THE IMPACT OF THE CONSUMER PROTECTION ACT 68 OF 2008 AND RELATED LEGISLATION ON TYPICAL LEASE AGREEMENTS

by

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DECLARATION

I, Marius Stenekamp, hereby declare that the contents of this dissertation represent my own work and include my own opinions, unless the contrary is indicated.

APPENDIX 1SUMMARY

The goal of this dissertation is to highlight the ambiguities contained in section 61 of the Consumer Protection Act 68 of 2008 (CPA), which attempts to introduce strict product liability for the entire supply chain in the event of product failure, and to propose amendments from which both the consumer as well as the supply chain could benefit. The new dispensation of strict product liability will lead to a step away from the no-fault based liability system that our courts have implemented for decades. Although this system is unfamiliar to South Africa, strict liability regimes have been followed in foreign countries for a considerable period of time. A comparative study of the approaches followed in America and Europe which boast advanced strict product liability regimes will be undertaken in this study in order to illuminate problematic aspects relating to the concept of defect contained in section 61 of the CPA as well as the various duties of the supply chain in a strict product liability regime. It is argued that the provisions of the Consumer Protection Act ought to be supplemented with regulations, including, but not limited to, the implementation of adequate safety regulations to mitigate product recalls and product liability claims.

SUMMARY

The common law of lease sets out certain reciprocal rights and duties of lessors and lessees. It also provides for *sui generis* aspects such as the lessor's hypothec and the protection of the lessee under the *huur gaat voor koop* rule. The relatively uncomplicated manner in which the common law has addressed specific issues pertaining to the law of lease has however been influenced by recent legislation that have an impact on various aspects of lease. The Rental Housing Act 50 of 1999 has entrenched parameters for the exercise of certain rights by the lessor and lessee and has introduced Rental Housing Tribunals to deal with unfair leasing practices. The Prevention of Illegal Eviction of and Unlawful Occupation of Land Act 19 of 1998 has radically impacted on the process that a lessor has to follow where he wishes to evict a lessee who remains in occupation of a leased premises after lawful termination of a lease agreement. Most recently the introduction of the Consumer Protection Act 68 of 2008, which came into full operation at the end of March 2011, appears to have a significant impact on the law of lease in those instances where the Act finds application to a lease agreement. In this regard it must be observed that the Consumer Protection Act impacts on a lease agreement that falls within its scope in two ways: on the one hand section 14 of the Act which regulates fixed term agreements may find specific application to a lease agreement that falls within the scope of application of the said section. On the other hand, there are certain 'general' provisions of the Act that will find application generally to lease agreements that fall within the scope of application of the Act , even if they do not fall within the specific scope of application of section 14. The purpose of this dissertation is to investigate how the various pieces of legislation indicated herein , impact on the common law of lease . The main focus will eventually be the impact of the Consumer Protection Act as such impact still has to manifest in practice.It will thus be endeavoured to present a holistic view of the 'changing face of the law of lease' in South Africa.

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CHAPTER ONE INTRODUCTION

1. Background and rationale for study

Every person requires shelter in the form of a dwelling of some kind or another. However not all persons are in a position to acquire suitable dwellings as their own property. Many persons consequently acquire residential shelter by entering into lease agreements which entitle them to the temporary use and enjoyment of a dwelling against payment of rental. Leasing of residential property, be it for instance a house or a flat or another form of dwelling, thus accounts for a large percentage of a country's residential portfolio.

As such the lease of residential property plays a pivotal role in providing adequate housing to persons and it is essential that the integrity of the lease agreement as a shelter-providing mechanism be preserved by affording due consideration to the rights and obligations of both parties in a leasing relationship. On the one hand, there is the landlord , who is usually the owner of the leased property, with his vested interest in his dominium of the property and his desire to obtain an income from the property in the form of rent . On the other hand, there is the lessor whose interest is in obtaining a dwelling on a temporary basis. The interests of both these parties require protection. Should the law of lease for instance fail to adequately protect the lessor's dominium in the leased property or should a lessor be able to terminate a lease agreement at his every whim and fancy, it will clearly lead to a demise in the popularity of the mechanism of lease. This will have grave consequences for the

many South Africans who employ the mechanism of lease as a method to obtain adequate housing. It will also impact negatively on the country's economy if owners of property no longer regard the lease agreement as a viable mechanism to raise income on their fixed property.

It is therefore clear that the objective of an efficient leasing regime should be to create legal certainty concerning the rights and obligations of the lessor (landlord) and the lessee (tenant). It is further essential that there must be a viable balance between the rights and obligations of the parties to the lease agreement as an imbalanced approach to such duties and obligations will eventually result in the mechanism of lease losing its attractiveness as an income generating , dwelling - providing tool.

Within the South African context, this balancing of rights appears to be quite a challenging proposition. Since the coming into operation of the South African Constitution[1], the right of access to adequate housing[2] has been constitutionally entrenched and forms part of the imperative constitutional framework within which South African law functions. In its desire to protect consumers and to fulfil its constitutional obligation of providing housing to South African citizens, the South African Government has, in addition to the existing body of common law, created a multi-layered maze through which the parameters of the rights and obligations of lessors and lessees must be navigated. In this context, the South African common law of lease has in recent years been supplemented by well-intentioned pieces of

[1] The Constitution of the Republic of South Africa 1996.
[2] The right of access to adequate housing is contained in s26(1) of the Constitution. For a detailed discussion see chapter 4 of this dissertation.

legislation such as the Rental Housing Act[3] and the Prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE)[4]. Whilst South African lessors were still coming to grips with the impact of the aforementioned two acts on the lease of urban residential property Government introduced the Consumer Protection Act[5] in an attempt to provide international standard consumer protection to South African consumers[6].

As will be discussed in detail in this dissertation, the CPA can apply to certain lease agreements of urban residential property as the Act in brief applies to the marketing and supply of goods and services (which includes rental of immovable property) by a supplier in the ordinary course of his business to a consumer[7]. Compared to the Rental Housing Act and PIE, the CPA is however quite a different legal beast. It contains a large number of provisions on a multitude of aspects ranging from non-discriminatory marketing[8] to juju[9] and is supplemented by an even more impressive and ever growing body of regulations with the effect that in size it outdoes the aforementioned two acts by far. Eight broad consumer rights are protected by the CPA, namely[10]:

(a) The right of equality in the consumer market.

(b) The consumer's right to privacy.

(c) The consumer's right to choose.

(d) The right to disclosure and information.

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[3] Act 50 of 1999.
[4] Act 19 of 1998.
[5] Act 68 of 2008(hereinafter the CPA or Act).
[6] Black magic.
[7] See the discussion in chapter 5 of this dissertation.
[8] S8,9 and 10 .
[9] I.e black magic. See s43(2)(a)(ii).
[10] Van Heerden in Nagel *et al Commercial Law* (4th ed) at 707.

(e) The right to fair and responsible marketing.

(f) The right to fair and honest dealing.

(g) The right to fair, just and reasonable terms and conditions.

(h) The right to fair value, good quality and safety.

The purposes of the Consumer Protection Act are also wide ranging. These purposes are to promote and advance the social and economic welfare of consumers in South Africa by[11]:

(a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;

(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers-

(i) who are low-income persons or persons comprising low-income communities;

(ii) who live in remote, isolated or low-density population areas or communities;

(iii) who are minors, seniors or other similarly vulnerable consumers; or

(iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;

[11] S3.

(c) promoting fair business practices;

(d) protecting consumers from

(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and

(ii) deceptive, misleading, unfair or fraudulent conduct;

(e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;

(f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;

(g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and

(h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

Notably the CPA contains various provisions detailing with how the interpretation of the Act is to occur. In the first instance it dictates that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3 thereof[12]. When interpreting the Act, a person, court or Tribunal or the Commission[13], may consider appropriate foreign and international law; appropriate international conventions, declarations or protocols relating to consumer protection; and any decisions of a consumer court, ombud, arbitrator in terms of the Act, to the extent that such decision has not been set aside, reversed or overruled by the High Court, the

[12] S2(1) of the CPA.
[13] I.e the National Consumer Commission, established in terms of s85 of the Act, is the primary body responsible for enforcement of the CPA.

Supreme Court of Appeal or the Constitutional Court[14]. If there is an inconsistency between any provision of the CPA and a provision of any other Act (except the Public Finance Management Act[15] and the Public Service Act[16]) the provisions of both acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second[17]. However to the extent that the aforesaid cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision[18]. The CPA clearly aims to extend the widest possible protection to South African consumers by further providing that no provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded to such consumer in terms of the common law[19] .

Additional interpretative aid is provided in section 4 of the Act. Section 4(1) provides that in any matter brought before the Tribunal[20] or a court in terms of the CPA the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons mentioned in section 3(1)(b) of the Act[21]. In addition the Tribunal or court, as the case may be, must[22] promote the spirit and purposes of the Act and make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not

[14] S2(2).
[15] Act 1 of 1999.
[16] Proclamation 103 of 1994.
[17] S2(9)(a).
[18] S2(9)(b) - however with the proviso that in the case of hazardous chemical products only the provisions of the CPA relating to consumer redress will apply.
[19] S2(10).
[20] This refers to the National Consumer Commission which was established in terms of section 26 of the National Credit Act 34 of 2005 and which hears matters arising from the aforesaid Act as well as the CPA.
[21] S4(2)(a).
[22] This refers to an obligation and the Tribunal or court thus does not have a discretion in respect of its duty in terms of this subsection.

limited to any order provided for in the Act and any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the CPA[23].

It is further provided that if any provision of the CPA, read in its context, can reasonably be construed to have more than one meaning, the meaning must be preferred that best promotes the spirit and purposes of the Act, and will best improve the realisation and enjoyment of consumer rights generally and in particular by persons contemplated in section 3(1)(b) of the Act[24]. Section 4(4) of the Act also in essence provide for interpretation of standard forms and contracts to the benefit of the consumer.

Thus, the point is that it is evident that the CPA, as its name clearly states seeks to protect the interests of consumers and not the interests of suppliers. Within the framework of the consumer rights it seeks to protect, the CPA has created various new rights for consumers and have imposed extensive compliance burdens on suppliers of goods and services. The impact of the CPA as umbrella legislation which exerts an influence on various areas of the law, and spesifically on lease agreements that fall within its scope of application, thus require consideration. However it is submitted that in order to comprehensively consider the impact of the CPA on lease agreements one has to start with an overview of the common law of lease and will have to take into account how this common law was changed by other legislation , namely the Rental Housing Act and PIE. Only when viewed holistically

[23] S4(2)(b)(ii)(aa) and (bb).
[24] S4(3).

as aforesaid can one gain an idea as to the impact of the CPA and related legislation on the common law of lease.

2. Scope of dissertation

This dissertation will focus on the rights and obligations of the lessor and lessee and related matters in respect of short term[25] leases of urban residential property. Long term leases will not be covered by this study save for a few peripheral remarks where appropriate.

As a point of departure, in chapter 2 of the dissertation, an overview will be given of the common law of lease of property in South Africa. This will be followed up by a discussion in chapter 3 of the impact of the Rental Housing Act on such common law whereafter the impact thereon of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE) will be scrutinized in chapter 4. The perceived impact of the Consumer Protection Act upon lease agreements will thereupon be considered in chapter 5.

[25] I.e leases of less than 10 years.

CHAPTER TWO THE COMMON LAW OF LEASE

1. Introduction

In order to facilitate the further discussions in this dissertation regarding the impact of the Consumer Protection Act and related legislation on lease agreements it is necessary to consider the legal phenomenon of lease and the common law principles that govern the law of lease in South Africa. This chapter will thus provide a concise overview of the principles that governed the law of lease in Roman law and the common law principles that govern the law of lease in South Africa.

2. Roman Law

2.1. Introduction

As the concept of lease has its origins in Roman law, a brief overview of the principles that applied in such law require consideration. In Roman Law, three types of contract of letting and hiring were recognised[26], namely the *locatio conductio rei*[27], *locatio conductio operarum*[28] and the *locatio conductio operis*[29]. In this dissertation the focus will be on the *locatio conductio rei*, with specific emphasis on the letting and hiring of property. Throughout the discussion of the evolution of the concept of lease in the Roman law, the terms 'hire' and 'lease' will be used interchangeably.

