

MC Rental Guide



M.C. VAN DER BERG INC
INC
ATTORNEYS, CONVEYANCERS & NOTARIES

Your Property Attorneys

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Legal indemnity - M.C. van der Berg Inc. has compiled this *MCRentalGuide* in an attempt to provide general legal advice regarding the lease of a residential property. It must not be construed as being specific advice applicable to your lease agreement. Changes in legislation, procedures and processes are frequent, and landlords and tenants are advised to get proper advice before entering into a lease agreement.

M.C. van der Berg Inc. can also assist you with:

- | | | |
|--------------------------|--|-----------------------------|
| * Transfer of properties | * Registration and cancellation of bonds | * Estate planning |
| * Notarial Services | * Administration of deceased estates | * Registration of Companies |
| * Agreements of sale | * Wills | * Trusts |

1. Introduction

The lease of a residential property is potentially a risky business, with landlords and tenants often being unaware and misinformed about their legal rights and obligations. This legal uncertainty is further amplified by lease agreements that are either outdated, have a total disregard for the relevant legal principles, or are insufficient and often just blatantly wrong.

Although it is suggested that the parties use a properly drafted lease agreement, it is impossible to set out all the rights, obligations, legal principles, and unforeseeable permutations relating to a specific lease, or leases in general. In addition to the lease agreement, there are numerous other rules, regulations, and principles that are by law deemed to be incorporated in the lease agreement. The prospective landlord and prospective tenant have to consider these to ensure that they are not surprised or find themselves in a financial and legal challenge.



This MCRentalGuide is provided to you by M.C. van der Berg Incorporated, Attorneys, Conveyancers and Notaries to enable the landlord and tenant to understand the basic legalese of the relevant principles, legislation, and rules relating to a residential lease.

Kindly take the time to read this, and the other MCGuides in our series, namely *MCSellersGuide*, *MCPurchasersGuide*, *MCQuickGuide*, *MCSectionaltitleGuide*, and *MCBondGuide*. These guides can be found at www.mcvdberg.co.za.

2. M.C. van der Berg Incorporated

M.C. van der Berg Inc. Attorneys, Conveyancers and Notaries is a well-established law firm specialising in property law since 1999. While our head office is in Centurion, we also have an office at Midstream and Pretoria East. Our company conducts business in the greater Pretoria, Centurion, Ekurhuleni, Midrand, Johannesburg, and surrounding areas.



The primary focus of our practice is giving legal advice on property law, drafting agreements, handling property transfers, as well as registering new bonds and cancelling existing ones.



We also attend to the registration of trusts, estate planning, drafting of wills, winding up deceased estates, registration of ante-nuptial contracts, and other notarial services.



For more information on M.C. van der Berg Inc., please visit us at www.mcvdberg.co.za.

3. Legal sources that regulate leases



Landlords and tenants are often under the impression that the lease agreement is the beginning and the end in regulating their legal relationship in a residential lease. This is very far from the truth and from the outset landlords and tenants have to understand that the lease agreement does not necessarily reign supreme in their legal relationship.

The answer to a legal problem relating to a specific lease e.g. who must pay for wear and tear, can the deposit be refunded, can the lease agreement be cancelled etc. may be found in various sources. The lease agreement is but one of these sources and will therefore most definitely play a role in establishing the do's and don'ts in a particular case. Often, the solution to a legal problem is however either not set out in the specific lease agreement, is vague, ambiguous, or in conflict with other legal principles.

The legal answer to a specific problem can be found in the common law, the lease agreement, statutory law or rulings by the courts and the Rental Housing Tribunal or a combination. As a starting point we will examine how each of these sources, in relation to the other sources, will influence a lease:

3.1. Common Law

The common law is a set of legal principles and doctrines inherited from Roman-Dutch law. These principles are not codified (written down) and form the default setting in our law. Common law principles can be invalidated by legislation and can also be changed in the lease agreement. In other words, if statutory law is silent, or in the absence of any contractual terms, the common law will regulate the legal position.

An example of a common law principle is the '*huur gaat voor koop*' rule which stipulates that if a property is sold while a valid and current lease agreement is still in place, the tenant will be able to enforce the lease against the purchaser.

3.2. Legislation/Statutory Law

The legislation applicable to rentals is predominantly The Rental Housing Act (RHA) with the regulations promulgated in terms thereof (including the various provincial Unfair Practices Regulations). The Consumer Protection Act (CPA) as well as The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) also plays a major role in the rental sphere. There are a number of other acts that are applicable, although not key, in the arena of rentals, for instance the Financial Intelligence Centres Act (FICA), The Occupational Health and Safety Act (OHSA) and many more.

The question often arises what happens if legislation is in conflict with a common law principle or with a contractual stipulation. Legislation will be deemed to have revoked the common law principle and will trump the contractual principle as well. In other words, the parties cannot agree to a term in the lease agreement if it is in conflict with the RHA, the CPA, or any other act or any regulation promulgated in terms of any legislation. ***In short, legislation will always trump the common law and the***



terms of the lease agreement.

