

# Liability under a lease

**Don't sign deal unless satisfied with condition of the dwelling**

*By Sayed Iqbal Mohamed*

AGENTS usually conclude leases for their clients (landlords/owners) with prospective tenants. A tenant is given the opportunity to view the dwelling before concluding a lease. In the instance of an oral agreement, payment of the security deposit or part payment of rental brings about a lease agreement.

## **What happens when a tenant after viewing the dwelling, signs the lease for a two year (fixed) period but later decides not take occupation?**

Let us look at the following example: the tenant was to take occupation in February but was allowed immediate occupation in mid January. The lease was effective from February but by agreement, the tenant had to pay a pro rata amount for January. The tenant, on closer inspection, discovered that the dwelling was in need of necessary repairs and communicated this to the agent. The landlord failed to carry out the repairs.

Does it mean that since the tenant has not moved in, the lease can be cancelled?

Can the landlord withhold the security deposit since no damage was caused to the dwelling by the tenant? Is this a breach that would allow the tenant to cancel?

In terms of the lease, occupation was to take place on the February 1 and should the landlord carry out the repairs before the effective date, the tenant is bound to the lease.

In terms of the common law and the law of contract, should the tenant cancel the lease when no breach was committed, the tenant is liable for rentals for the full lease period unless the landlord finds another tenant. It would appear that no breach was committed since the lease would only come into effect on February 1.

The lease has a clause that states the tenant will have no claim for not having

beneficial occupation from February 1 due to the condition of the dwelling. The landlord would in this instance reduce the rental until the dwellings was repaired. The tenant cannot cancel the lease even though she did not take physical occupation or did not move any personal property into the dwelling.

A lease comes into effect once parties agree about the dwelling to be rented, the rental amount and the lease period.

### **What about the security deposit?**

The landlord is entitled to use the deposit for unpaid rental (“the payment of all amounts for which the tenant is liable under the said lease”) but is obliged to refund it, or part thereof, if a ‘replacement’ tenant is found in February.

The courts would look at the written lease contract that provides for the terms of agreement between the parties. It is absolutely crucial not to sign a lease unless one is satisfied about the conditions of the dwelling and the terms of the lease.

### **Does this mean that there are no consequences when concluding an oral agreement?**

Our courts have given judgments based on the agreed verbal terms and circumstances of each case. At the beginning of March 2011, the Commissioner of the Small Claims Court<sup>1</sup> gave judgment against a tenant who issued summons against his landlord for failing to refund his deposit.

The tenant decided, on the day he took occupation, to move into a bigger section of the dwelling that was occupied by the landlady. The landlady agreed to let this portion of the dwelling once she moved out. He then paid R300 in addition to his rental of R2000 in anticipation of the bigger section. When he realised, a few days later, that it would not be available, he informed his landlady that he would be moving out at the end of the month.

The landlady disputed this and stated that the R300 was for storage for his personal property that could not be accommodated in his room. While she

offered the bigger section at a higher rental (R3500), she indicated to her tenant that she would be in occupation at least for a month and could not give him a specific date.

The tenant moved out at the end of the month without given notice. The landlady withheld the deposit.

After hearing the evidence of both parties, the Commissioner stated the following: -

- I cannot, on a balance of probabilities, find that Plaintiff has proved the variation of the original lease agreement.
- We are left with an oral lease agreement on a monthly basis in terms of which the Defendant leased the premises to Plaintiff at a rental of R 2 000, 00 per month.
- On the basis of a monthly tenancy, the Plaintiff should he wish to terminate the lease, is obliged to give one calendar month’s notice. He did not do so and the Defendant is entitled to one month’s rental in lieu of notice.
- This notice rental is off-set against Plaintiff’s claim for the deposit and accordingly Plaintiff’s claim fails.
- I therefore give judgement for the Defendant

<sup>1</sup> In the matter between *Devdas Ramcharan, the Plaintiff (tenant) and Renitha Sudhoowa, the Defendant (landlady)*

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