[26] Borkowski,and Du Plessis *Textbook on Roman Law* (2005).275-280 (hereinafter Borkowski and Du Plessis).
[27] The letting and hiring of a thing.
[28] The letting and hiring of services (contract of employment).
[29] The letting and hiring of a job or contract.

In ancient Roman times lessees tended to live in large blocks of flats where the activities of careless neighbours and dangers of structural collapse and fire were constant worries[30]. The *locatio conductio rei* occurred where a person (the *locator)* allowed another person (the *conductor*) the use and enjoyment of a thing for payment of rent[31]. As soon as the parties agreed on the subject matter for hire and the amount of payment, the contract was concluded[32]. The amount of payment had to be certain, but if payment was readily ascertainable, the contract would also be valid[33]. The thing that was hired would normally not be a thing that is consumable through use, but a corporeal thing[34].

Normally a period for the duration of the hire would be agreed on, otherwise either party could renounce the hire at any time[35]. If the duration was specified, the hire would normally terminate when the period ended[36]. In practice, this meant that, unless the *locator* gave the *conductor* notice to quit before the expiry of the original period, he would continue as a tenant. Hire could end through termination or destruction of the subject matter and it could even end through the misconduct of either party[37].

[30] Borkowski, and Du Plessis 278.
[31] Borkowski. and Du Plessis 275.
[32] Ibid.
[33] Ibid. Normally payment consisted of money, but in agricultural land, a part of the produce of the land was often used as payment.
[34] Borkowski and Du Plessis 276.
[35] Ibid.
[36] Ibid. The implied extention was regarded as a new lease and not a continuation of the old agreement.
[37] Ibid.If the *locator* substantially prevented the conductor from enjoying the property, the conductor could terminate the contract and sue for damages.

If the *locator* sold the property to a third party, the sale did not automatically terminate the contract of hire, but it would constitute interference with the rights of the *conductor* if the third party exercised his rights as owner[38]. The *conductor* could sue the *locator* for damages, but the *conductor* could be evicted, as he could not insist on the continuation of the hire[39]. The medieval lawyers used the maxim 'sale broke hire'[40]. Misconduct by the *conductor* that justified the termination of the hire included the failure to pay rent or where the conductor grossly abused the property. Unless the parties agreed to the contrary, the death of either party did not terminate the contract[41].

2.2 Duties of the parties

The lessor and the lessee each had specific duties to observe with regard to the lease agreement. The *locator* had to deliver the property to the *conductor*, who received custody, but not possession, as well as any accessories required for the use of the property had also to be handed over[42]. The *locator* furthermore had to ensure that the *conductor* could enjoy the property for the lease period[43]. He also had to maintain the hired thing in good repair throughout the lease period and the hired thing had to be fit for the use normally expected[44]. Therefore the *conductor* could recover reasonable expenses incurred in the maintenance of the property and also the *locator* would be liable for damage caused by undisclosed defects of which

[38] Borkowski and Du Plessis 277.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.In the case of a farm being leased, the tenant had *inter alia* to be provided with a press and grinder, cauldrons in which olives could be washed with hot water and storage jars.
[43] Ibid.
[44] Ibid.

he was aware or should have been aware[45]. The standard of care was that of the *bonus paterfamilias*[46].

The duties of the *conductor* were to accept delivery of the hired property and to pay, either in instalments or by way of a lump sum[47]. The property could not be used in an unauthorised way, the essential character of the property had to be preserved and the property had to be returned substantially in the original state, subject to normal wear and tear[48]. If the property was destroyed or damaged during the hire without the *conductor's* fault, the risk of the accidental or unpreventable loss were on the *locator*. If the damage was only partial, the tenant was entitled, if the damage was caused by exceptionally abnormal conditions, to a rebate or remission of rental[49].

The duties of the parties could, by agreement, be varied. Remedies available for the enforcement of duties were the *actio locati* for the *locator* and the *actio conducti* for the *conductor*[50].

2.3 Proprietary interest

[45] Ibid.
[46] Ibid.
[47] Ibid. Security for the payment of rent could be agreed on, but in the case of the hire of agricultural land, it was an implied term that the produce of the agricultural land was regarded as security, which is, according to Pomponius, the hypothec that the *locator* enjoys.
[48] Borkowski and Du Plessis 278.
[49] Ibid.
[50] ibid.

As a general Roman Law principle, a contract normally did not give rise to proprietary interest (rights *in rem*), only to contractual obligations, i.e. rights *in personam*[51]. Two exceptions, however, require some discussion.

2.3.1 Emphyteusis

The first exception is *emphyteusis*, which originated as a perpetual or long lease of land[52]. The land belonged to the State or to a city and it was leased to a private individual in return for a ground rent[53]. The lessee enjoyed protection by proprietary remedies, because the transfer of land had important consequences for private law[54]. If the lessee defaulted in payment of the rent, he would not enjoy this benefit[55]. The lessee could sell the land, but the owner had the right of first refusal[56]. Generally the tenant could deal freely with the land, i.e. leave the property to his heirs, mortgage the property, create servitudes and he is entitled to fruits. The lessee was the *dominus* and he enjoyed a modern *vindicatio* to protect his interest[57].

The obligation on the lessee was to, on termination of his interest in the land, ensure that the property is returned substantially unimpaired[58]. *Emphyteusis* could be created by a contract or a will and it ended through destruction of land, forfeiture, death of a tenant without heirs or by expiry of a term[59]. Originally *emphyteusis* only

[51] Ibid..
[52] Borkowski and Du Plessis 280.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid. If the owner decided not to buy the land, he was entitled to 2% of the purchase price.
[57] Ibid..
[58] Ibid.
[59] Ibid.

created contractual obligations, but it later developed into a proprietary interest, like ownership or a servitude[60].

2.3.2 Superficies

The second exception is *superficies*, which was for building purposes originating in grants by the State or municipalities of land[61]. If the lessee erected a building on the leased land, he did not become owner of the building, because the building attached to the land[62]. The lessee was given the protection of a special interdict by the praetor, to encourage building on leased land[63]. Later *superficies* became regarded as a full proprietary right *in rem*, with the lessee being in a similar position as to the position in *emphyteusis*[64].

3. The Common Law of Lease

3.1 Introduction

In Roman-Dutch Law all three forms of lease that existed in the Roman law were recognised. Until 1 August 2001 agreements regarding lease of immovable property in South Africa were mainly governed by the common law[65].

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[60] ibid.
[61] Ibid.
[62] Ibid..
[63] Ibid.
[64] Ibid. The affinity of *superficies* to both ownership and servitudes is clear, however, it is not classed belonging to either category.

[65] This is the date upon which the Rental Housing Act 50 of 1999 came into operation.

In terms of the common law a lease of a thing is a reciprocal agreement in terms of which one party, the lessor, undertakes to confer upon another party, the lessee, the use and enjoyment of a particular thing in exchange for counter performance[66].

3.2 General requirements for the conclusion of a lease agreement

Nagel points out that a contract of lease is in the first instance a contract[67]. The agreement must therefore also comply with the requirements for contracts in general, namely consensus, contractual capacity, legality, physical possibility of performance and formalities.

3.2.1 Contractual capacity

The person entering a contract of lease must have contractual capacity[68]. This requirement is broad and has many angles, namely[69]:

a) if a property is owned by more than one owner at the same time, a co-owner has the power to conclude a lease in respect of the whole or part of his undivided share without the consent of the other co-owners. This specific owner must however take the interests of the other owners into account.

b) the executor of a deceased estate may only let property in the estate with the authorisation of the testator.

[66] Ibid.
[67] Nagel 243.
[68] Nagel 245. The ability of a party to enter into a legally binding contract, which may be affected by age, mental capacity, mental illness, intoxication and various other factors.
[69] Ibid.

c) a guardian may let a minor's property, but not for a period which lapses only after the minor reaches the age of majority. The Court's consent will be required if the lease covers a period of ten years or more. If a contract is concluded to the contrary, it will not be invalid, unless it is registered against the title deed. The minor has, however, the choice, upon reaching the age of majority, to ratify or to repudiate the contract.

d) an unrehabilitated insolvent will need the written consent of the trustee to be able to conclude a lease agreement.

e) a fiduciary may conclude a contract of lease in respect of the fideicommissary rights, unless there is a prohibition to the contrary. The contract may not cover a longer period than that for which the fiduciary's rights are valid. On expiry of the fiduciary's rights, the contract is not terminated automatically. It is only terminated after proper notice to the lessee from the fideicommissary.

3.2.2 Formalities

A lease of immovable property can be concluded tacitly, verbally or in writing[70]. The common law therefore does not require a contract of lease of immovable property to be in writing, but, a long lease[71] needs to be reduced to writing to make it binding upon the lessor's *bona fide* creditors or successors under the burdened title[72]. If, in terms of the common law, the parties to a lease agreement decide to reduce the terms of the agreement to writing, it must be determined if the reduction to writing is for purposes of the validity of the agreement, or to serve as proof of the

[70] Nagel 246.
[71] I.e a lease in excess of 10 years.
[72] Ibid.

terms of the agreement[73]. If it is for the validity of the agreement, the agreement cannot be established orally[74]. If not, the absence of the lease agreement being reduced to writing, does not preclude the agreement to be enforceable[75].

3.2.3 Essentialia of contract of lease

Apart from the general requirements for the conclusion of a lease agreement, as discussed above, consensus must be reached between the parties on the following[76]:

a) the leased property;

b) that the use and enjoyment of such a property be conferred only temporarily;

c) the nature and extent of the counter-performance delivered.

3.2.3.1 Leased property

Consensus must be reached on the leased property, which needs to be commercially available to be let[77]. The leased property needs to be identified or identifiable, to prevent to the contract to be void due to vagueness[78]. A lease in respect of land can describe the specific number of units let, or the land as a unit or even a portion of the property let[79]. Movables will only form part of the leased property if they were intended to go with such property, for example a pump with a

[73] Ibid.
[74] Ibid.
[75] ibid.
[76] Nagel 247.
[77] Nagel 248.
[78] Ibid.
[79] Ibid.

swimming pool[80]. If a land is leased with immovable structures and there is no mention about the structures in the contract, those structures are deemed to be included[81].

An interesting provision in a so-called lease agreement was asked to be interpreted in *Ferndale Crossroads Share Block (Pty) Ltd and Others v Johannesburg Metropolitan Municipality and Others*[82]. In terms of this agreement between Ferndale and the municipality, Ferndale would rent a piece of municipal land in order to construct an overhead bridge over a busy thoroughfare. The purpose of the bridge was to 'channel' pedestrians from a taxi rank to Ferndale shopping centre. The lease agreement provided for the following:

(a) The extension of the existing walls around the taxi rank;

(b) The construction of kiosks at the floor of the bridge for leasing to hawkers;

(c) Ferndale would obtain all the necessary approvals from, and passing of, plans by the authorities for the design and construction of the bridge; and

(d) The construction would be carried out at the cost of Ferndale.

It was not clear from the wording of the agreement that it was in fact a lease agreement. However, it was common cause that the agreement contained provisions pointing to a lease such as the following:

(a) it contained language associated typically with a lease;

(b) this language identified an ascertainable thing, being a specific piece of land, to be leased;

[80] Ibid.
[81] ibid.
[82] 2011 (1) SA 24 (SCA).

(c) the frequency of rental was set, being annually; and

(d) the amount rental to be paid was set, being nominal, but R 499,00.

A problematic issue was that section 79(18) of the Local Government Ordinance[83] provided that no immovable property of a local authority could be alienated or disposed of without notice to its ratepayers. *In casu* no such notice was given to its ratepayers. The question in law therefore was whether the agreement constituted a lease agreement, and if so, whether a lease constituted an alienation or disposal as provided for in the Ordinance.

The Court found that the lease provisions of the agreement formed a significant and integral part of the agreement and that the objectives of the parties could not have been realised without it. The Court also found that other indicators showed that the parties intended a lease agreement, being:

(a) The property owner shall be entitled to cede, transfer or assign any of [their] rights under the lease;

(b) A provision for the payment by the property owner for advertisement costs and a valuation fee.