In the instance where both the CPA and any other legislation are applicable and in conflict, the CPA expressly provides that, in such an instance, the law that is most beneficial to the consumer (tenant) will apply.

3.2.1. The Rental Housing Act 50 of 1999 (RHA)

The Rental Housing Act is the prominent legislation regulating the rental housing industry in South

Africa specifically relating to residential property. The RHA automatically incorporates certain stipulations into the lease agreement, without it being expressly stated in the lease agreement. This act also criminalizes certain actions by landlords e.g. the changing of locks, removing of doors etc.

The Minister of Human Settlements also promulgates regulations in terms of the RHA, which has to be considered. Apart from the aforementioned, in Gauteng the MEC has promulgated Unfair Practices Regulations, which can be found at <https://www.gov.za/documents/rental-housing-act-regulations-procedural-and-unfair-practice-comments-invited>.



Landlords and tenants must take note of these unfair practices.

Although it can be argued that the RHA, to a large extent, codified the South African rental law, the common law and other legislation still play a vital role and the landlord and the tenant must not only rely on the RHA for guidance.

3.2.2. The Consumer Protection Act 68 of 2009 (CPA)

The purpose of the CPA is to protect consumers and it includes a certain category of tenants who are deemed to be consumers for the purposes of the CPA.

This category of tenants are natural persons (i.e. human beings) or juristic entities (company, CC, or Trust) which have an asset value or annual turnover of less than R2 000 000 (Two Million Rand) per annum. The CPA therefore treats small juristic persons the same as natural persons.



If the tenant falls into the aforementioned category, the CPA will apply to the lease agreement, with the effect that the consumer rights contained in the CPA will be to the avail of the tenant, regardless whether the lease agreement stipulates otherwise.

3.2.3. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)

The PIE Act prevents the unfair and unlawful eviction of tenants from the property they occupy. It also sets out the rules and procedures, often regarded by landlords as lengthy, costly and cumbersome, to evict a tenant from property.

3.2.4. Occupational Health and Safety Act 85 of 1993

The Occupational Health and Safety Act requires compliance certificates (E.g. Electrical, Electrical Fence and Gas) be made available to the tenant. These certificates confirm that the installations comply with the requirements of the Act and must be issued by qualified, registered service providers.

3.3. The lease agreement



The lease agreement plays a key role in the relationship between the landlord and tenant. ***Although the parties generally have contractual freedom, they cannot agree to limit the rights of the tenant as provided by the CPA and RHA or contravene any other legislation.***

A lease agreement does not have to be reduced to writing, although this will be required shortly in terms of the Rental Housing Act Amendment Act. The landlord and tenant, however, usually agree to (and it is strongly advised that they do) reduce the lease agreement to writing. Should the tenant request that the lease be reduced to writing, the landlord is required to do so.

3.4. Rulings by the courts and the Rental Housing Tribunal

The courts and the Rental Housing Tribunal give guidance with regards to the correct application of legislation, the interpretation of lease agreements and makes rulings on what will constitute an unfair rental practice.

4. Principles that regulate the lease agreement

4.1. Essential terms required in terms of common law

As mentioned, lease agreements can be entered into verbally, although it is ill-advised to do so. In such an instance the common law lays out the essential legal terms and requirements the lease agreement must contain to constitute a valid and binding lease agreement, namely:

- The parties (landlord and tenant);
- An undertaking by the landlord to give the tenant the temporary use and enjoyment of a defined property;
- An undertaking by the tenant to pay the agreed rental;
- The duration of the lease.

In other words, if the landlord and tenant verbally agree on the aforementioned terms, it will (unless the parties agree to reduce the lease agreement to writing) constitute a valid verbal lease agreement.

4.2. Terms and conditions required and incorporated by the RHA



If the parties elect to reduce the lease in writing, the RHA sets out the requirements that the lease agreement must meet. These requirements include common law requirements for a verbal lease agreement but also impose additional requirements, namely:

- The names of the tenant and the landlord and their addresses in the Republic for purposes of formal communication;
- The description of the property;
- The amount of rent and reasonable escalation;
- If the rent is not paid on a monthly basis, then the frequency of rental payments;
- The amount of the deposit;
- The lease period;
- The notice period for termination of the lease;
- Obligations of the tenant and the landlord;
- The amounts (other charges) payable in addition to the rent.



In addition to the aforementioned requirements, The RHA states that a lease agreement (written or verbal) will be deemed to include the following terms:

- The landlord must furnish the tenant with a written receipt for all payments received by the landlord if requested;
- The landlord may require the tenant to pay a deposit before moving into the property;
- The deposit must be dealt with as set out herein in paragraph 7.
- The incoming and exit inspections must be done as set out herein in paragraph 6.

