

SIGNING AWAY YOUR RIGHTS

Repairs, maintenance deductions may be limited by contract - Part 2

LAST week we discussed the necessity that the dwelling leased had to be in a condition fit for the purpose for which it was let, and when a tenant can deduct costs of repairs from rental.

In *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at 468, van Winsen AJ stated that the Courts recognised the right of the tenant under certain conditions to deduct the amount spent on repairs from the rent.

“These conditions are that the work done must be in the nature of repairs properly so-called, that there must have been prior demand and notice to the landlord, and the latter must have failed or refused to effect the repairs himself. See *Poynton v Cran*, 1910 AD 205 at p. 227.”

Restrictive Clause

It is extremely important to look for a clause that may prevent any deduction or set off.

It is important to approach the Courts and the Rental Housing Tribunals to examine such a clause.

The courts have jurisdiction to decide on the merits of each case in the context of the lease contract, the circumstances surrounding the need for repairs and the evidence of the parties.

In *Poynton v Cran* 1910 AD 205, the tenant signed a lease that stated that he would not be able to deduct from the rent at all, and that he would be responsible for the internal and external repairs and maintenance of the premises (a hotel).

In spite of these conditions in the lease, the landlady was under duty to ensure the property was repaired at the outset of the lease, and handed over in a tenable condition.

The tenant did not accept the premises with the defects, if he had, then he would have had no claim because this would have been a waiver.

In other words, having knowledge of the defects and accepting them without demand for repairs or protest results in the tenant not having the right to claim repairs or damages.

In the *Poynton* case, the tenant retained his right to demand that repairs be carried out and the right to claim costs for repairs he was eventually compelled to do when the landlady failed to respond.

The landlady's failure at the outset to attend to the repairs prevented her from relying on the condition that the tenant could not charge the cost against the rental.

Both parties were in default, the landlady for not repairing and the tenant for deducting the costs from the rental.

Lord De Villiers, CJ said:-

“The question is complicated by the fact that the payment of rent is stipulated for "without any deduction whatsoever," but I do not consider that this stipulation was intended to deprive the lessee of any right which

he might have to claim any sum of money from the lessor by way of damages or otherwise.” (at page 216)

Innes, J (at pages 227-8): -

“It remains to consider whether the evidence discloses any circumstance which would deprive the tenant of the legal right which he exercised. I do not think that the clause in the lease providing for the payment of rent on a certain day "without any deduction whatever" has that result.

“That provision cannot relieve the landlady of her obligation to place the leased property in repair, or deprive the tenant of the remedy which the law gives him in respect of her initial default.

“That default afforded *pro tanto* a defence to the claim for rent. And I entirely agree with the learned Judge when he says that "it is only the rent due which can be stipulated to be paid without deduction.”

Tenant's Remedy

The tenant may attend to these repairs himself or herself and

- (i) deduct the cost of such repairs from the rental¹, or
- (ii) set it off against the rentals when the cost exceeds a month's rental, or
- (iii) claim a rental reduction.

(Receipts and cash sale slips are important as proof of money spent.)

- (iv) The tenant could cancel the lease contract because the landlord /lady refused or failed to carry out the

necessary repairs or maintenance, which is not be merely an inconvenience².

The tenant can sue the landlord /lady for breaking the lease contract (breach).

- (v) The tenant may decide not to carry out repairs himself, and not cancel the lease contract.

The tenant can file a complaint with the RHT or apply to the High court for a specific performance order.

Limitations of the use of Repair-and-Deduct

- ❑ Tenant must give reasonable notice in writing to the landlord /lady regarding repairs to be carried out. The landlord /lady must be given the opportunity to attend to the repairs.
- ❑ Tenant can only attend to defects that interfere with the proper use and enjoyment of the dwelling.
- ❑ Tenant may not have the money for the cost of repairs.
- ❑ Tenant agreed (in a written lease) to maintain and repair the inside (and outside) of the dwelling in a condition fit for the purpose for which it was let.
- ❑ Tenant agreed and accepted the dwellings with defects.

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¹ *Harlin Properties (Pty) Ltd and Another v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A).

² *The Treasure Chest v Tambuti Enterprises (Pty) Ltd* 1975 (2) SA 738 (A).