The provisions for payment of advertisement costs and valuation fee was a clear indication that the parties had the provision of section 79(18) of the Ordinance in mind. The Court also held that section 79(18)(b) required notice to the ratepayers of the municipality and afforded any interested person to object and have the objection

[83] 17 of 1939 (Gauteng).

duly considered. The Court construed the concepts of 'alienation' and 'disposal' liberally in the interest of the public. The Court held further the municipality failed to publish a notice in the newspaper, calling for objections, and that this was the jurisdictional fact necessary for the exercise of the power. Accordingly the Court held that there was a lease element to the agreement, but that the lease element was *ab initio* invalid. The Court held that the remainder of the agreement was valid and enforceable.

3.2.3.2 Temporary use and enjoyment

The parties to the contract need to agree that the use and enjoyment of the property are given to the lessee only temporarily[84]. The lessee does not acquire the power to consume or to destroy the property and any agreement giving the lessee this right would not constitute a lease[85]. Therefore parties can not conclude a lease in terms of which one party acquires the right to remove clay, minerals, stone or salt from the premises[86].

A property can also not be let in perpetuity, because the use and enjoyment of the property is being conferred only temporarily[87]. The duration of the lease may also appear in different forms, eg from a specific date to another, from a fixed date for a specific period, from the commencement of an event for a specific period or until the

[84] Nagel 248.
[85] Ibid.
[86] *Uitenhage Divisional Council v Port Elizabeth Municipality* 1944 EDL 2
[87] Nagel 248.

occurrence of a specific event (eg the death of a party)[88]. It is also, according to the common law possible to conclude a lease for as long as the lessor or lessee should desire[89]. Yet another possibility is to conclude a lease on a periodic basis such as from day to day or month to month or year to year[90].

3.2.3.3 Nature and extent of counter-performance

Agreement must be reached between the parties on the nature and extent of the counter-performance that needs to be paid in exchange for the use and enjoyment of the property[91]. There is uncertainty as to whether the counter-performance has to be monetary or whether it can assume the form of improvements on the leased premises or the rendering of services[92]. The court found in *Zulu v Van Rensburg* [93] that it is not possible to have a lease agreement with the counter-performance of the lessee anything other than payment of rent, for example labour. The same view was held in *Jordaan NO v Verwey*[94] and the Court placed the responsibility on the legislature to abolish the rule. However, until this happens, it forms part of the South African Law[95].

[88] It is certain that the event will occur, but uncertain when.
[89] Nagel 248.
[90] Ibid. Nagel indicates that the parties may either expressly agree to conclude a periodic lease or it may be implied, for example where V lets a flat to H, without mention of the duration of the lease, at R 800 per month.
[91] Nagel 249.
[92] Ibid.
[93] 1996 (4) SA 1236 (LCC).
[94] 2002 (1) SA 643 (E).
[95] Nagel at 249.

Nagel points out that the counter-performance can be calculated according to various methods and he provides the following examples[96]: To stipulate a specific amount, for example Rx per month is the most general method. The rent can, secondly, be fixed according to a formula convertible into money, for example the same remuneration paid by the previous tenant. If the rent is described as fair compensation, the lease will be valid if the compensation can be fixed with reference to the rental value of the property in the open market. The parties may also agree that a specific third party or person will determine the rent, for example ABC Attorneys or an arbitrator[97]. If the third party makes a manifestly unjust determination, the Court has a general power, when asked to do so, to correct such determination. The lessee can, however, not be bound by the Court's decision, as it is not the method of determination agreed between the parties. In such a case, the aggrieved party has the election whether or not to be bound by the lease[98]. A contract will also not be valid if the fixing of rent is within the absolute discretion of only one party. The contract will be valid if objective standards are laid down according to which the discretion must be exercised[99],[100].

The extent of the rent must further be certain[101]. It the compensation is fixed, for example between R 2 200,00 and R 2 500,00 per month, a lease does not come into existence except if the lessee agrees to pay the highest amount[102]. If a regular increase in rent is provided for in the agreement, it can only be enforced if the rent

[96] Ibid.
[97] Ibid. See also *Southern Port Developments (Pty) Ltd v Transnet* 2005 (2) SA 202 (SCA).
[98] Ibid. See also *Hurwitz NNO v Table Bay Engineering (Pty) Ltd* 1994 (3) SA 449 (C).
[99] Ibid. See also *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A).
[100] Ibid.
[101] Nagel at 250.
[102] Ibid.

can be determined with certainty[103]. Rent can however not be increased unilaterally by the lessor, unless his discretion to do so, as set out in terms of the lease agreement, is based on objective criteria and is exercised in an objectively reasonable manner[104]. The mere fact that the lessee retains the use and enjoyment of the property after the lessor has given him notice of an increase does not mean *per se* that he has agreed to pay the increased rent[105]. Agreement to pay the increased rent can be inferred where the lessee does not respond after the lessor gave reasonable notice of termination of the lease and offered that the lessee may retain the use and enjoyment of the property on payment of the increased rent[106].

3.4 Duties of the Parties

A lease is a reciprocal agreement which implies that both the lessor and the lessee have certain rights and obligations in terms of the lease agreement. The common law duties of the lessor and the lessee w thus require specific consideration.

3.4.1 Duties of the Lessor

The four most important duties of the lessor are the delivery of the leased property; maintenance of the leased property; ensuring undisturbed use and enjoyment and, finally, compensating the lessee for attachments and improvements[107]. Before discussions of these duties are undertaken it is to be noted that Cooper is of the

[103] Ibid.
[104] Ibid. See also *Engen Petroleum Ltd v Kommandonek (Pty) Ltd* 2001 (2) SA 170 (W).
[105] Nagel at 250.
[106] Ibid.
[107] Nagel at 256.

opinion that the payment of rates and taxes imposed by the State or public bodies is a further important obligation on the lessor[108].

3.4.1.1 Delivery of the leased property

The main duty of a lessor is to make the temporary use and enjoyment of the property available to the lessee[109]. For the purpose of this dissertation, it is submitted that symbolic delivery, being delivery of the keys to the property let, will be sufficient to effect "delivery" of the leased property[110]. The property must also be delivered in the condition that was agreed upon[111]. For example, if the agreement was that the house would be let furnished, the necessary furniture needs to be supplied. Furthermore, if any maintenance is necessary, for example to paint the property, it needs to be done before the delivery[112].

If no agreement has been reached with respect to the condition of the property with delivery, it must be delivered in the condition it was in at the time of contracting[113]. If the property is let for a specific purpose, eg a residence, it must be reasonably

[108] Cooper *The South African Law of Landlord and Tenant* 114-115. He indicates that parties may regulate liability for rates and taxes by agreement. If a lessee is under a contractual obligation to pay the said rates and taxes to the lessor and he fails to do so, the State or public body cannot recover it from the lessee, as there is no *vinculum iuris* between them. The lessor will remain liable for payment of the rates and taxes and can recover it from the lessee. In the absence of a cancellation clause, the lessor will only be entitled to cancel the lease, if non-payment of the rates is a breach in the circumstances serious to merit cancellation. Cooper is furthermore of the opinion that the lessor will be entitled to send a notice of rescission and will be entitled to cancel the lease if the lessee fails to pay within a further reasonable period allowed in the notice.

[109] Nagel at 257.
[110] Ibid.
[111] Ibid. Nagel indicates that the thing let must be delivered together with the attachments and additions required to make it suitable for the purpose for which it was hired, for example, a house with keys to it .
[112] Ibid.
[113] Ibid.

suitable for that purpose[114]. Also, if a building must comply with certain specifications according to a statute, the lessor has to ensure that the specifications are met[115].

3.4.1.2 Maintenance of the leased property

Unless the parties have agreed otherwise, the lessor has to maintain the property for the duration of the lease to ensure that the property is suitable for the purpose for which it is hired[116]. The scope of the duty to maintain the property will depend on the arrangement between the parties[117]. In the absence of an arrangement the property must be maintained in such a way that it is suitable for the purpose for which it was hired[118]. A provision which will place the duty of maintenance on the lessee will be construed strictly and it will still not release the lessor from the obligation to deliver the property in the condition that the lessee has agreed upon to maintain it[119]. Unless an agreement to the contrary has been concluded, a lessee who has taken the duty of maintenance upon himself will also be responsible to effect the repair due to wear and tear arising as a result of the use of the property or by effluxion of time[120]. The lessor will not be obliged to repair damage caused by the lessee or any other persons for whose actions the lessee is responsible[121]. Finally, minor repairs, for example the replacement of bathroom taps or door frames, which cannot be attributed to the age or quality of the property, have to be undertaken by the lessee,

[114] Ibid. See further *Mpange and Others v Sithole* 2007 (6) SA 578 (W).
[115] Ibid.
[116] Nagel at 258.
[117] Ibid.
[118] Ibid.
[119] Ibid. Nagel indicates that problems often arise where the lessor maintains the outside of a building and the lessee the inside. For example, when a front door or window frames need to be replaced, the question arises whether it is the lessor or the lessee's duty to replace it.
[120] Ibid.
[121] Ibid.

since such repairs will be presumed to be caused by the lessee or persons for whose actions the lessee is responsible[122].

3.4.1.3 Remedies of the lessee

The lessee will be entitled to three general common law remedies if the lessor fails to comply with the duties to deliver and maintain the leased property, placing the lessor in breach, namely specific performance, rescission and damages[123]. Furthermore the lessee will have avail to the additional remedies of reduction of rent and undertaking the repairs himself and recovering the costs from the lessor .

3.4.1.3.1 Specific performance

Specific performance as a remedy is available to the lessee if the lessor fails to deliver the property for rental to the lessee[124]. The South African courts however generally appear to be reluctant to grant an order for specific performance if a defective leased property is delivered or if the property is not maintained properly during the duration of the lease[125].

3.4.1.3.2 Rescission

[122] Ibid.
[123] Ibid.
[124] Nagel at 259.
[125] *Marais v Cloete* 1945 EDL 238. See however *Mpange and Others v Sithole supra* where the court held that the granting of an order for specific performance under such circumstances remains in the court's discretion. It was held that the past tendency of the courts to refuse specific performance orders in the context of a lessor's failure to maintain leased premises could not be elevated to an absolute rule, and that an order for specific performance should be allowed where the lessor's failure to maintain the premises affects the lessee's constitutional rights to adequate housing, dignity and privacy.

If the leased property is defective in respect of an essential aspect, such that a reasonable man would not have continued with the agreement, the lessee may rescind the contract[126]. It the lease contains a *lex commisoria*, the lessee may also rescind the contract. Rescission will also be available to the lessee if the time of performance was of the essence and the property was delivered late[127].

3.4.1.3.3 Damages

If the breach was foreseeable at the time of contracting, caused by the lessor's action and the breach is not of an essential nature, the lessee can insist that the lessor places him in the position in which he would have been had no breach of the lease agreement occurred[128]. Nagel points out that it is however uncertain whether the lessee can claim damages where the lessor did not have any real or imputed knowledge of the defect[129].

3.4.1.3.4 Reduction of rent

Where the breach of the agreement is not sufficiently serious to justify rescission, the lessee may insist on a reduction of the rent in proportion to the diminished use and enjoyment of the leased property[130]. If the breach is of a minor nature, the lessee will not be entitled to a reduction of rent. There are conflicting views in case law as to

[126] Nagel at 259.
[127] *Levy v Rose* (1903) 20 SC 189.
[128] Nagel at 259.
[129] Ibid. Knowledge will be imputed to the lessor if, owing to the nature of his occupation, he was able to have knowledge of the defect. Nagel points out that the majority of writers are of the opinion that knowledge should not be a prerequisite and that the extent of the damages should be restricted by the reasonable foreseeability rule of the general law of contract.
[130] Ibid.

whether a lessee can insist on a reduction of rent if the leased property is not maintained properly during the continuance of the lease. In terms of Roman and Roman Dutch law a lessee who remained in occupation of the leased property could refuse to pay rent if he did not have full use and enjoyment of the property[131]. In *Arnold v Viljoen*[132] the Court held the view that the test for a lessee's liability for rent is not whether the occupation of the premises was beneficial or not, but simply whether the lessee was in occupation of the premises. The view of the Court therefore was that the lessee is obliged to pay rental, but has a claim for damages.