- If any costs incurred by the landlord is claimed from the tenant, the relevant receipts must be available for inspection by the tenant, on request;
- The landlord may at the end of the lease deduct from the tenant's deposit and interest any amount that the tenant is liable for in terms of the lease, as well as reasonable costs of repairing damage to the property;
- Should the tenant vacate the property before expiry of the lease, without notice to the landlord, it is deemed to have expired on the date that the landlord established the tenant has vacated the property, but in such event the landlord retains all his or her rights arising from the tenant's breach of the lease.

5. Rights and obligations of the tenant and landlord

The rights and obligations of tenants, as well as landlords, are covered by the RHA and the common law.

5.1. Rights and obligations of the tenant in terms of the RHA

The tenant's obligations are:

- To make prompt and regular payment of rent and other charges payable in terms of the lease;
- To make payment of a deposit;
- To take part in a joint incoming and exit inspection with the landlord as set out in paragraph 6;
- To continue to pay the rent and additional costs and not offset the deposit against the rent. The tenant may not request the landlord to use the deposit as rent at any time during or at the end of the lease;
- To care for the property during the tenure and return the property in the same good order (save for fair wear and tear);
- To pay the full amount of rent and all additional charges before or on the due date into the landlord's specified account. It is a myth that the tenant has an automatic period of seven days to pay the rent with no recourse available to the landlord.

The tenant's rights:

- The tenant has the right to privacy during the lease period, and the landlord may only exercise his or her right of inspection in a reasonable manner, after reasonable notice to the tenant;
- The tenant's rights include his or her right not to have:
 - his or her person or home searched;
 - his or her property searched;
 - his or her possessions seized, except if an order of court has been obtained;
 - the privacy of his or her communications infringed;
- The deposit must be treated as set out in paragraph 7;
- If requested, the tenant has a right to receive a receipt for all monies paid to the landlord;
- The tenant has a right to a rental invoice which contains a cost breakdown e.g. basic rent, electricity, water etc.;
- The tenant has a right to inspect the landlord's municipal account to ascertain the charges passed

on to him;

- To expect from the landlord to rectify any serious defects making the property unfit for purpose for which it is let.

5.2. Rights and obligations of the landlord in terms of the RHA

The landlord's obligations:

- The landlord must ensure that the rental unit is fit for the purpose for which it is let;
- The landlord must, if requested by a tenant, reduce the lease to writing;
- The landlord must deal with the deposit as set out in paragraph 7;
- The landlord must take part in a joint incoming and exit inspection with the tenant as set out in paragraph 6;
- The landlord may not increase the rent during the fixed term period unless it is specifically agreed to in the lease agreement. The landlord may however, if agreed to in the agreement, recoup any increase in rates and taxes, levies and municipal costs.

The landlord's rights are:

- To receive prompt and regular payment of the rent or any charges that may be payable in terms of a lease;
- To recover unpaid rent or any other amount that is due and payable after due process is followed;
- To terminate the lease in case of breach by the tenant, with the understanding that the cancellation is in accordance with the lease agreement, the RHA and the CPA and does not constitute an unfair practice as set out in paragraph 14;
- To apply such deposit and interest towards the payment of all amounts for which the tenant is liable in terms of the said lease at the end of the lease;
- On termination of a lease to:
 - receive the rental property in a good state of repair, save for fair wear and tear;
 - repossess the property after first obtaining a court order;
 - claim compensation for damage to the rental property caused by the tenant, a member of the tenant's household or a visitor of the tenant.
- The landlord may pass any increase in the monthly charges e.g. levies and/or rates and taxes, on to the tenant, if the lease agreement specifically makes provision for it.

6. Inspections

6.1. The entry inspection



The tenant and the landlord must jointly, before the tenant moves into the property, inspect the property to establish the presence of any defects or damage. It is important to distinguish between defects the landlord must repair to make the property fit for the purpose for which it is let, and defects that are merely placed on record for reference at termination of the lease.



If no entry inspection is held, the landlord will forfeit his claim for damages when the tenant moves out, unless it can be proven that the tenant caused certain damage.

6.2. Interim Inspections

The landlord (or the rental agency on the landlord's behalf) may, from time to time and with reasonable notice, inspect the property.

6.3. Exit inspections



At the expiration of the rental period, the landlord (or the rental agency on the landlord's behalf) and tenant must arrange a joint exit inspection of the property, at a mutually convenient time, within a period of three days prior to such expiration. The purpose of the exit inspection is to establish damage caused to the property during the tenant's tenure.



Failure by the landlord to inspect the property in the presence of the tenant is deemed an acknowledgement by the landlord that the property is in a good and proper state of repair at the termination of the lease, and the landlord will have no further claim against the tenant, who must then be refunded the full deposit plus interest (if applicable) by the landlord.



Should the tenant fail to respond to the landlord's request for an inspection, the landlord must inspect the property within seven days from the expiration of the lease to assess any damage or loss which occurred during the tenancy. The landlord may, in these circumstances, without detracting from any other right or remedy of the landlord, deduct from the tenant's deposit and interest the reasonable cost of repairing damage to the property and the cost of replacing lost keys.

