

SCHINDLERS

— ◆ —
attorneys - conveyancers - notaries



GUIDANCE FOR LANDLORDS AND TENANTS DURING COVID-19

MUST TENANTS CONTINUE TO **PAY RENT**?

What is certain is that COVID-19 and the resultant lockdown does not automatically excuse any tenant from paying rent or to claim a remission of rental. The non-payment or short payment of rental by a tenant who is in occupation of a property constitutes non-performance on the part of the tenant and will result in a breach under the lease agreement.

A tenant cannot unilaterally reduce the amount of rent he pays the landlord either. Most lease agreements contain a clause that excludes a tenant's entitlement to deduct or set-off any rental amounts for any reason whatsoever.

LANDLORD & TENANT GUIDELINES

CAN A LANDLORD **PLACE A TENANT IN BREACH DURING THIS TIME?**

Yes- If the tenant is in breach, the landlord is entitled to exercise its rights by giving written notice to the tenant as directed by their lease agreement.

CAN A LANDLORD **CANCEL THE LEASE IF THE BREACH IS NOT RECTIFIED?**

Provided the landlord has followed the proper procedure as set out in the lease agreement, and the tenant remains in breach, and no other resolution or agreement has been reached between the parties, the landlord can validly cancel the lease agreement. The landlord will also be entitled to then claim arrear rentals and sue the tenant for damages. The tenant will however, have to remain in occupation of the property and will be liable for rent during this extended time until the Regulations of the Disaster Management Act are clear in terms of personal movement or an order for the tenants' eviction has been granted by a Court.

BUT WHAT ABOUT FORCE MAJEURE?

(Unforeseeable circumstances preventing a party from fulfilling its obligations under a contract)

If the lease agreement contains a force majeure clause, the definition of a force majeure event must be examined to see if it would include the Covid-19 pandemic. The onus is on the party relying on the force majeure clause to prove that the COVID-19 outbreak falls within the contract wording, and that non-performance has been a result of the pandemic and is therefore justified.

If there is no force majeure clause in the lease agreement, the non-performance by the tenant will be measured against the doctrine of "supervening impossibility of performance" which means the performance of a tenant's obligations must be objectively impossible as a result of an unforeseeable and unavoidable event, which is not his fault. Again, the tenant must prove that his failure to pay rent is a direct consequence of the pandemic. This will have to be proved in a court of law, and the court will have to decide what rights the tenant may have had not to pay the rental as a result of the lockdown.

CAN TENANTS **MOVE ON 1 MAY 2020?**

No movement is allowed. Tenants whose leases have been validly cancelled, as a result of a breach or otherwise, or whose leases have expired, will not be able to vacate and/or move into properties from 1 May 2020, even if another tenant is lined up. Personal movement is still restricted to essential travel for work purposes under levels 4 to 2 at this stage. In the circumstances, the tenant continues to have full beneficial use and enjoyment of the leased property and shall continue to pay the normal rent to the landlord if possible, alternatively parties must negotiate that tenants whose leases have ended be allowed to continue occupying the premises on reasonable and suitable terms for both parties. Tenants will not be guilty of "holding over" during this time.

LANDLORD & TENANT GUIDELINES

CAN LANDLORDS EVICT TENANTS DURING THE LOCKDOWN?

Evictions are allowed under the level 4 lockdown period. Sheriff services are to commence for all legal practitioners thus Court documents, applications, and action can be served. Provided that landlords have followed the correct procedure to get to such a stage that an eviction is the only remedy available to them, landlords may in fact institute eviction proceedings against the tenant and a competent court may grant an order for eviction if it is just and equitable to do so. However, any order of the eviction shall be stayed and suspended until the last day of the relevant alert level or until directed by the Court.

Landlords may not force a tenant to vacate without such a court order, and also may not interrupt or stop the supply of electricity, water and other essential services to the property while the tenant remains in occupation. Tenants remain liable for their usual rent for as long as they remain in occupation under these circumstances.

WHAT LANDLORDS AND TENANTS SHOULD DO:

- Parties should familiarise themselves with the clauses of their lease agreements, particularly clauses excluding or limiting remedies based on force majeure;
- Parties are advised to communicate and negotiate as to whether failure to pay on time, in full or at all will constitute breach of the lease;
- Parties are encouraged to propose alternative measures such as reduction in rent or a moratorium on rental payments;
- Parties may agree to add any arrear or shortfall rental over the remaining period of the lease term or at the end of the lease (hopefully without incurring any interest);
- Parties may agree that tenants pay only towards rates and taxes to keep services running;
- Parties to a commercial lease may negotiate for the rent to be permanently or temporarily converted to a turnover-only basis (without a base cost);
- Most commercial lease agreements require tenants to obtain and keep in place their own business insurance, which normally includes business interruption cover. Tenants should check whether they can claim against their insurance first before refusing to pay rent; and
- In the event that tenants have lost income due to the Covid-19 pandemic, landlords whose properties are mortgaged with banks, are advised to enquire with their banks if there are payment relief measures in place for the period of the pandemic.

BUSINESS DETAILS

◇ Contact Schindlers Attorneys for all property related assistance info@schindlers.co.za

- | | |
|-------------------------------------|--|
| ◇ MELROSE ARCH | 3rd Floor. 3 Melrose Boulevard. Melrose Arch. Johannesburg, South Africa. 2076 |
| ◇ EAGLE CANYON BUSINESS PARK | 1st Floor. Eagle Canyon Office Park. Christian De Wet Road. Johannesburg. South Africa |
| ◇ ASPEN BUSINESS PARK | Washington House. Ground Floor. Aspen Lakes Drive. Johannesburg. South Africa |
| ◇ POSTAL ADDRESS | P O Box 10909. Johannesburg. South Africa. 2000 |