However, Nagel indicates that a more acceptable view was taken in *Ntshiqa v Andreas Supermarket (Pty) Ltd*[133], namely that the lessee was not obliged to give up possession of the property before he could claim a reduction in rental[134]. The Court in *Ntshiqa* took it one step further and found that a lessee can claim the defence of *exceptio non adimpleti contractus* and therefore refuse to pay rental until the lessor honours his part of the agreement. Finally, in *Thompson v Scholtz*[135] the Court found that the reduction should be calculated with reference to the value of the reduced use and enjoyment of the leased property, being an estimate based on the subjective value to the lessee of the reduced enjoyment[136].

3.4.1.3.5 Lessee himself undertakes repairs

[131] Ibid.
[132] 1954 (3) SA 322 (C)
[133] 1997 (3) SA 60 (TkSC)
[134] Nagel at 260.
[135] 1998 (4) All SA 526 (SCA)
[136] Nagel at 260.

A further remedy that the lessee has in the event of the lessor breaching his common law duty of maintenance is to undertake repairs himself and either recover the costs from the lessor or deduct the costs from the rent[137]. A lessee is however only entitled to revert to this remedy after giving the lessor reasonable notice that repairs are needed and the lessor fails to act[138].

3.4.1.4 Providing undisturbed use and enjoyment

Kerr indicates that the subject matter of a lease is not the leased property itself but the use and enjoyment thereof[139]The lessor of a leased property does not have to be the owner of the property, but has to ensure the undisturbed use and enjoyment by the lessee of the leased property[140]. If the lessor is not the owner, the lessee cannot claim specific performance, but will be entitled to sue for damages[141]. This obligation on the lessor means that not only the lessor, but also no third party with a better title may disturb the lessee in his use and enjoyment[142].

3.4.1.4.1 Disturbance by the lessor

Disturbance by the lessor may assume various forms such as changing the locks of a lease flat or house[143]. Non-compliance by the lessor with the obligation to provide undisturbed enjoyment and use of the leased property will entitle the lessee to

[137] Ibid.
[138] Ibid. Thus the lessee can achieve specific performance in an indirect manner.

[139] Kerr *The Law of Sale and Lease* (3rd ed) 247.
[140] Ibid.
[141] Ibid.
[142] ibid.
[143] Nagel at 261.

remedies for breach of contract, namely to claim specific performance, by obtaining a prohibitive interdict or a spoliation order, and / or to a claim for damages[144]. Under certain circumstances the lessee will also be entitled to a reduction in rent[145].

Not all interferences by the lessor will constitute a breach of contract, for example regular inspections of the property, with reasonable notice to the lessee, in order to enable the lessor to comply with the maintenance obligation. If the lessor undertakes essential repairs, the lessee has to tolerate the situation, even if the lessee is required to temporarily vacate the premises[146].

In *Fisher v Body Corporate Misty Bay*[147] Fisher owned a house in a complex. Access to the complex was controlled at a main motor gate leading into and out of the complex and such access was allowed through a disk at the main gate. Fisher fell in arrears with payment of his levies and the body corporate deactivated his disc, with the result that he was unable to gain access to the complex through the motor gate. The body corporate argued that it was only Fisher's motor vehicle that was barred from entering the complex and not him personally. The Court however held that the decision of the body corporate to bar the motor vehicle from the complex resulted in Fisher no longer having peaceful and undisturbed possession and / or use of his vehicle. Accordingly a spoliation order was granted[148]. The Court indicated that a spoliation order is a robust remedy, intended to secure the status quo, being to

[144] Ibid.
[145] Ibid.
[146] Ibid. The lessee may not refuse such a reasonable request to vacate the leased property and is not entitled to claim damages, but is entitled to a reduction of rental, depending on the degree of the disturbance. If, however, the disturbance could have been foreseen at the time of contracting, the lessee will not be entitled to any reduction.

[147] 2012 (4) SA 215 (GNP).
[148] De Rebus (September 2012) 44.

restore possession taken away by action or conduct by one taking the law into his or her own hands[149]. The Court held further that it is a summary remedy, intended to express displeasure at taking the law into one's hands[150].

A problematic issue in this context is when water and/or electricity supply is interrupted. In *City of Cape Town v Strümpher*[151] Strümpher withheld payment due to a dispute that was lodged to the *quantum* of the water amount owing, due to a leak. It was held by the Supreme Court of Appeal that although a water consumer entered into an agreement with a body, like the City, to supply water, it does not make his rights to the water personal rights arising from the agreement. The Court held further that a right to water is a basic right and that, in terms of the Constitution[152], everyone has the right to have access to sufficient water. This gives effect to section 3(1) of the Water Services Act[153], which also provides that everyone has the right of access to basic water supply. Therefore the court held that the City has a duty to provide a water supply in terms of section 27(2) of the Constitution[154].

3.4.1.4.2 Disturbance by third parties

As indicated, the lessor must also guarantee that nobody else with a better title than the lessee will infringe on the property, being similar to the seller's duty to warrant a

[149] At par 28.
[150] Ibid. The Court also made a punitive cost order as it was of the view that the Respondent insisted that it was entitled to deny the Applicant's access to his house and somewhat to his motor vehicle.

[151] 2012 (4) SA 207 (SCA)
[152] S 27(1) of the Constitution of the Republic of South Africa, 1996.
[153] 108 of 1997
[154] At par 9.

buyer against eviction[155]. If a third party with a better title infringes upon the lessee's occupation, the lessee must inform the lessor, to enable the lessor to defend the rights in property or assist the lessee in the defence[156]. If the lessor fails to act, the lessee may not vacate the property without conducting a vigorous defence[157] against the claim of the third party[158]. If the claim of the third party seems to be indisputable, the lessee need not to give notice to the lessor or to conduct a vigorous defence, but can only claim damages, without the option for specific performance, from the lessor[159]. If a third party with no title or with a title inferior to the lessor's title interferes with the property, the lessee needs to act himself against such a party and restore his occupation by either claiming damages against the third party or by obtaining a spoliation order or an interdict against such a third party[160]. This is because the lessor does not have a duty to guarantee the lessee against interference by a third party with no title or a title inferior to that of the lessee[161].

3.4.1.3.3 *Huur Gaat Voor Koop*

In Roman law the lessee had no real rights in respect of the property, but only personal rights[162]. If the lessor sold the property during the continuance of the lease, the lessee could only sue the seller for damages and he could not enforce the lease against the purchaser[163].

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[155] Nagel at 260. This obligation is similar to the seller's duty to warrant the buyer against eviction.
[156] Nagel at 261.
[157] Also referred to as a *virilis defensio*
[158] Ibid.
[159] Ibid.
[160] ibid
[161] Ibid.
[162] Nagel at 262.
[163] The only exception was in respect of successors *titulo universali*, being successors in both rights and obligations. Here the lessee could enforce the lease against the purchaser.

In Roman-Dutch law the position was different in respect of a lessee of land and buildings as the lessee could enforce his real right against the entire world. This exception, referred to as *huur gaat voor koop* (lease takes precedence over sale) was received in South African law and finds application in all forms of alienation, for example bequests and donations[164].

The protection granted by the *huur gaat voor koop* rule is as follows[165]: A lessee of a short lease is protected if he is in occupancy of the property. A lessee of a long lease[166] will be protected, if the lease is registered at the Deeds Office, for the full duration of the lease. If the lease is not registered, he will be protected for the first ten years of the lease, provided that he is in occupation of the leased premises. All rights vested in the land at a later stage will be subject to the lease[167]. If registration did not take place or the lessee is not in occupation, the lease is binding only on persons who acquire the land without rendering a counter-performance[168]; persons who succeeded the lessor in rights and obligations[169] and purchasers and credit grantors who are aware of the lease at the time of granting credit or of conclusion of the transaction in terms of which he establishes a real right or becomes the owner.

[164] Nagel at 262. The rule does not apply to expropriation of land.
[165] Nagel at 263.For a proper understanding of the operation of the *huur gaat voor koop* rule in South African common law it is necessary to distinguish between short term and long term leases although this dissertation focuses on short term leases.
[166] A lease for ten years or longer or a lease extendable to ten years at the lessee's choice or a lease valid for the lifetime of the lessee. Section 1(2) of the Formalities in Respect of Leases of Land Act 18 of 1969.
[167] On the ground of the maxim *qui prior est tempore potior est iure* which when translated means that he who is first in time is also first in law.
[168] So called successors *titulo lucrativo*.
[169] Successors *titulo universali*.

A question that needs to be answered in this context is whether the purchaser replaces the seller as debtor and creditor under the lease[170]. Nagel explains that in terms of the law of contract cession and delegation is required for the replacement of the seller by the purchaser as debtor and creditor under the lease[171]. The view of the Courts, however, is that as soon as transfer is acquired by the new owner, he replaces the lessor as debtor and creditor by operation of law, thus *ex lege*, without the need for cession of rights or delegation of obligations[172]. Therefore the lessor or new owner will be entitled to rent from the moment that risk passed[173] and cannot on the basis of *huur gaat voor koop* retain any money paid to him which was by law property of the previous lessor[174]. Although the lessee must still meet his obligations towards the purchaser, the lessee can however still raise the same defences against the purchaser as he could against the seller, for example that set-off has taken place and that he does not need to pay rent[175]. For the purchaser to replace the seller as debtor, delegation is necessary, which is a three-fold juristic act, requiring the co-operation of the seller, lessee and purchaser[176]. Thus the contention of the courts that the purchaser is bound to comply with the essential terms of the lease is problematic[177].

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[170] Nagel at 263.
[171] Ibid.
[172] *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A) and *Genna-Wae Properties (Pty) Ltd v Media-tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A).
[173] The terms of each contract have to be analysed to determine the date on which the risk passed.
[174] *Garvin NNO v Sorec Property Gardens Ltd* 1996 (1) SA 463 (C)
[175] Nagel at 263.
[176] Ibid.
[177] *Boschoff v Theron* 1940 TPD 299. Nagel at 263 points out that this standpoint is necessitated however, by practical realities. Another standpoint would have placed the lessee in the unenviable position of having to pay rent to the purchaser, but having to fall back on the seller, who usually does not retain any interest in the land, to fulfil the obligations of the lessor. If however, the replacement of debtors places the lessee in a weaker position than he was in originally, or if the agreement excludes such replacement, the lessee should still be able to compel the seller to fulfil his obligations.

Since the purchaser is bound only by the *essentialia* of the lease he needs not to comply with additional, incidental obligations contained in the lease[178]. The lessee has no right of election whether to accept the purchaser as lessor and to continue with the lease[179].

3.4.1.5 Compensation for attachments and improvements

If the lessor granted the lessee permission to make attachments and improvements to the leased property and agreed to compensate the lessee for such attachments and improvements, the lessee will be entitled to compensation[180]. Problems arise when permission was not obtained, or permission was obtained but without an agreement to pay compensation[181].

Problems regarding compensation for attachments and improvements have to be answered with reference to the Dutch Placcaat of 1658, re-enacted in 1696, which was received in South African law. The Placcaat only applies to rural land[182] and

[178] Nagel at 263. Nagel points out that a purchaser need not for example, honour an option to purchase the leased premises granted to the lessee in the lease agreement as it was held by the Supreme Court of Appeal that an option to purchase is not an integral part of the lease contract as it does not relate to the lessee's real right of occupation in the leased premises (which is what *huur gaat voor koop* seeks to protect). The obligations of the original lessor in relation to an option to purchase are thus not transferred automatically (*ex lege*) to the purchaser of the leased property by virtue of the huur gaat voor koop rule and where the lessee seeks to exercise the option he must do so against the original lessor and not against the purchaser. The ensuing situation would then be dealt with in accordance with the principles applying to double sales as per *Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd* 2010 (2) SA 1 (SCA). If the lease provides for an extension of the lease however, the purchaser will have to tolerate the lessee for the extension period should the lessee exercise his option to extend.
[179] *Genna-Wae Properties (Pty) Ltd v Media-tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A).
[180] Nagel at 265.
[181] Ibid.
[182] *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings* (2006) SA 72 (SCA)

where the Placcaat does not apply, the lessee may rely on ordinary rules of unjustified enrichment in order to claim compensation[183].