7. The Deposit

7.1. Payment and investment of the deposit

The RHA stipulates that the tenant may be required to pay a deposit, the amount of which should be agreed upfront between the landlord and tenant.

If there is no rental agency, the RHA stipulates that the deposit must be invested by the landlord in an interest-bearing account with a financial institution, for the benefit of the tenant.

If the property is leased through a rental agency, the rental agency may invest the deposit. The Estate Agency Affairs Act stipulates that interest earned on the deposit in this case, will not accrue to the tenant but will be split evenly between the rental agency and the Estate Agency's Fidelity Fund unless it is agreed otherwise. It is suggested that the lease agreement specifies that the interest accrues for the benefit of the tenant.

If the rental agency only procures the tenant, but does not manage the lease, the deposit can remain with the rental agency, but is often paid to the landlord as the rental agency's role is fulfilled on procurement of the tenant.

7.2. Deductions from the deposit



On the expiration of the lease, the landlord may apply the deposit and interest (if applicable) towards the payment of all amounts for which the tenant is liable including:

- reasonable cost of repair of damages to the property (excluding fair wear and tear);
- unpaid/arrear rent;
- unpaid/arrear utilities;
- other costs agreed to between the parties in the lease agreement.



In terms of the RHA a tenant can't request a set off of the last month's rental against the deposit. This does however not preclude a landlord from utilizing the deposit for any arrear rental amount, but is not advisable. The deposit is security for any damage to the property and if it is used to cover the last month's rent, the landlord will have nothing to cover possible damage. It is more difficult to issue summons and claim damages than it is to claim for outstanding rent (as the latter is a liquid claim and damages must be proven).

7.3. Refund of the deposit

The scenarios regarding the repayment of the deposit can be explained as follows:

7.3.1. A joint outgoing inspection was held:

- *If there is no damage to the property*, the deposit together with interest (if applicable) must be refunded to the tenant, within 7 (seven) days after termination of the lease.
- *If there is damage to the property*, which the tenant is liable for, the deposit together with interest (if applicable) must be applied for the damages, and the balance must be refunded within 14 (fourteen) days of restoration of the property.

7.3.2. A joint outgoing inspection was not held:

7.3.2.1. The landlord did not attend the exit inspection

Because the landlord did not attend, it is deemed that there is no damage to the property at the termination of the lease and the landlord cannot deduct any amounts from the deposit and interest (if applicable) for damages, but only for arrear rent and agreed costs due.

7.3.2.2. The tenant did not attend the exit inspection

- *If there is no damage to the property*, the landlord must refund the deposit and interest (if applicable) with 14 (fourteen) days of termination of the lease, provided no other amounts such as rent and agreed costs are due.
- *If there is damage to the property*, which the tenant is liable for, the balance of the deposit and interest (if applicable), must be refunded to the tenant after the deduction of damages, no later than 21 (twenty one) days after the restoration has taken place.

7.4. Sale of the property

If the property is sold during the course of the lease period, the purchaser becomes the new landlord, and the previous landlord must pay over the tenant's deposit to the new landlord if a rental agency is not involved.

8. Costs

From both the landlord and the tenant's perspective, additional costs can become a problem if not planned for in advance.

The general rule is that the landlord is responsible for set amounts such as the levies and rates and taxes (those amounts that require payment whether the property is occupied or not), while the tenant is responsible for utilities and fines incurred, as set out below:

	Landlord	Tenant
Rates and Taxes	X	
Levies to HOA (<i>if applicable</i>)	X	
Levies to Body Corporate (<i>if applicable</i>)	X	
Water		X
Electricity		X
Waste management		X
Sanitation		X
Traffic and other fines levied by the HOA/Body Corporate in respect of all infringements by the tenant or his/her visitors		X

This is not a set rule and the lease agreement should therefore clearly set out whether the landlord or tenant is responsible for each expense in connection with the property.

In practice, municipalities do not allow tenants to open utility accounts in the tenants' name and therefore the utilities account stays in the name of the landlord. If the tenant fails to pay the amount due for the utility account to the landlord, the landlord will remain liable. It is thus advisable that the landlord request a deposit for such utilities. The tenant is entitled to a copy of a utility bill if the tenant is not billed directly.

Additional costs the tenant may be responsible for:

- Cash deposit fees;
- Actual cost for drafting of lease agreement;
- Interest on late payments;
- Fair and reasonable early cancellation penalty, including costs of advertising and commission;
- Legal costs in case of breach;
- Costs of repairs.

Standard lease agreements may include other expenses which the parties should be aware of and both parties must apply their minds when reading the lease agreement and negotiate such terms if they are not acceptable. It is recommended that these costs also be brought to the explicit attention of the tenant.

9. Damage



Subject to the requirement that a proper entry and exit inspection was attended to by the landlord (as discussed in paragraph 6), the landlord can, on termination of the lease agreement, claim compensation for damage to the property caused by the tenant, a member of the tenant's household or a visitor of the tenant. Normal wear and tear does not constitute damage.

The receipts indicating the costs which the landlord incurred must be available to the tenant for inspection.

