Introduction

Commercial property owners who lease out their properties must ensure that they are fully informed of the provisions of the Consumer Protection Act 68 of 2008 (the “Act”) as it places onerous requirements on “suppliers” as regards the management of lease agreements for the purposes of protecting “consumers”.

A “consumer” (as defined in the Act) includes tenants of commercial properties such as small or medium sized businesses and also individuals who are party to residential lease agreements. It does not include a juristic person whose asset value or annual turnover, at the time of entering into the transaction (lease agreement), equals or exceeds R2 000 000.00 (Two Million Rand).

A “supplier” (as defined in the Act) is a person who markets any goods or services. As a result, landlords are considered suppliers and the Act specifically includes landlords who let premises as part of their ordinary business operations within this definition. Therefore, both landlords and tenants are subject to the provisions of the Act, save for the exclusions set out hereinafore.

Certain provisions of the Act which are relevant to landlords and tenants who wish to enter into commercial lease agreements, to whom the Act applies, are discussed hereunder.

Important Sections

Section 22- Obligation to understand terms of lease placed on landlord

*Caveat subscriptor* is a well-known common law principle in the law of contract which entails that when an agreement is reduced to writing and signed by the parties thereto, they are bound to its terms. In terms of this principle, the consumer is obligated to protect him/herself by understanding the terms of the agreement before signing it, and will further be bound to the ordinary meaning of such agreement.

The Act however, veers away from the abovementioned principle by placing the consumer’s...
(a tenant for the purposes of this article) obligation to understand the terms of an agreement on the supplier (a landlord for the purposes of this article). In particular, Section 22 of the Act requires a landlord to ensure that a lease agreement is in plain and understandable language. Further, section 50 of the Act provides that a lease agreement must ‘set out an itemised break-down of the consumer’s financial obligations under such agreement’ (own emphasis). It is clear from these provisions that a tenant’s obligation to fully acquaint him/her/itself with the terms of a lease agreement has been shifted to the landlord in terms of the Act.

It is significant to note that the caveat subscriptor principle is still in existence and a tenant will still be bound to a lease agreement upon signature. However, a landlord can no longer rely solely on the abovementioned principle for the enforcement of a lease agreement by a court.

**Sections 48 and 49 – Unfair, unreasonable and unjust terms**

Further to the above, sections 48 and 49 of the Act provide for terms of an agreement that are deemed unfair, unreasonable or unjust. Standard clauses found in commercial lease agreements which limit the liability of landlords in respect of damages claims by tenants, indemnify landlords from any claims by third parties or any other terms which are extremely favourable to the landlord could be deemed to be unfair, unreasonable or unjust and fall under these sections.

These sections place heavy obligations on landlords. Section 49 in particular requires a landlord to bring to the notice of the tenant any term of the lease agreement that purports to:
- limit, in any way, the risk or liability of the landlord or any other person;
- constitute an assumption of risk or liability by the tenant;
- impose an obligation on the tenant to indemnify the landlord or any person for any cause;
- be an acknowledgement of any fact by the tenant; and
- concern any activity or facility that is subject to certain specified risks.

**Section 51 – Prohibited Transactions**

In addition, Section 51 of the Act provides a general list of prohibited transactions, agreements, terms and conditions.

The abovementioned sections are drafted in a vague and broad manner and it is, therefore, recommended that landlords seek professional advice and confirmation that their lease agreements are drafted fairly and reasonably and the terms thereof abide by the requirements of the Act. Failing which a tenant may be able to utilise the provisions of the Act so as to escape liability from, or even have an entire lease agreement declared null and void. It may even have certain provisions severed from a lease agreement by a court on the basis that they are unreasonable or unfair according to the Act. The tenant can also claim that he/she/it did not understand the terms of the lease agreement and the onus to prove otherwise will fall on the landlord, as already explained hereinabove.

**Section 14 -Maximum lease period**

This section provides for a maximum lease period of 2 years unless the landlord can show financial benefit to the tenant (own emphasis) if a longer lease is concluded. What constitutes proof of “financial benefit” is unclear.

Further, this section provides for the cancellation of all lease agreements with only 20 days’ notice by a tenant. As a result, breach clauses in lease agreements must now be drafted to allow a tenant a 20 day period to remedy a breach of the lease agreement.

Further, this section provides that a tenant may cancel a lease agreement by giving only 20 days’ notice to the landlord. Notwithstanding the aforesaid, in the event that a tenant cancels a lease agreement, such tenant shall remain liable to the landlord for all amounts owing in terms of the lease up until the date of cancellation. The landlord will also be able to impose a reasonable cancellation penalty on the tenant.
The problem presented by this section is that it may negatively impact the use of lease agreements by landlords as security in other transactions, as the tenant is able to cancel it with only 20 days’ notice.

It is important to note that this section is not applicable to leases involving juristic persons, no matter their annual turnover or asset value. A result of the aforementioned may be that individuals who wish to enter into long term agreements may resort to creating companies for the sole purpose of entering such lease agreements. Landlords may also, as a result of this section, be more favourable to leasing their property to juristic persons as opposed to individuals.

In terms of this section, landlords must also provide the tenant with written notice of the termination of a lease agreement when the duration of the lease agreement is close to completion. This is irrespective of whether or not the duration of the lease is clearly stipulated in the lease agreement and this places yet another obligation on landlords.

Conclusion

Having regard to the above sections of the Act and to the onerous requirements they places on landlords, it is recommended that standard lease agreements provided by agents, attorneys or landlords themselves are scrutinised to ensure that such lease agreements are enforceable in terms of the Act and that the landlord who is a party to that agreement is exposed to as little risk as possible and complies properly with the relevant provisions in the Act.

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