No compensation can be claimed for improvements made without permission[184]. The lessee will not have a lien over the property as a result of the improvements, but the improvements may be removed during the continuance of the lease, on the condition that the premises are not left in a worse condition than at the commencement of the contract[185]. A lessee may have a claim on the basis of unjust enrichment for improvements and attachments effected to immovable property with the permission of the owner[186]. In respect of necessary improvements, all expenditure may be claimed but in the case of useful improvements, only the lesser of the increase in market value due to the improvements or the costs incurred may be claimed[187].

3.5 Duties of the lessee

The lessee has three main duties namely[188]:

a) to pay the rent;

[183] *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646 (C). Nagel at 264 explains that a great deal of obscurity existed in South African law with regarding the application of the Placcaat. .Firstly until 1996 uncertainty existed as to whether the Placcaat applies to both rural and urban tenements. Earlier decisions such as *Burrows v McEnvoy* 1921 CPD 229 held that it applied only to rural tenements whereas later decisions such as *Phalaborwa Mining Co Ltd v Coetzer* 1993 (3) SA 306 (T) held the opposite. In 2006 however the Supreme Court Of Appeal held in *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings supra* that the Placcaat applies only to rural land and not to urban land as well.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Nagel at 264.
[188] Nagel at 265.

b) to make proper use of the leased property and

c) to return the leased property on the termination of the lease.

3.5.1 Payment of rent

The most important duty of the lessee, is payment of the rent in the manner agreed upon in the contract, otherwise at the end of the term of lease[189]. Should the lessor require payment in advance[190], it must be agreed upon[191]. Payment of rent is a twofold legal act and the co-operation of both parties is required, therefore the lessee will not be in default should the lessor prevent the lessee from fulfilling his obligation by, for example, refusing to accept the rent, as the duty to see that the rent is paid on time rests with the lessee[192]. If the parties have not agreed on a place of payment, the lessee must go to the lessor as creditor[193]. Finally, a clause in a lease agreement giving a lessee a discretion to unilaterally decrease the amount of rent is not void for vagueness so long as the discretion is not completely unfettered[194].

[189] Ibid.See also the discussion in Kerr *The Law of Sale and Lease* (3rd ed) at 262 .
[190] For example on or before the beginning of each month.
[191] Nagel at 265. Nagel explains that the parties usually agree upon the place and time of payment and, unless otherwise agreed upon, rent is payable up to midnight of the date agreed upon. When rent is payable in advance it means that it must be paid on or before the first day of each period. Except where payment has to be made at the premises of a public business, such as a bank, the lessee must pay on that day, irrespective of the fact that it may be a Sunday or public holiday.
[192] Ibid. Nagel explains that this means that if the rent is paid by mail without the lessor's consent having been obtained for such method of payment, the risk of loss or late payment rests with the lessee. He further indicates that payment by cheque is only conditional payment but that this does not imply that payment by cheque must be made in time so that the lessor receives cash payment on the payment date in terms of the lease agreement – the cheque only needs to reach the lessor before midnight on the date of payment.
[193] Ibid.
[194] *Engen Petroleum Ltd v Kommandonek supra.*

As indicated, the lessee can insist upon a reduction of rent if the property is not delivered in the condition agreed upon or is not maintained properly or if the lessor himself or a third party with a better title than the lessee interferes with the use and enjoyment of the property. The lessee will further be entitled to a reduction of rent if the lessee has no or only partial use and enjoyment of the property caused by complete or partial destruction by *vis maior*[195]. If the use and enjoyment is only partial, a reduction in proportion to the loss may be insisted on but if the *vis maior* results in a complete destruction of the leased property, the lessee does not have to pay any rental[196]. If the property is leased for a specific purpose and the damage caused by *vis maior* resulted into the lessee not being able to use the property for that purpose, then the lessee does not have to pay any rental[197].

3.5.1.1 Remedies for the lessor

(a) Specific performance, rescission and damages

The lessee commits *mora debitoris* or repudiation of the agreement if he does not pay the rental, giving the usual contractual remedies to the lessor, being either maintaining the contract or to rescind it, with or without a claim for damages[198]. The lessor may resile if the lease contains a *lex commissoria* or if he acquired a right of rescission by reasonable notice[199]. If the lessor should choose to rescind the contract, he must inform the lessee of his decision[200].

[195] Nagel at 266.
[196] Ibid. Non-substantial loss of use and enjoyment does not justify any rent reduction.
[197] Ibid.
[198] Ibid.
[199] *Goldberg v Buitendag Boerdery Beleggings (Edms) Bpk* 1980 (4) SA 775 (A)
[200] Nagel at 266 points out that failure to exercise the option immediately, however, does not imply that the right to rescind has been forfeited. The lessor's conduct should not, however, amount to a

A claim for payment of rent in arrears in terms of a lease agreement is considered to be a claim for specific performance and not one for damages[201]. If it is not possible to claim rent in arrears (for example, where the rent is payable only at the end of the term of lease and the lessor elects to rescind during the continuance of the contract or repudiation occurs during the continuance of the contract) a claim for unjustified enrichment may be instituted[202]. Nagel indicates that, despite case law to the contrary[203] the correct position appears to be that a lessee who remains in occupation of a leased property cannot be held liable for the payment of rent during this period[204]. Depending on the circumstances, the lessor either has a delictual claim or he may institute a claim on the basis of unjustified enrichment[205].

(b) Lessor's Tacit hypothec

In order to ensure the payment of rent, the lessor has a tacit hypothec over the movable assets (*invecta et illata*) brought on the leased premises as well as the fruits and crops of the property, whether gathered or not[206]. If the premises are sub-let, the

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waiver of the right to rescind. Waiver can be inferred, for example, where the lessor accepts rent in arrears several months after it has fallen due.

[201] *Director - General, Department of Public Works v Kovacs Investments 289 (Pty) Ltd* 2010 (6) SA 646 (GNP).

[202] Nagel at 266.

[203] *Sapro v Schlinkman* 1948 (2) SA 637 (A).

[204] Nagel at 267 . See also *Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd* 2002 (6) SA 236 (C).

[205] Ibid.

[206] Nagel at 267.Animals, furniture, ornaments, clothes, firearms, implements and tools brought onto the premises by the lessee with the intention to be held there permanently, are subject to the hypothec.

movable assets of the sub-lessee are subject to the hypotec only insofar as the sub-lessee owes rent to the sub-lessor[207].

The hypothec comes into operation the moment the rent falls into arrears and exists only for the period in which the rent remains in arrears[208]. As a result the lessor cannot obtain an interdict against the lessee to prevent him from removing assets from the premises until the rent is in arrears[209]. Furthermore the hypothec operates only for as long as the assets remain on the premises: as soon as the assets are removed, other than by attachment, the hypothec lapses[210]. While the assets are in transit to anew destination they may be attached[211]. The hypothec lapses at the moment that the rent in arrears is settled[212].

Nagel indicates that assets on the leased premises but belonging to third parties are subject to the lessor's hypothec only if[213]:

a) the lessor is unaware that the asset do not belong to the lessee[214];

[207] Nagel at 267 points out that conflicting viewpoint exist as to whether or not, during the sub-lease, the lessor has a hypothec over the yield of the premises for rent in arrears owed by the original lessee. See further *Reinhold & Co v Van Oudtshoorn* 1931 TPD 382.
[208] Nagel at 268.
[209] Ibid.
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] See the summary provided by Nagel at 267.
[214] *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T).Nagel at 267 explains that the lessor usually acquires knowledge of the true position as a result of having received notice to that effect from the owner. A lessor may also become aware of the true position in other ways, for example by receipt of a copy of an agreement between the lessee and a third party under which the latter reserves ownership, despite the fact that the goods are in the position of the lessee. In the latter regard see *Paradise Lost Properties (Pty) Ltd v Standard Bank of South Africa Ltd* 1998 (4) SA 1030 (N). According to Nagel, the nature of the lessee's business could also determine whether or not the lessor, through the exercise of reasonable care, could have established that the goods did not belong

b) the assets were brought onto the premises with the knowledge that an impression could be created thereby that the lessee is the owner of the assets and the third party fails to correct this impression[215];

c) the assets were brought onto the premises with the intention to hold them there permanently[216];

d) the assets were brought onto the premises for use by the lessee[217].

These requirements are cumulative, meaning that all four requirements have to be met in order for assets belonging to a third party to be subject to the lessor's tacit hypothec[218]. It is however important to note that , even where all four requirements are met, the *invecta et illata* of a third party can be subject to the lessor's hypothec only insofar as the lessee's own *invecta et illata* are insufficient to defray the rent in arrears[219].

3.5.2 Proper use of the property

to the lessee, for example goods left on a premises by an auctioneer normally do not belong to the lessee.

[215] Nagel at 267 remarks that actual knowledge by the third party that the assets have been brought onto the premises being leased is not required. It is however required that the third party must have been in a position to have taken reasonable steps to discover whether the premises were being leased and failed to do so.

[216] Nagel explains at 267 that goods purchased in terms of an instalment sale are usually brought onto the premises with such an intention, since the intention is that the buyer will in due course become the owner of the assets. Such intention is absent however if for example a company car that is used exclusively for business purposes is brought onto the premises. The asset must therefore be brought onto the leased premises with the intention that it will remain there not temporarily but indefinitely.

[217] This will usually exclude assets brought onto the leased premises by visitors and persons who have to do work at the premises such as a plumber or electrician.

[218] Nagel at 268.

[219] Ibid.

The lessee must act like a *bonus paterfamilias* during the continuance of the lease, in other words he must use the leased property as the reasonable man would[220]. This means that the leased property should be used for the purpose for which it was leased: a residence for example may not be used as a boarding house or for business purposes[221]. If the lease agreement is silent about the particular purpose, the property may be used for the purpose for which it was created or manufactured or it may be used in the same manner as in the past[222].

Unless a different intention appears from the agreement between the parties, the leased property may not be altered without the lessor's consent during the continuance of the lease, for example a garage being converted into a bedroom, unless the lessee is able to return the property back to its original state on termination of the lease[223]. If the agreement stipulates that no alterations or additions shall be made to the leased property, it does not preclude the installation of demountable partitions[224].

3.5.2.1 Remedies of the lessor

Should the property be damaged, used improperly or used for a purpose other than that for which it was leased, or should alterations be made without the lessor's

[220] Ibid. Nagel explains that the lessee is obliged to use the leased property as a reasonable man would use and care for his own property. He points out that the most common form of improper use is damage caused to the property by the lessee or by a person for whose actions the lessee is responsible.
[221] Ibid.
[222] Ibid.
[223] Ibid.
[224] *Protea Assurance Co Ltd v Presauer Developments (Pty) Ltd* 1985 (1) SA 737 (A)

permission, specific performance in the form of an interdict may be claimed[225]. If the breach of contract is sufficiently material or if the right to resile was reserved[226] the lessor may rescind the contract[227]. Damages may also be claimed[228].

3.5.3 Return of the property on termination of lease

The property must be returned, at the end of the lease period, in the same condition as that in which it was received, with allowance for ordinary wear and tear resulting from the use of the property and from the effluxion of time[229]. A lessee must thus return the keys to a residential property and remove all his personal belongings as well[230].

3.5.3.1 Remedies of the lessor upon termination

The remedies that the lessor enjoys upon termination of the lease agreement are as follows[231]: if the property is not returned in the same condition as that in which it was received, the lessor has the choice between specific performance and a claim for damages. The granting of specific performance is in the discretion of the court[232], as a court will be reluctant to grant an order of specific performance when the order will hold little advantage for the lessor, but entail large costs for the lessee.

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[225] Nagel at 269.
[226] Through the inclusion of a *lex commissoria.*
[227] Ibid.
[228] Ibid.
[229] Ibid.
[230] Ibid.
[231] Nagel at 269.
[232] *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A).

If the lessee can prove that the damage to the property is not due to his actions or the actions of the persons that he is responsible for, he cannot be held liable for such damage[233]. However, should he be able to prevent the damage, he would be held liable.

An eviction order can be obtained if the property is not returned at all[234]. It should be noted that the lessor may however not take the law into his own hands and forcibly eject the lessee, even if the lease agreement contains a clause to such effect[235].