Typical examples of damage:

- Excessive holes in walls;
- Broken tiles or fixtures in bathrooms;
- Clogged drains and toilets due to misuse – sanitary ware blockage;
- Broken walls;
- Tears, holes or burn marks on carpets, curtains or wooden floors;
- Animal stains on carpets caused by domestic animals or leaking fish tanks;
- Broken windows and window screens;
- Broken doors and locks;
- Broken appliances due to negligence;
- Broken or missing window blinds;
- Missing outlet covers;
- Cracked kitchen or bathroom countertops;
- Broken bathroom vanities.

The Rental Tribunal increasingly favours the tenant in this regard, especially if the damage can be categorized as normal wear and tear.

10. Conduct rules

The landlord or the rental agency on the landlord's behalf must ensure that the tenant receives a copy of the body corporate and/or home owner's association rules (if applicable) prior to entering into an agreement. The tenant must familiarize him-/herself with the content thereof as he/she will be bound by these rules upon signature of the lease agreement.

These rules may directly influence the tenant, for example, whether they are allowed to keep pets, the type and number of pets, how many cars the tenant can park on the property, whether the tenant may operate a business from the property etc.

The tenant must also be aware that often the body corporate/HOA may impose fines for the non-compliance with the rules and the tenant will be liable to pay such fines.

11. Termination/Cancellation of the lease agreement

There are four scenarios for the cancellation/termination of a lease agreement –

11.1. Natural termination in terms of the lease agreement

By definition a lease agreement only subsists for a specified period of time and will, at some future date, come to an end. Although the tenant has no statutory obligation to advise the landlord that he/she will vacate the property at the end of the lease, the lease agreement may specify otherwise.



The landlord is obliged to advise the tenant in writing between 80 and 40 working days prior to the impending termination of the lease agreement of such termination (section 14 of the CPA). The landlord must indicate to the tenant whether he wishes to terminate the agreement and if not invite the tenant to renew the agreement. If the landlord fails, the lease agreement will continue on a calendar month to calendar month basis on the same terms and conditions as contained in the written agreement. The tenant will then still occupy the property lawfully and no action for eviction can be taken. In this situation either party can give the other party a calendar months' notice to vacate the property.

11.2. Early termination by consensus

The parties can, by mutual agreement, cancel the lease agreement before the initial termination date agreed upon in the lease agreement.



The early termination must not be done verbally but in accordance with the lease agreement (normally in writing in an addendum). Exit inspections and the repayment of the deposit remain applicable.

The position of the rental agency and commission must be kept in mind. If the parties summarily cancel the lease agreement, either or both parties can become liable for the rental agency's commission in terms of the lease agreement.

11.3. Termination in terms of the CPA



Section 14 of the Consumer Protection Act stipulates that a tenant (note - not the landlord) can cancel a lease agreement, regardless the reason, by giving the landlord 20 business days written notice of the cancellation.



If tenant elects to cancel the lease before the initial agreed expiry date of the lease term, the landlord is entitled to a reasonable cancellation penalty. It is advisable that the parties agree on this amount in the lease agreement. This penalty must be justified as well as reasonable and any excessive penalty amount will be tempered by the courts and/or Rental Tribunal. The tenant must also take note of possible contractual penalties regarding the rental agency's commission in case of early cancellation.

11.4. Termination in case of breach

Either party can, after due written notice, cancel the lease agreement where the other party is in violation of the terms of the lease agreement.

Where one of the parties is in breach of the lease agreement, the aggrieved party must first give written notice to the defaulting party requiring him/her to first remedy his/her breach within a specified time period (which will be discussed hereunder), failing which the cancellation will be invalid and unenforceable.

11.4.1. The tenant is in breach:

If the tenant is in breach it is important to determine whether the CPA applies to the lease or not. The CPA will apply if the tenant is natural person or a juristic person with an asset value or annual turnover of less R2 000 000.



- If the CPA *is applicable*, (as in most residential lease agreements), ***section 14 of the CPA requires that the landlord gives at least 20 (twenty) business days' written notice (regardless of what the lease agreement stipulates) to the tenant to remedy his/her breach, where after the landlord has the right to cancel the lease.*** If the landlord in this case gives the tenant less than 20 business days' notice, to remedy the breach, the notice will be insufficient and any subsequent cancellation will be void.
- If the CPA *is not applicable*, it is not necessary to give 20 (twenty) business days' notice to remedy the breach, but instead the provisions of the breach clause in the agreement must be adhered to before the landlord can cancel the agreement. In the absence of a breach clause, the landlord will have to give the tenant a reasonable opportunity to remedy the breach.

11.4.2. The landlord is in breach:

The tenant only needs to follow the requirements of the lease agreement and give notice to the landlord for the number of days as stipulated in the lease agreement (and not the 20 days as required in the CPA) to remedy any breach before he/she can cancel the lease. In the absence of a breach clause, the tenant will have to give the landlord a reasonable opportunity to remedy the breach.

