

# Daily News

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## Termination is irrevocable

**Cancellation of a lease, by either party, cannot be withdrawn**

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A TENANT was given notice to vacate in the middle of the month to move out at the end of the same month.

She contended the notice was not valid because the lease required two months' calendar notice and the landlord therefore did not comply with this.

The landlord stated the non payment of rental and the failure to remedy the breach was the reason for cancelling the lease. When a party (tenant or landlord / landlady) fails to perform on its contractual obligation or performs late, the innocent or aggrieved party can cancel for a major breach.

If the tenant cancels, say for the landlord's / landlady's failure to maintain the dwelling that placed the onus on the landlord / landlady to carry out repairs and maintenance, the lease is cancelled.

The landlord's / landlady's refusal to acknowledge or accept the cancellation (for breach) does not have an effect on the lease that is terminated.

Similarly, if the landlord cancels the lease for late payment of rental, the tenant's acceptance or rejection of the cancellation is not required for the termination to come into existence.

The lease is cancelled and the relationship between the parties is terminated.

In terms of section 4(5)(c) of the Rental Housing Act 50 of 1999, the reasons for cancellation must be stipulated in the lease and may not constitute an unfair practice. Should the tenant fail to pay after a notice is given to remedy the breach, the landlord / landlady can cancel the lease agreement. A clause stating that the landlord / landlady has the right to cancel should the tenant fail to pay his or her municipal charges for the water and electricity consumption on time, affords the landlord / landlady the right to cancel.

A tenant may have at least two options when a landlord cancels for breach: the tenant can ignore the cancellation and continue to occupy the dwelling, at enormous risk if a breach has been indeed been committed, or accept she has breached the lease contract and vacate the dwelling.

If the tenant is in breach but refuses or fails to vacate, and the landlord / landlady follows ejectment proceedings, the tenant would be liable for legal costs and ultimately removed by the sheriff on a writ

of execution issued by a court at the landlord's / landlady's instruction.

Should the tenant intend to challenge the landlord's cancellation and can prove that the breach did not occur; the tenant must hold the landlord to the lease.

In other words, the tenant must continue to occupy the dwelling and discharge his or her obligations. The tenant should notify the landlord / landlady that there is no breach.

Take for example, the case where the landlady alleges that the tenant failed to pay rental on time, on the first day of the month, as agreed.

The tenant indeed failed to honour the agreed payment date.

The landlady cancels the lease because cancellation for late payment is not an unfair practice and the lease contract contains a clause that states that the landlady can cancel for late payment.

The landlady or tenant does not have to cancel for breach and can decide to continue with the lease or may choose to invoke the breach at a later stage, depending on the nature of the breach. The courts would examine an alleged breach within the context of the lease and the construction of a clause breached would depend "upon a consideration of the nature, effect and scope of the lease and the intention of the parties as gathered from the lease"<sup>1</sup>. In the Protea Assurance case, the court held that the tenant did not breach the lease by erecting partitioning. These were non-permanent structures and did not amount to alterations and additions

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<sup>1</sup> Protea Assurance Co Ltd v Presauer Developments (Pty) Ltd 1985 (1) SA 737 (A).

that required the landlord's prior written consent.

The courts could limit the meaning of clause as in the Larry Chao-Sheng Chang case<sup>2</sup>. Cancellation for breach was an extraordinary remedy and the tenant installing a geyser without the landlord's permission did not breach the lease. Plasket J concluded his judgment by stating that he was "at a loss to understand how this one act may be said to entitle the applicant to cancel both leases. On this ground, I am of the view that the applicant has failed to prove its entitlement to cancel either of the leases."

It is advisable to seek legal advice when there is no clarity about cancellation for breach, because once the lease is properly cancelled, the contract is terminated. Should either party decide to continue with the lease after cancellation, a new lease comes into being because a party cannot withdraw a notice that cancels or terminates a lease.

*Dr. Sayed Iqbal Mohamed is the chairperson of the Organisation of Civic Rights; commissioner at the KwaZulu Natal Rental Housing Tribunal and member of the Council of Canadian Administrative Tribunals. [www.ocr.org.za](http://www.ocr.org.za) For advice, contact Pretty Gumede or Loshni Naidoo on 031 3046451*

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<sup>2</sup> Changon behalf of the King William's Town Property Trust v Coral Blue Trading No. 3 CC (6158/2007) [2008] ZAECHC 26 (10 March 2008), (not reportable).