The lessor cannot refuse to receive the property, if it is returned in a damaged condition[236]. His only remedy is a claim for damages, calculated in accordance the difference between the value of the property at the end of the lease and the value of the property if delivered in a proper condition[237]. The reasonable costs of repair or maintenance are normally an indication of such a difference. Should the application of the general rule lead to inequitable results, actual damages suffered may be claimed[238]. In addition, the lessor also has a claim for a loss of rent during the restoration period[239]. Finally, a lessor only has a claim for damages once the lease agreement has terminated and not during the duration of the lease agreement[240].

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[233] It was held in *Mutual Construction Co (Tvl) (Pty) Ltd v Komati Dam Joint Venture* 2009 (1) SA 464 (SCA) that the onus of proving that damage to property was not caused by the lessee's actions or by persons for whom the lessee is responsible rests on the lessee.
[234] The lessor's right to evict the lessee may be seriously affected. See the discussion about the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 in ch4.
[235] Nagel at 269.
[236] Nagel at 270.
[237] Ibid.
[238] *Swart v Van der Vyfer* 1970 (1) SA 633 (A).
[239] Nagel at 270.
[240] *Commercial Union Assurance Co of South Africa v Golden Era Printers and Stationers (Bophuthatswana)(Pty)Ltd* 1998 (2) SA 718(B).

Prior to the termination of the lease, the lessor has no contractual claim against the lessee for breach of the duty to return the premises in the same condition as it was received in even if the property had been damaged prior to this time[241].

4. Termination of lease

A lease can be terminated by fulfilment, agreement, set-off, prescription, supervening impossibility of performance and rescission as a result of breach of contract[242]. A lease can also be terminated in the following manners[243]:

4.1.1 Effluxion of time

As indicated a lease must be concluded for a determined or a determinable period. If a lease is concluded for a specified time or until the occurrence of a certain event, the lease is terminated on the expiry of that period or on the occurrence of that event, without the requirement of a notice of termination[244].

If a lease was concluded on a periodic basis, for example from month to month, the agreement may be terminated at any time by any party giving reasonable notice[245]. The reasonableness of the notice will depend on the circumstances[246]. If the lease

[241] Nagel at 270.
[242] Nagel at 275.
[243] Ibid.
[244] Nagel at 275 to 276.
[245] Nagel at 276.
[246] *Ramburan v Ming Housing* 1995 (1) SA 353 (D)

lays down a period of notice, this must be complied with[247]. If no period is specified in the lease, reasonableness is often determined by the manner in which rent is payable, for example if rent is payable on a monthly basis, one month's notice will suffice[248].

4.1.2 Discretion of party

If the term of lease can be terminated by the sole discretion of one of the parties, the lease is terminated upon the party exercising that choice, or upon the death of that party, subject to that party giving reasonable notice[249]. If a partnership entered into a lease agreement, the partners individually becomes co-lessees after the dissolution of the partnership and are liable *in solidum* for the rent. A partnership is not a juristic person and its dissolution does not lead to the termination of the lease[250].

4.1.3 Insolvency

According to the South African common law, a lease is terminated by the insolvency of the lessee. Section 37 of the Insolvency Act[251] stipulates, however, that the lease is not automatically terminated, but that the trustee has the choice to terminate the lease by notice[252]. If the trustee fails to exercise this choice within three months of his appointment, the lease is deemed to be terminated[253]. Termination of the lease by the trustee gives the lessor the remedy for issuing summons against the insolvent

[247] Nagel at 276.
[248] Ibid.
[249] Ibid.
[250] Nagel at 279.
[251] Act 24 of 1936
[252] Nagel at 278.
[253] Nagel at 279.

estate for damages, for example the remainder of the rental of the lease agreement, whilst the insolvent estate's claim for improvements will be lost[254]. A stipulation in the lease agreement to the effect that the agreement will terminate upon the sequestration of the lessee's estate is null and void[255].

4.1.4 Death

As a rule a lease is not terminated upon the death of one of the contracting parties except[256]:

a) If it was agreed that the agreement would terminate upon the death of any of the parties, or

b) If the lease continues for as long as it is the will of the lessor, it is terminated upon the lessor's death, or

c) If the lease continues for as long as it is the will of the lessee, it is terminated upon the death of the lessee.

5. Renewal of lease

The lessor and the lessee may expressly or tacitly agree to conclude a new lease in respect of the same property after termination of the existing lease[257]. If the parties do not expressly agree upon the renewal of the lease, uncertainty can arise as to

[254] Ibid.
[255] Ibid.
[256] Nagel at 278.
[257] Nagel at 279. Such an agreement is often referred to as relocation. Nagel however remarks that this concept gives rise to confusion since the parties conclude a new lease and do not merely extend the previous one.

whether or not the period of lease was, accordingly the common law, extended[258]. Continued use of the property after termination of the lease does not mean that the lease was tacitly renewed[259]. It is not always possible to lay down a general rule and the facts and circumstances of each case must be analysed to determine whether or not a new lease had come into being[260].

Unless the contrary appears, the new contract is formed on the same terms and conditions that reasonably have relevance to the relationship between the lessor and the lessee as contained in the original lease[261]. Conditions that are only incidental to the original lease, like a pre-emptive right, appear not to be part of the new lease[262]. Unless an intention to the contrary appears, at common law, the new lease is concluded for an indefinite period and can be terminated by reasonable notice at any time[263].

A lease can also contain an option to renew[264]. The option must contain the *essentialia* of a lease agreement[265]. If no rent is specified or can be inferred from the agreement, the lessee cannot form a valid lease by exercising the option[266]. It may be conditional, for example that the lessee must have complied with all the terms

[258] Ibid.
[259] Ibid.
[260] *Nedcor Bank Ltd v Withinshaw Properties supra.*
[261] Nagel at 279.
[262] Ibid.
[263] *Cape v Zeman* 1966 (1) SA 431 (SWA).
[264] Nagel at 280.
[265] Ibid. In *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A) it was held that if no rent is specified or can be inferred from the agreement, the lessee cannot form a valid lease by exercising the option.
[266] *Letaba Sawmills Edms Bpk v Majovi Edms Bpk supra*.

and conditions of the previous agreement of lease[267]. If the lessee wants to exercise this option, his choice must be conveyed unequivocally to the lessor[268]. If the lease stipulates a period within which the option has to be exercised, it must be done before the expiry of that period[269]. In the absence of such a period, the option must be exercised before the expiry of the lease[270].

6. Conclusion

The common law of lease in South Africa embodies a relatively straight forward set of legal principles that apply to the reciprocal lessor-lessee relationship. As a lease agreement is a contract it requires the usual aspects to be present when the contract of lease is concluded, namely consensus, contractual capacity, legality and physical possibility. It does not require as a formality that a short term lease agreement be in writing unless the parties agreed that writing would be necessary for purposes of the validity of the agreement. It is furthermore clear that a lease entails temporary enjoyment and possession of the leased premises and that such premises cannot be let in perpetuity.

In terms of the common law the lessor has a few main duties (which translate into rights for the lessee) namely delivery of the leased premises which must be fit for the purpose for which it leased; maintenance thereof (which aspect may be varied by agreement); ensuring that the lessee has undisturbed use and possession of the

[267] Nagel at 280.
[268] Ibid.
[269] Ibid.
[270] Ibid.

leased premises and compensating the lessee for necessary and useful improvements and attachments. As such the lessor is not entitled to change locks during the continuation of the agreement and he must further give reasonable prior notice to the lessee if he wishes to inspect the leased premises. Where the lessor does not comply with his common law duties the lessee has a choice between a number of remedies such as specific performance, rescission, damages, reduction of rent or to effect repairs himself and claim compensation. The lessee is also afforded protection in terms of the *huur gaat voor koop* rule which favours the contract of lease above a contract of sale.

The lessor's rights include aspects such as entitlement to payment of rent and receiving the leased premises back in at least the condition it was in when the agreement was concluded. Where a lease agreement has terminated the common law allows the lessor to approach a court to evict the lessee who refuses to vacate the premises. No procedures are prescribed by the common law for such eviction. In practice a lessor who wishes to evict a lessee will thus merely follow the procedure prescribed by the rules of the relevant court that he approaches. Applications for eviction of lessees from residential premises are often brought in the Magistrates courts where provision is made for rent interdict summonses and attachment of property to be used in addition to simple and combined summonses[271].

A lessee also has certain duties in terms of the common law, namely payment of the agreed rent; proper use of the leased property and return of the property upon

[271] See s31 and 32 of Act 32 of 1944.

termination of the lease in at least the same condition it was in when the lease agreement was concluded. The remedies of the lessor in the event of non-compliance by the lessee with his common law duties are specific performance, rescission and damages depending on the nature of the breach. A lessor also has the unique common law remedy of the tacit hypothec in terms whereof he can attach *invecta et illata* on the leased premises in order to ensure payment of rent.

It is submitted that the common law of lease appears to strike a reasonable balance between the rights and obligations of the lessee and the lessor. It contains certain rights which give recognition to the lessor's ownership of the leased property and his right to derive an income from it .It furthermore protects the lessee by entitling him to receive delivery of the leased premises and to enjoy temporary undisturbed possession thereof and imposes a duty on the lessor to maintain the property. Furthermore even though it recognises that a lessee may be evicted from a leased premises if he refuses to vacate it after termination of a lease, it is clear that the lessor who wishes to evict such lessee may not revert to self-help but must use due court procedure to obtain such eviction. In terms of the common law however courts are not obliged to consider any special circumstances pertaining to the lessee in terms of which the lessee may be entitled to stay on in the leased premises.

CHAPTER THREE THE RENTAL HOUSING ACT

1. Introduction

The Rental Housing Act[272] which repealed the Rent Control Act[273] came into force on 1 August 2000. It regulates the relationship between the lessor and lessee in respect of leases of dwellings for housing purposes[274]. Section 15 of the Act furthermore empowers the Minister of Housing to issue regulations in respect of various matters relating to rental housing property[275]. For purposes of this chapter and in keeping with the express terminology employed by the Act, the terms 'landlord' [276] and 'tenant'[277] will be used interchangeably with the term "lessor and 'lessee' respectively. It is to be noted that the Rental Housing Act has been the subject of considerable amendment and proposed amendments. For this reason the provisions of the principal Act will first be dealt with whereupon a chronological indication of amendments and proposed amendments to the Act will follow in order to provide a holistic overview of the Act and developments related thereto.

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[272] Act 50 of 1999 (hereinafter the Rental Housing Act or Act). All references to sections in this chapter are to sections of the Rental Housing Act unless otherwise indicated.
[273] Act 80 of 1976.
[274] Kerr *The Law of Sale and Lease* (3rd ed) 286.For a comprehensive discussion of the Rental Housing Act see also De la Harpe ' Aantekeninge oor die Wet op Huurbehuising 50 van 1999' 2002 PELJ1.
[275] S15 of the Act indicates that regulations may be made relating to anything which may or must be prescribed under chapter 4; the procedures and manner in which the proceedings of the Tribunal must be conducted; the forms and certificates to be used; the notices to be given by the Tribunal in the performance of its functions, powers and duties; unfair practices , which , amongst other things may relate to the changing of locks; deposits; damage to property; demolitions and conversions; eviction; forced entry and obstruction of entry; House Rules, subject to the provisions of the Sectional Titles Act 95 of 1986 (where applicable); intimidation; issuing of receipts; tenants committees, municipal services; nuisances; overcrowding and health matters; tenant activities; maintenance; reconstruction or refurbishment work or anything that is necessary to prescribe for purposes of the Act.
[276] A 'landlord' is defined in s1 of the Act as meaning the owner of a dwelling which is leased and includes his or her duly authorised agent or a person who is in lawful possession of a dwelling and has the right to lease or sublease it.
[277] A tenant is defined in s1 of the Act as referring to the lessee of a dwelling which is leased by a landlord.

