant to be put 'in breach'

When a tenant breaches the lease agreement ("lease"), for example by failing to pay rental on the date as stipulated in the lease, he must firstly be placed 'in breach'. This effectively means that the tenant must be given some formal notice to alert him of the fact that the failure to pay constitutes a 'serious transgression' of the terms of the lease. The notice will invite the tenant to remedy the breach (i.e. by making payment of whatever arrears exist at the time) and will alert the tenant of the landlord's rights should he (the tenant) not meet his obligation.

Landlord's rights when tenant fails to remedy breach

In terms of the common law, in the scenario where a tenant is in breach of a lease and fails to remedy the breach after demand to do so, the landlord has an election to either hold the tenant to the agreement (in legal jargon called 'specific performance'), or to cancel the agreement and claim damages. This is usually explained in the 'breach clause' of the lease.

Formal Notice of Breach

In practice your attorney will prepare a written Notice of Breach ('Notice') to be served on the tenant in the manner (i.e. per hand, fax, ordinary mail, etc) and at the address (the so-called *domicilium citandi et executandi*) as stipulated in the lease agreement. This must be addressed to the tenant and to all those who hold title through him, for example a sub-lessee.

Can the Landlord cancel and proceed with eviction?

Only after the above steps have been taken, can the landlord exercise the election to cancel the lease agreement. Such cancellation may, however, only occur 20 business days after the aforesaid Notice was delivered to the tenant. Notably, if the tenant remedied the breach in this period, the landlord can no longer cancel the agreement based on the relevant breach. (Consumer Protection Act, section 14(3)). On the other hand, if the lessee fails to remedy the breach, your attorney will address a further letter ("Letter of Cancellation") to the tenant in the same manner as above confirming that, due to the tenant's breach, the landlord has elected to cancel the agreement.

In principle, the tenant should then vacate the premises immediately. (This should not pose a problem for the tenant as the tenant had the 20 business day period in which he could find alternative accommodation.) Should the tenant, for whatever reason, not vacate the leased premises, then it becomes necessary to consider applying to court for his/her eviction.

Eviction can be a complicated and drawn out procedure, most often because of the injunction in the PIE Act (Prevention of Illegal Eviction from and Unlawful Occupation of Land Act) that courts must make certain enquiries regarding, amongst others, the tenant's access to alternative housing, before granting an eviction order. In residential leases where the tenants have an income and some means, this is not too problematic, however in instances where the tenants are poor and without recourse, it may pose more difficulties.

The eviction process needs experienced consideration. Don't attempt it without professional advice. Contact Tiaan Smit at <mailto:tiaans@stbb.co.za> should you require assistance.

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