

Can rental be withheld?

Unless lease specifically provides for it, this is an unwise move

A TENANT who withholds rental believing that she / he is doing so for good reason, may end up being evicted. Non-payment of rental is a breach and even though the tenant is deprived of full use and enjoyment of the dwelling or its usage had diminished, rental must be paid.

The courts have allowed non-payment of rental in certain instances, but the courts decide on the facts of the dispute, common law and the terms of the lease contract. The tenant may be absolved from any payment if the tenant is unable to take occupation due to the landlord's failure to deliver the dwelling as agreed.

In the case where the use and enjoyment is disturbed by the landlord's failure to maintain the property, the defects being necessary and the landlord having tempered with the electricity, the tenant was entitled to withhold rental for one month to force the landlord to perform (*Ntshiqqa v Andreas Supermarket (Pty) Ltd, 1996 (3) All SA 1*).

The tenant can have the rental reduced (remission of rental) in proportion to the reduced use and enjoyment, depending on the circumstances of the case.

What is the remission amount, how is it calculated and once established, how is it the amount recovered by the tenant?

In a case of a tenant who claimed the right to withhold rentals because only partial occupation was possible, the facts of the case based on the lease contract provided options the tenant did not exercise and allowed for the cancellation of the lease when the tenant failed to remedy the breach of non-payment. In the case of Ethekwini Metropolitan Unicity Municipality (North Operational Entity) and Pilco Investments cc, Case No: SCA 320/06, the tenant was not allowed rental remission. The tenant failed to rectify the breach within 90 days to pay the

arrear rental that accumulated over about three years.

The tenant claimed that the landlord was in breach for the failure on the landlord's part to point out the boundary pegs as required by the provision of the lease and approximately 3000 to 4000m² of the property being used by another occupant.

In the judgment delivered in May 2007 in the Supreme Court of Appeal, Justice B J van Heerden, said: "It follows that, upon taking occupation of the property in late 1994, the plaintiff became obliged to pay rent to the defendant, as stipulated in clause 1 of the lease. Of course, because the plaintiff was, until early June 1997, deprived of the use of that portion of the property which was being used by the person making pre-cast fencing, the plaintiff would be entitled to a remission of rent over the period in question, proportional to its reduced use and enjoyment of the property.

"If the amount to be remitted was capable of prompt ascertainment, the plaintiff could have set this amount off against the defendant's claim for rent; if not, the plaintiff was obliged to pay the full rent agreed upon in the lease and could thereafter reclaim from the defendant the amount remitted." The tenant did receive some benefit by occupying the dwelling and was therefore liable for rental proportionate to the deprivation. A tenant cannot cancel the lease for not having "total occupation" when the landlord had already cancelled for the tenant's breach (of non-payment of rental). The tenant also had the option of taking possession of the dwelling after the occupant had vacated with the full rental being due from the time of "total" occupation.

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