The preamble of the Rental Housing Act is instructive as to its enactment and also for purposes of considering the interrelation between the Rental Housing Act and the Prevention of Illegal Eviction and Unlawful Occupation of Land Act[278] in chapter 4 hereinafter. It is thus important to note that the preamble contains the following:

'Whereas in terms of section 26 of the Constitution of the Republic of South Africa[279] everyone has the right of access to adequate housing;

And whereas the State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right;

And whereas no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances;

And whereas no legislation may permit arbitrary evictions;

And whereas rental housing is a key component of the housing sector;

And whereas there is a need to balance the rights of tenants and landlords and to create mechanisms to protect both tenants and landlords against unfair practices and exploitation;

And whereas there is a need to introduce mechanisms through which conflicts between tenants and landlords can be resolved speedily at minimum cost to the parties……."

[278] Act 19 of 1998.
[279] The Constitution of the Republic of South Africa, 1996.

The point to be made at this stage, with reference to the above statements contained in the preamble to the Rental Housing Act, is that the legislature was acutely aware of the right of access to adequate housing and the right not to be evicted from one's home without an order of court made after considering all the relevant circumstances as contemplated in section 26 of the Constitution.

The focus of this chapter will be to establish how the Rental Housing Act influenced the common law rights and duties of lessors and lessees. In order to consider the impact of the Rental Housing Act on the South African Common law of lease it is further necessary to consider the objectives of the Act, its scope of application and provisions.

2. Purpose of the Rental Housing Act

In terms of the preamble to the Act it has various objectives, namely:' to define the responsibility of government in respect of rental housing property; to create mechanisms to promote the provision of rental housing property; to promote access to adequate housing through creating mechanisms to ensure the proper function of the rental housing market; to make provision for the establishment of a rental housing tribunal; to define the functions, powers and duties of such Tribunals, to lay down general principles governing conflict resolution in the rental housing section; to provide the facilitation of sounds relations between tenants and landlords and for this purpose lay down general requirements relating to leases, to repeal the Rent Control Act…and to provide for matters connected therewith".

From an overview of the objectives of the Act and a preliminary glance at its provisions, it is thus clear that, against the backdrop of the legislature's awareness of the rights contained in section 26 of the Constitution, it sought to maintain and promote the rental housing market by regulating certain aspects of the relationship between the landlord and tenant and by creating Rental Housing Tribunals to deal with unfair practices in the context of lease agreements. It is to be noted that the Rental Housing Act initially defined an 'unfair practice 'as'a practice unreasonably prejudicing the rights or interests of a tenant or a landlord'[280]. It does not provide a list of these unfair practices but section 15 which deals with the types of regulations that the Minister may make in terms of the Act alludes to the fact that unfair practices would include practices pertaining to changing of locks, inappropriate practices relating to deposits and receipts and damage to property, forced entry , etc.

3. Scope of Application

The geographical scope of application of the Act is the whole of South Africa[281] . However the Act does not cover all contracts of lease, but only leases of dwellings for housing purposes[282]. For purposes of the Act "dwelling" includes any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage or demarcated

[280] S1.
[281] Kerr *The Law of Sale and Lease* (3rd ed) 286.
[282] A lease is defined in s1 as a lease agreement entered into between a landlord and a tenant in respect of a dwelling for housing purposes.

parking space which is leased as part of the lease[283]. De La Harpe validly remarks that dwellings that are used for both business and housing purposes are thus not covered by the Act[284]. He posits that it would have been appropriate for the legislature to have included dwellings such as the informal 'makuka' in the scope of application of the Act [285].

4. Responsibility of Government to promote rental housing property

Chapter Two of the Act deals with the responsibility of Government to promote rental housing. In brief this entails that Government must[286]:

a) promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives mechanisms and other measures that

   (i) improve conditions in the rental housing market;

   (ii) encourage investments in urban and rural areas that are in need of revitalisation and resuscitation and

   (iii) correct distorted patterns of residential settlement by initiating, promoting and facilitating new development in or the redevelopment of affected areas;

(b) facilitate the development of rental housing in partnership with the private sector.

[283] S1 of the Act.
[284] De la Harpe 2.
[285] Ibid. A 'Makuka' , as explained by de la Harpe, is a dwelling in the informal housing sector in which an entrepreneur resides and from which he also conducts his business.
[286] S2(1) of the Act.

As part of the measures to be undertaken by Government to increase the provision of rental housing, the Act provides that the relevant Minister may introduce a rental housing subsidy programme as a national housing programme[287] or other assistance measures to stimulate the supply of rental housing property for low income persons[288].

5. Relations between landlords and tenants

Chapter 3 of the Rental Housing Act regulates the relations between landlords and tenants. It contains certain general provisions pertaining to lease agreements and also sets out specific rights of tenants and landlords respectively.

5.1 General provisions

In advertising a dwelling for purposes of leasing it, or in negotiating a lease with a prospective tenant, or during the term of a lease, a landlord may not unfairly discriminate against such prospective tenant(s) or the members of such tenant's household or the bona fide visitors of such tenant on certain grounds specified in the Act [289]. As indicated later in this chapter, the 2007 Amendment Act deleted the words' bona fide' in relation to visitors with the result that the protection of this

[287] As contemplated in s3(4)(g) of the Housing Act, 107 of 1997.
[288] S3 of the Act.
[289] S4(1) of the Act. The grounds of prohibited discrimination include race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth.

section , insofar as visitors of the lessee is concerned, is not limited to bona fide visitors anymore[290].

5.2 Rights of the tenant

In terms of the Rental Housing Act the tenant has the right, during the lease period, to privacy and the landlord may only exercise his right of inspection of the leased premises in a reasonable manner after reasonable notice to the tenant[291]. The tenant furthermore has the following rights[292]:

a) the right not to have his or her person searched;
b) the right not to have his or her property searched;
c) the right not to have his or her possessions seized except in terms of law of general application and having first obtained an order of court[293];
d) the right to not have the privacy of his or her communications infringed.

It is interesting to note that the rights of the tenant, contemplated in section 4(3), are expressed in the negative form. It is submitted that it is possibly the intention of the Legislature that these are the specific actions that the landlord should refrain from.

De la Harpe raises the question whether the provision that a lessee's goods may only be seized after certain requirements have been met has any impact on the landlord's tacit hypothec[294]. He however indicates that the normal meaning of

[290] See par 9 herein.
[291] S4(2) of the Act.
[292] As set out in s4(3) of the Act. In terms of s4(4) these rights apply equally to members of the tenant's household and to bona fide visitors of the tenant.
[293] This provision was later amended to include orders by the Tribunal. See the discussion below in par 9.
[294] De la Harpe 5.

'attachment' does not include the rights which arise from the tacit hypothec and remarks that the nature of the hypothec is different from the nature of attachment and the hypothec also has to be perfected before the lessor obtains any real right[295]. The tacit hypothec does not imply that the lessor may resort to self-help and due legal process must first be followed before attachment can occur in terms of the hypothec[296]. It can thus be agreed with De La Harpe that it does not appear that the provisions of section 4(3) of the Rental Housing Act influences the tacit hypothec which the lessee has at common law.

5.3 Rights of the landlord

The landlord has the following rights in terms of the Rental Housing Act[297]:

a) the right to prompt and regular payment of rental or any other charges payable in terms of the lease;
b) the right to recover unpaid rental or any other amount due and payable after obtaining a ruling by the Tribunal or after obtaining a court order;
c) the right to terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice[298] and are specified in the lease;
d) the right , on termination of the lease, to receive the rental housing property in a good state of repair, save for fair wear and tear and to repossess rental housing property having first obtained a court order; and

[295] Ibid.
[296] Ibid.
[297] S4(5)of the Act.
[298] An unfair practice is defined in s1 of the Act as a 'practice described as a practice unreasonably prejudicing the rights or interests of a tenant or landlord."

e) the right to claim compensation for damage to the rental housing property or any other improvements on the land on which the dwelling is situated, if any, caused by the tenant, a member of the tenant's household or a visitor of the tenant.[299]

5.4 Specific provisions pertaining to leases

5.4.1 Formalities

Apart from setting out the rights of the tenant and landlord as aforementioned, the Act also contains specific provisions pertaining to leases. In this regard it is provided that, subject to section 5(2) of the Act, a lease between a tenant and a landlord need not be in writing or to be subject to the Formalities in respect of Leases of Land Act[300]. A landlord is however obliged, if requested thereto by a tenant, to reduce the lease to writing[301].

5.4.2 Contents of lease agreement

According to section 5(6) a written lease agreement as contemplated in section 5(2) must include the following information[302]:

a) the names of the tenant and landlord and their addresses in the Republic for purposes of formal communication;

b) the description of the dwelling which is the subject of the lease;

[299] S 4(5).
[300] S5(1) with reference to Act 18 of 1969.
[301] S5(2) of the Act.
[302] S5(6)(a) to (g).

c) the amount of the rental of the dwelling and reasonable escalation , if any, to be paid in terms of the lease;

d) if rentals are not paid on a monthly basis, then the frequency of rental payments;

e) the amount of the deposit , if any

f) the lease period, or, if there is no lease period determined, the notice period requested for termination of the lease;

g) obligations of the tenant and the landlord[303]; and

h) the amount of the rental, and any other charges payable in addition to the rental of the property.

It is further stipulated that a list of defects registered in terms of section 5(3)(e)as discussed hereinafter, must be attached as an annexure to the lease[304]. In addition a copy of the House Rules applicable to a dwelling must also be attached as an annexure to the lease[305]. It is to be noted that section 5(9) expressly obliges a landlord to ensure that the provisions of section 5(6),(7) and (8) are complied with.

Section 5(1) of the Act thus confirms the common law position that a contract of lease does not have to be in writing[306]. De la Harpe cautions that the following aspects *inter alia* have to be borne in mind[307]:

[303] These obligations must not detract from the provisions of section 5(3) or the regulations relating to unfair practice.
[304] S5(7).
[305] S5(8). An example of this is if the leased premises forms part of sectional title scheme and the relevant Body Corporate has any rules.
[306] Except in the case of a long lease which is governed by the Formalities regarding Lease of Land Act 18 of 1969.
[307] De La Harpe 8.

a) no limitation is placed upon the time period within which the lessor may be requested to put the lease agreement in writing and it will be prudent for a lessee to make such request prior to the expiry of the lease.

b) The contract, irrespective of whether it is oral or written, comes into existence prior to the request to reduce it to writing and the lessee thus has to make sure that the written agreement is a correct reflection of the agreement between the parties.

c) The Act does not specifically state who is responsible for the costs of reducing the lease agreement to writing.

5.4.3 Payment, deposit and inspection

Section 5(3) of the Rental Housing Act further provides that a lease will be deemed to include the undermentioned terms, which can be enforced in a competent court, and which cannot be waived[308]:

5.4.3.1 Proof of payment

The landlord must furnish the tenant with a written receipt for all payments[309], which must be dated and clearly indicate the address, including the street number and further description, if necessary, of the leased premises. The receipt must also indicate whether the payment has been made for rental, arrears, the deposit or otherwise and must specify the period for which payment is made[310].

[308] S 5(4).
[309] S 5(3)(a).
[310] S 5(3)(b).

5.4.3.2 Deposit

The landlord may also require from the tenant, before moving into the dwelling, to pay a deposit[311], which must be invested in an interest-bearing account with a financial institution[312]. It is to be noted that the Act does not stipulate what the amount of the deposit must be. It does not mention any fixed amount or any percentage according to which the deposit must be calculated[313]. The landlord must pay the tenant the interest rate applicable to such account[314], subject thereto that there are no amounts outstanding in terms of the lease and no damage is recorded in the joint inspection at the termination of the lease as discussed later herein[315]. The tenant may during the period of lease request the landlord to provide him with written proof in respect of interest accrued on such deposit and the landlord must provide such proof on request[316].

