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INTRODUCTION

In a prior article (available at <https://www.schindlers.co.za/news/makah-v-magic-vending-pty-ltd-ngolo-v-magic-vending-pty-ltd-a-325-2016-a326-2016-2017-zawchc-142-2018-3-sa-241-wcc-16-may-2017/>) we explained the court's finding in *Makah v Magic Vending (Pty) Ltd* ("*Makah*"), in which the court confirmed the principle that month to month leases constitute fixed term or fixed period contracts, to which the requirements for cancellation in terms of section 14(2) of the Consumer Protection Act ("CPA") do not apply. Section 14(2) requires 20 business days' notice for all other agreements that fall within the ambit of the CPA, other than fixed term agreements.

RECONFIRMATION OF THE PRINCIPLE, AND CONFIRMATION OF THE NON-APPLICABILITY OF THE RHA IN CERTAIN INSTANCES

Fast forward to 2020, wherein once again the Western Cape High Court has been called upon to deliberate on the legal issue involving the applicability of Section 14 of the CPA and Section 5 (5) of the Rental Housing Act to periodic lease agreements, in relation to a case concerning *Magic Vending (Pty) Ltd* ("*Magic*").

In the recent judgment of *Magic Vending (Pty) Ltd v Tambwe and Others*, the Honourable Judge Binns-Ward had reaffirmed the stance as confirmed in the previous case and subsequent appeal of *Makah* which was decided just three years prior to this matter coming before the Honourable Court. The salient facts of the Tambwe matter were that the Applicant (*Magic*) had entered into a verbal, later written lease agreement with the lessee in 2014. The written lease agreement purported to be one operating on a month-to-month basis. Following consecutive material breaches of the lease agreement by the lessee, specifically in failing to effect payment in respect of rental, Magic took action and cancelled the agreement operating periodically and demanded that the lessee vacate the property.

The arguments presented by counsel for the First Respondent were threefold. The first argument

THE 'MAGIC' IN TERMINATING FIXED PERIOD (MONTH TO MONTH) LEASE AGREEMENTS IN TERMS OF THE CPA AND RHA

was in relation to a specific clause in the lease agreement being in contravention of Section 51 (1) (a) of the CPA. So as to not make this article too voluminous and negate from the main discussion herein, we will not go into further detail in this regard.

However, in respect of the second and third argument which involves the main focus of our discussion. Two contentious issues arose and to which due consideration had to be given by the Honourable Court. Counsel for the First Respondent argued that the lease agreement was not effectively cancelled as the lessee did not receive notice of such cancellation. In response to same, the court found that while the notice to remedy never came to the attention of the lessee that mere service of the eviction proceedings amounted to successful notice of termination of the contract as so decided in the matter of *Middelburgse Stadraad v Trans-Natal Steenkool Korporasie Bpk* 1987 (2) SA 244 (T) at 249, [1987] 3 All SA 14 (T) and *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C).

On the discussion of cancellation, counsel for the First Respondent further contended that a notice of cancellation was required to give the lessee a calendar months' notice of the termination of the contract. In this regard, the lessee sought to rely on Section 5(5) of the Rental Housing Act and the judgment of *Luanga v Perthpark Properties (Pty) Ltd* [2018] ZAWCHC 169 (20 September 2018), 2019 (3) SA 214 (WCC).

Below is an extract of the wording of Section 5(5) of the Rental Housing Act which provides that: -

"If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month written notice must be given of the intention by either party to terminate the lease"

The Honourable Court's confirmation in relation to the above argument was that it was clear from the plain wording of the provision that this would only be applicable to the termination of a periodic lease that is deemed to have come into being when the lessee remains in the property with the express or tacit consent of the lessor after the expiration of a pre-existing fixed term lease. Which did not apply to the current matter as it was a periodic lease agreement from the outset. Moreover, the court reasoned that it would not be applicable in a situation in which a lease

THE 'MAGIC' IN TERMINATING FIXED PERIOD (MONTH TO MONTH) LEASE AGREEMENTS IN TERMS OF THE CPA AND RHA

containing a forfeiture clause is terminated by the landlord for reason of the lessee's failure to pay the rent. Thus, the judgment in *Luanga*, which held that the one month's notice referred to in Section 5(5) which denoted one calendar months' notice, had no bearing on the landlord's right to terminate a lease on account of a material breach of contract by the lessee. Subsequently, the eviction order was granted on this basis and the lessee was to vacate on or before 18 January 2021, the City of Cape Town intervened to provide emergency occupation to the lessee and her children.

CONCLUSION

The aforementioned case law has once again confirmed unequivocally the current stance in our law regarding cancellation of periodic lease agreements, specifically that a landlord is not required to comply with the provisions of section 14(2)(b)(ii) of the CPA in terminating a month-to-month or indefinite lease agreement. A month-to-month lease is not a fixed term contract and thus a landlord need not comply with the mandatory 20-business day notice period prior to terminating the agreement.

Moreover, section 5 (5) of the Rental Housing Act will not be relevant in instances where there was no pre-existing fixed term lease agreement in place which is later rendered a month-to-month contract subject to the same terms and conditions as contained in the original agreement. Nor will section 5 (5) apply in instances where a periodic lease agreement that contains a forfeiture clause is terminated by the lessor for reason of failing to pay rental as so required.