12. Sale of the rental property by the landlord – *huur gaat voor koop*

Often the landlord wishes to sell the leased property to either the tenant or to a third party.



A landlord who wishes to sell their property should get proper legal advice. M.C. van der Berg Inc. will gladly assist in this regard.

There are 2 scenarios when selling the property occupied by a tenant:

12.1. The tenant wishes to buy the property



If the tenant wishes to purchase, the landlord must be mindful of the position of the rental agency who was initially involved in the procurement of the tenant. ***The lease agreement may contain a clause stipulating that if the tenant, who was procured by the rental agency, purchases the property, it will be deemed that the rental agency was the effective cause of the sale and the landlord will become liable for sales commission.***

12.2. A third party wishes to buy the property

If a third party wishes to buy the property, the landlord and the prospective purchaser have to take cognisance of a common law rule referred to as the *huur gaat voor koop*-rule. This rule states that if a leased property is sold, the rights of the tenant in terms of the lease agreement can be enforced against the new owner.

Therefore, if a landlord anticipates that the property will be sold during the lease period, the lease agreement must address this issue clearly and univocally with full disclosure and agreement by the tenant that his/her rights in terms of the common law are waived in case of a sale.

There are three options available to manage the *huur gaat voor koop*-rule to avoid the negative impact on the prospective purchaser:

12.2.1. The Purchaser becomes the new landlord

Although the *huur gaat voor koop*-rule stipulates that the lease agreement is enforceable against a purchaser by default, it needs to be recorded and regulated in the agreement of sale if it is the intention of the parties. The tenant will continue to lease the property until registration (with the seller as landlord) and also thereafter (with the purchaser as the new landlord) until termination of the lease agreement.

The transfer of the property will be subject to all the rights of the tenant in accordance with legislation, the common law and the lease agreement.

12.2.2. The transfer of the property is delayed

The transfer of the property can be delayed until the expiry of the lease agreement. The aim is to ensure that the purchaser is given vacant occupation on the date of registration. The landlord must give due and proper notice taking into account the legislative and contractual requirements as failure will result in the tenant still lawfully occupying the property.

12.2.3. Termination of the lease is expedited

The terms of the lease agreement can be amended by an addendum to expedite the termination date thereof by mutual agreement. This will ensure that the purchaser can take vacant occupation on the date of registration.

The addendum must address aspects including repayment of the deposit and interest (if applicable), the exit inspection and payment of commission due to the rental agency.

13. Conflict resolution

The relationship between landlords and tenants are often challenging, with the potential of conflict during and after the tenancy. This conflict often stems from the fact that the parties are not aware of their rights and obligations and the rights and obligations of the other party. The purpose of the common law and legislation is to regulate the legal relationship between the parties, manage unnecessary conflict and to prohibit the parties from taking the law into their own hands. A properly drafted lease agreement also goes a long way to regulate the legal relationship between landlord and tenant and to avoid conflict.

Regardless of the aforementioned, conflict and subsequent disputes still do arise and in such situations the aggrieved party should follow the correct and effective approach to obtain the desired

result. Wrong actions can be detrimental to the aggrieved party's case and be beneficial to the party in the wrong.

13.1. Taking the law into your own hands



The parties must adhere to the terms of the common law, the applicable statutory provisions and the lease agreement and cannot unilaterally take the law into their own hands.

Although the common law and legislation favours the tenant, the tenant must take care to operate within the confines of the law and the lease agreement. The tenant must for instance not summarily cancel the lease agreement and vacate the property or withhold rental or other amounts due to the landlord.



The landlord may not cancel the agreement or infringe on the tenants' rights without following due process.

The landlord cannot for example change locks, cancel biometric access, remove doors, terminate services or place other tenants in the property or commit any of the unfair practices as defined by the Gauteng Unfair Practices Regulations. The remedy available to a tenant subjected to these unfair practices is to bring an application to court for a Spoliation order. This is a quick and robust remedy for the restoration of deprivation of possession by the tenant and the court will most certainly order the landlord to reverse or refrain from any of the unfair practices implemented, even if the tenant is in arrears and in the wrong. This order will be accompanied by a punitive cost order and may even have the consequence that the landlord is criminally prosecuted.

13.2. Negotiation and Mediation

The saying goes that your worst negotiated or mediated deal is often better than your best day in court and therefore the first step should be an attempt by the landlord and tenant to resolve the conflict. If a rental agency is involved (take note – not when the rental agency was only required to procure the tenant) the rental agency can be approached to attempt to mediate the dispute in an amicable way.

Attempts at amicably resolving the conflict is not always successful, leading to the aggrieved party having to take the adversarial route.

13.3. The adversarial route

Before the inception of the RHA and the subsequent establishment of the Rental Housing Tribunal, the civil courts were the only avenue for an aggrieved party in a lease agreement to pursue. The establishment of the Rental Housing Tribunal did not nullify the authority of the courts, but rather created easier and more accessible avenues to resolve lease related disputes. The nature of the matters adjudicated, the procedures to follow and the rulings these institutions can make however,



differs. An aggrieved party must get proper legal advice and elect which of the institutions will be approached to adjudicate the matter.

13.3.1. The Courts

The landlord and the tenant can approach the court to obtain an order to enforce the agreement. If rent is outstanding or there is damage to the property, not covered by the deposit, the landlord has the right to approach a civil court (Magistrate or High Court) and claim any arrear rent as well as damages from the tenant.

The Magistrates Court Act makes special provision that the landlord can, simultaneously with the proceedings to recover arrear rent, institute legal action to obtain an order (even on an urgent basis) to attach and remove the tenant's movables from the leased property. This is called perfecting the landlord's rental hypothec. The landlord cannot remove the tenant's movables without a court order and even then it must be removed by the sheriff. The landlord must approach an attorney to assist with this process.

13.3.2. Rental Tribunal

The RHA established a Rental Housing Tribunal in each province to simplify and expedite the legal process and to curb legal costs for landlords and tenants.

The Rental Housing Tribunal is a statutory body which provides mechanisms to resolve disputes and build positive relationships between landlords and tenants. The services of the Tribunal are rendered mostly free of cost and only a small application fee is payable. Tenants, landlords and rental agencies may approach the Tribunal for assistance.

Although we categorized the Rental Tribunal under the heading "Adversarial" it must be noted that the Rental Tribunal starts the conflict resolution process with mediation to try and advance the landlord/tenant relationship and to make the process accessible to the man in the street.

13.3.3. Functions & objectives of the Tribunal

The Tribunal performs the following functions for tenants and landlords or rental agencies acting on behalf of the landlord, in residential properties:

- Receive and administer complaints lodged;
- Inspectors investigate cases which are lodged;
- Advise interested parties or individuals of their rights and obligations;
- Attempt to resolve disputes through a mediation process;
- Adjudicate disputes that can't be mediated successfully;
- Conduct consumer education of stakeholders and within communities;
- Inform landlords and tenants should an unfair or unlawful practice arise.

(Note that the relationship between the landlord and the rental agency is not regulated by the Rental Tribunal)

13.3.4. Matters adjudicated by the Tribunal

The tribunal has the authority to deal with disputes, complaints or problems that include, but are not limited to:

- Non-payment of rental;
- Failure to refund deposit;
- Leases that are not fully compliant with the law;
- Rights and duties of landlords and tenants;
- Lack of maintenance to the property;
- Service cuts-offs without a court order;
- Damage to property;
- Harassment and intimidation;
- Threats, lockouts, illegal evictions without a court order and
- Spoliation, attachment orders and grant interdicts.



Note that the Rental Housing Tribunal cannot grant an eviction order.

13.3.5. How to lodge a complaint

The aggrieved party can lodge a complaint to the Rental Housing Tribunal as follows:

- Personally, by hand at the office of the Tribunal;
- By mail to the office of the Tribunal;
- By facsimile to the office of the Tribunal; or
- By email using a centralised email address.

13.3.6. The complaint process

STEPS	PROCESS
STEP 1	A file is opened for each complaint, and the particulars of the complainant(s) and the respondent(s) are entered into a register.
STEP 2	A letter is sent to all parties informing them of the particulars of the complaint that has been lodged.
STEP 3	The Rental Housing Tribunal will conduct a preliminary investigation to determine whether the complaint relates to a dispute in respect of a matter which may constitute an unfair practice.
STEP 4	Mediation is scheduled to try and resolve the matter. If there is no agreement between the parties during the mediation proceeding, the matter is referred to the Tribunal for a hearing, which is called the Arbitration stage.
STEP 5	During the arbitration (Tribunal hearing) a ruling is given, which is binding to both parties.
STEP 6	A ruling by the Tribunal is deemed to be an order of a magistrate's court in terms of the Magistrate's Court Act (Act No. 32 of 1944) and is enforced in terms of that act.
STEP 7	If a person feels unsatisfied with the proceedings of the Tribunal, he/she can take the matter on review before the High Court within its area of jurisdiction.



As from the date of lodgement of the complaint, until the Tribunal rules on the matter or a period of three months lapse:

- The **landlord may not** evict the tenant; and
- The **tenant must continue** to pay rental payable in respect of the rental property.


13.3.7. Documents required when making a complaint

- ID / Permit / Passport;
- Lease agreement;
- Proof of payment of the application fee;
- The physical address of both parties (landlord and tenant);
- Contact telephone numbers of both the landlord and the tenant.


13.3.8. Contact details:


Rental Housing Tribunals are operated provincially. You will be able to obtain the contact details for the local tribunal from the municipality or from the local government website. The website for Gauteng can be found at <https://www.gauteng.gov.za/>.

14. Role of the rental agency – The rental mandate

 The landlord can decide to market and procure a tenant and thereafter manage the rental property him-/herself or elect to make use of a rental agency. ***The landlord and tenant should ensure that they only deal with a procurement/rental or managing agency who is accredited at the Estate Agency Affairs Board (EAAB) and is in possession of a valid FFC certificate.*** The agent and the agency must both have a valid FFC which must be produced on request. The parties are not protected by the Estate Agents Affairs Fidelity Fund if a deposit is misappropriated by a rental agent or rental agency, who is not accredited at the EAAB.

If the landlord elects to appoint a rental agency, it must be done with care. The scope of the services delivered by rental agencies differ from rental agency to rental agency and from lease to lease.

 ***The legal relationship between the landlord and the rental agency, the scope of the responsibilities and duties of the rental agency, as well as the commission/fee payable by the landlord, are set out in the rental mandate.*** Landlords often misunderstand the scope of the rental agency's duties with an associated misplaced expectation that the rental agency will carry certain risks in case of default by the tenant. ***For instance, the rental agency is never responsible for the risk and costs of litigation in case of eviction and the recovery of rent and/or damages.*** In light hereof, it is vital that the landlord applies his/her mind when the rental mandate is signed.

 ***There are generally three distinct rental mandates:***

14.1. Procurement mandate

In this case, the rental agency will only market the rental property, take prospective tenants to view the property, procure, and secure a tenant, vet the tenant, do the necessary credit checks, see to the signature of the lease agreement and attend to the incoming inspection. After the conclusion of

the lease agreement, there is no further involvement of the rental agency, and the landlord manages the lease him-/herself.



The landlord will be liable for payment of a once-off procurement commission to the rental agency. In certain instances, further commission will become due in case of any renewal of the lease agreement or subsequent purchase of the property by the tenant.

Landlords are generally under the false impression that the procurement commission automatically includes the management of the lease as well, but this is not the case.

14.2. Management mandate

In this case, the rental agency will be involved in managing the lease, i.e. invoicing the tenant, collecting rent, attending to renewals, managing the utility services and payments, act on the instructions of the landlord, and become involved with inspections and maintenance issues.

The rental agency will be paid a monthly fee for managing the lease. The ambit of the management services must be set out carefully in the mandate agreement. It is prudent to incorporate or attach the relevant responsibilities of the rental agency in the lease agreement. This provides for easy reference by the tenant in terms of as example who to contact in certain cases and informs the tenant of the right of the rental agency to conduct inspections and perform other actions on behalf of the landlord.

A landlord can cancel the management agreement (if the management agreement falls within the ambit of the CPA in that the landlord is a consumer) with the rental agency by giving 20 working days' notice in terms of the CPA as it falls within the definition of a fixed term agreement. The landlord may however be liable for payment of a reasonable penalty for early termination.

14.3. Procurement and full management

In this case, the rental agency will attend to both responsibilities in 14.1 and 14.2 above.

In this scenario the rental agency can charge both the procurement commission and the management fee but most landlords feel that it is too expensive. Therefore, rental agencies often combine the procurement and management functions and only charges the landlord a single charge for the combination of the two functions.

As landlords are generally not willing to pay an upfront fee for the management (and/or commission for the procurement) of the tenant, rental agencies generally heed to market expectations and elect to procure the tenant and manage the lease for the duration of the lease (the initial agreed period and for extensions thereof) and as remuneration only receive a monthly combined fee/commission. The tacit intention is then that the rental agency earns his/her procurement commission on procuring the tenant, but it is paid monthly in fractions over the duration of the lease together with the management fee. Simply put, the money the rental agency receives monthly is partly a procurement commission (already due on procurement) and partly a management fee (due monthly).

The landlord and tenant often mistakenly assume that if the lease is lawfully cancelled (in terms of the CPA by the tenant or in case of breach by either party) the rental agency's right on the

remuneration (fee/commission) also falls away as they are not managing the property anymore. Landlords often also argue that they can cancel the management agreement with the rental agency with 20 working days' notice in terms of the CPA in lieu of the fact that it falls within the definition of a fixed term agreement (as in the case with the tenants). This, as explained, is however not necessarily entirely true as the remuneration the rental agency receives monthly includes both the procurement commission and the management fee.

If the lease agreement or the lease mandate for managing the property is terminated for whatever reason, the landlord or tenant (or even both in case of mutual agreement of cancellation) may be held liable for the expected remuneration (or at least for a fair portion thereof as procurement commission) to be earned by the agency. It is sensible to regulate this matter in the lease agreement and the rental mandate to avoid future conflict.

15. Message from the directors

The directors of M.C. van der Berg Inc. trust that this *MC Rental Guide* has provided you, our valued client, with essential and useful information.

Furthermore, we trust that this informative guide, together with our professionalism, effectiveness, and expertise, will result in a hassle-free, pleasant, and exceptional business experience.



We invite you to put your trust in M.C. van der Berg Inc. You are welcome to contact us if you have any queries. Visit our website at www.mcvdberg.co.za, contact us on 012 660 6000 or send an email to info@mcvdberg.co.za.

The MC-team looks forward to meeting you over the best cup of coffee in town.

M.C. VAN DER BERG^{INC}
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