The landlord may, on expiration of the lease, apply the deposit and interest towards payment of all amounts for which the tenant is liable in terms of the lease, including the reasonable cost of repairing damages to the dwelling during the lease period and the cost of replacing lost keys.[317] The balance of the deposit and interest, if any, after deduction of any amounts due in terms of the lease, must be refunded to

[311] S 5(3)(c). It is stated that the deposit may not, at the time, exceed an amount equivalent to an amount specified in the agreement or otherwise agreed to between the parties.
[312] The interest rate may not be less than the rate applicable to a savings account with that financial institution.
[313] See further the comments by De la Harpe at 10.
[314] Such interest rate may not be less than the rate applicable to a savings account with a financial institution.
[315] S5(3)(d) of the Act read with s5(3)(g).
[316] S5(3)(d) of the Act. Where the landlord is a registered estate agent, as provided for in the Estate Agency Affairs Act 112 of 1976, the deposit and interest shall be dealt with in accordance with that Act. According to the Estate Agency Affairs Act, the interest earned on the deposit will be payable to the Estate Agents Fidelity Fund.
[317] S 5(3)(g).

the tenant within fourteen days[318] after restoration of the premises by the landlord[319]. The landlord must have the relevant receipts, indicating the costs incurred by the landlord, available to the tenant for inspection as proof of the costs as contemplated in section 5(3)(g), incurred by the landlord[320].

The landlord must, if no amounts are due and owing in terms of the lease, refund the deposit and accrued interest to the tenant, without any deduction or set-off, within seven days[321] of expiration of the lease[322]. If the landlord fails to inspect the premises in the presence of the tenant, it is deemed an acknowledgement by the landlord that the dwelling is in a good and proper state of repair, and the landlord will have no further claim against the tenant[323]. The landlord must then refund the full deposit and accrued interest to the tenant[324].

If the tenant should fail to respond to the landlord's request for a joint inspection on the expiry of the lease, the landlord must then, within seven days[325] from the expiry of the lease, inspect the premises in order to assess any damages or loss which occurred during the tenancy[326]. The landlord may then, without detracting from any other right or remedy of the landlord, deduct from the deposit and interest the reasonable cost of repairing damage to the dwelling and the cost of the replacement of lost keys[327].

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[318] These days are calendar days.
[319] S 5(3)(g).
[320] S 5(3)(h).
[321] These days are calendar days.
[322] S5(3)(i).
[323] S5(3)(j).
[324] Ibid.
[325] These days are calendar days.
[326] S 5(3)(k).
[327] S 5(3)(l).

The balance of the deposit and interest, if any, after the deduction of the aforementioned amounts must be refunded to the tenant by the landlord not later than twenty one days[328] after the expiration of the lease[329]. Also in this situation the landlord is required to have the relevant receipts, indicating the costs incurred by the landlord, available to the tenant for inspection as proof of the costs incurred by the landlord[330].

5.4.3.4 Inspection

The tenant and landlord must jointly, before the tenant moves into the leased premises, inspect the premises to ascertain the existence or not of any defects or damages with a view to the landlord's obligation to rectify it or with a view to record the damages[331]. A list of the defects must be attached as an annexure to the lease[332]. The landlord and tenant must also, three days prior to the expiration of the lease arrange a joint inspection at a mutually convenient time to ascertain if there were any damage caused to the dwelling during the tenant's occupancy thereof[333].

5.4.3.5 Vacation of premises prior to expiry of lease

Should the tenant vacate the leased premises before expiration of the lease, without notice to the landlord, the lease is deemed to have expired on the date that

[328] These days are calendar days.
[329] S 5(3)(m).
[330] S 5(3)(n).
[331] S 5(3)(e).
[332] S5(7).
[333] S 5(3)(f).

the landlord established that the tenant had vacated the dwelling. The landlord, however, retains all his or her rights arising from the tenant's breach of the lease[334].

5.4.3.6 Non-vacation of premises on expiry

If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease[335], on the same terms and conditions as the expired lease, except that at least one month's written notice must be given of the intention by either party to terminate the lease[336]. This provision is clearly conducive to legal certainty regarding the continuation of the lease in such a case and the subsequent termination thereof. Thus, if a lessor in such a situation wants to evict a lessee he will still be entitled to do so, provided he has given the lessee at least one month's written notice of termination of the lease agreement prior to any attempt to evict the lessee.

6. Rental Housing Tribunals

6.1 Introduction

The provisions of the Rental Housing Act are enforced by Rental Housing Tribunals which are established in terms of section 7 of the Rental Housing Act. The function of the Tribunal is to fulfil the duties imposed upon it in terms of Chapter 4[337] of the

[334] S 5(3)(o).
[335] A periodic lease is defined in s1 as " a lease for an undetermined period, subject to notice of termination by either party'.
[336] S 5(5). See also De la Harpe 12.
[337] S6 of the Act provides that unless a province has, before or after the commencement of the Act, enacted legislation providing for matters dealt with in Chapter 4 of the Act, Chapter 4 will apply to such province.

Rental Housing Act and to do all things necessary to ensure that the objectives of Chapter 4 are achieved[338].

The Tribunal is composed of not less than three and not more than 5 members, who are fit and proper persons appointed by the relevant MEC[339]. It comprises of a chairperson, who must be suitably qualified and must have the necessary expertise and exposure to rental housing matters as well as not less than two and not more than four members of whom at least one and not more than two must be persons with expertise in property management or housing development matters and at least one and not more than two must be persons with expertise in consumer matters pertaining to rental housing or housing development matters[340].

6.2 Meetings of the Tribunal

The Tribunal sits on the days and during such hours as the chairperson of the Tribunal may determine[341]. Meetings of the Tribunal must be convened for the consideration of any complaint referred to the Tribunal in terms of section 13 of the Act and any other matter which the Tribunal may or must consider in terms of the Act[342]. The quorum of any meeting of the Tribunal is three members of which at

[338] S 8.
[339] S9(1).See further s11 in respect of the staff of the Tribunal as well as s12 regarding funding of the Tribunal.
[340] S9(1)(a) and (b). In accordance with s9(1)(c) a deputy chairperson must be appointed by the relevant MEC from the members referred to in s9(1)(b). See further s 9(2) to (9) for miscellaneous aspects regarding the appointment of members of the Tribunal.
[341] S10(1). See further s10(2) and (3) in respect of meetings of the Tribunal.
[342] S10(4)(a) and (b).

least two members must be appointed in terms of section 9(1)(b)(i) and(ii) respectively[343].

6.3 Complaints

Section 13 of the Act deals with the lodging and hearing of complaints regarding an unfair practice. Section 13(9) significantly provides that as from the date of the establishment of the Rental Housing Tribunal as contemplated in section 7 of the Rental Housing Act, any dispute in respect of an unfair practice must be determined by the Tribunal unless proceedings have already been instituted in any other court. Rental Housing Tribunals thus appear to have exclusive jurisdiction in matters involving unfair leasing practices unless proceedings have already been instituted in another court prior to the establishment of a Rental Housing Tribunal. Note should however also be taken of section 13(10) which provides that nothing contained in section 13 precludes any person from approaching a competent court for urgent relief under circumstances where he would have been able to do so were it not for the Rental Housing Act, or to institute proceedings for the normal recovery of arrear rental or for eviction in the absence of a dispute regarding an unfair practice[344]. It is further provided that a magistrate's court may, where proceedings before the court relate to a dispute regarding an unfair practice as contemplated in the Rental Housing Act, at any time refer such matter to the Tribunal[345].

[343] S10(5). In terms of s10(6) all decisions of the Tribunal , subject to s10(7) , must be by consensus. Where consensus cannot be reached, s10(7) provides that the decision of a majority of the members must be the decision of the Tribunal. In the event of an equality of votes on any matter, the person presiding at the meeting of the Tribunal will have a casting vote in addition to that person's deliberate vote. See further s10(9) regarding the impartiality of the Tribunal members.
[344] S13(10).
[345] S13(11).

Any tenant or landlord or group of tenants or landlords or interest group may in the prescribed manner lodge a complaint with the Tribunal concerning an unfair practice[346]. Once a complaint has been lodged with the Tribunal, the Tribunal must[347], if it appears that there is a dispute in respect of a matter which may constitute an unfair practice list particulars of the dwelling to which the complaint refers in the register[348]; and through its staff conduct such preliminary investigations as may be necessary to determine whether the complaint relates to a dispute in respect of a matter which may constitute an unfair practice[349]. Where the Tribunal is of the view that there is a dispute regarding a matter which may constitute an unfair practice and that such matter may be resolved through mediation, it must appoint a mediator, which may be a member of the Tribunal, a member of staff or any person deemed fit and proper by the Tribunal, with a view to resolving the dispute[350]. Where however the Tribunal is of the view that the dispute is of such a nature that it cannot be resolved through mediation or where a mediator has issued a certificate to the effect that the parties are unable to resolve the dispute through mediation, the Tribunal must conduct a hearing and, subject to section 13, make such a ruling as it may consider just and fair in the circumstances[351].

For purposes of a hearing as contemplated in section 13(2)(d) the Tribunal may[352]:

[346] S13(1).
[347] Thus the Tribunal does not have a discretion in this regard.
[348] S13(2)(a). In terms of s13(8) the Tribunal must keep a register of complaints received and complaints resolved with such details as may be prescribed and quarterly provide the local authority in whose jurisdiction dwellings are situated in respect of which complaints have been received with a list of complaints received and complaints resolved in such format as may be prescribed.
[349] S13(2)(b).
[350] S13(2)(c).
[351] S13(2)(d).
[352] S13(3).

a) require any Rental Housing Information Officer[353] to submit reports concerning inquiries and complaints received, as well as on any other matters concerning the administration of the Rental Housing Act;

b) require any inspector to appear before the Tribunal to give evidence, to provide information, or to produce any report or other document concerning inspections conducted which may have a bearing on any complaint received by the Tribunal;

c) require any Rental Housing Information Office to advise the Tribunal on any matter concerning a dwelling or concerning a complaint received from any landlord or any tenant within the area of jurisdiction of that office;

d) summon any tenant or landlord or any other person who, in the Tribunal's opinion may be able to give evidence relevant to a complaint, to appear before the Tribunal;

e) summon any person who may reasonably be able to give information of material importance concerning a complaint or who has in his possession or custody or under his control any book, document or object to attend its proceeding and to produce any book, document or object in his possession or custody or under his control, to give evidence or to provide information under his control;

f) call upon and administer an oath to, or accept an affirmation from, any person present at the meeting in terms of paragraphs (a),(b) or (c), or who has been summoned in terms of paragraphs (d) or (e).

[353] A Rental Housing Information Office is defined in s1 as ' an office established by a local authority in terms of s14(1) of the Act. "A Rental Housing Information Officer is obviously a person employed by a Rental Housing Information Office.

Where a Tribunal, at the conclusion of a hearing, is of the view that an unfair practice exists, it has a various powers. It may[354] rule that any person must comply with a provision of the regulations relating to unfair practices[355]. Where it would appear that the provisions of any law have been or are being contravened, it may refer such matter for an investigation to the relevant competent body or local authority[356]. It may also make any other ruling that is just and fair to terminate any unfair practice, including, without detracting from the generality of the aforegoing, a ruling to discontinue overcrowding, unacceptable living conditions, exploitative rentals or lack of maintenance[357]. A ruling contemplated in section 13(4) may include a determination regarding the amount of rental payable by a tenant, but such determination must be made in a manner that is just and equitable to both tenant and landlord and takes due cognisance of prevailing economic conditions of supply and demand; the need for a realistic return on investment for investors in rental housing and incentives, mechanisms, norms and standards and other measures introduced by the Minister in terms of the policy framework on rental housing referred to in section 2(3) of the Act[358].

When acting in terms of section 13(4), the Tribunal must have regard to[359]:

a) the regulations in respect of unfair practices;

b) the common law to the extent that any particular matter is not specifically addressed in the regulations or a lease;

[354] It is submitted that the use of the word “may” is indicative of a discretion that the Tribunal exercises in this regard.
[355] S13(4)(a).
[356] S13(4)(b).
[357] S13(4)(c)(i) to (iv).
[358] S13(5)(a) to (c).
[359] S13(6)(a) to (e).

c) the provisions of any lease to the extent that it does not constitute an unfair practice;

d) national housing policy and national housing programmes; and

e) the need to resolve matters in a practical and equitable manner.

The lodging of a complaint with the Tribunal has serious implications for the landlord and tenant. As from the date of a complaint having been lodged with the Tribunal, until the Tribunal has made a ruling on the matter or a period of three months have elapsed, whichever is the earlier, the landlord may not evict the tenant[360] subject to the payment of rental as per section 13(7)(b). In terms of section 13(7)(b) the tenant must continue to pay the rental payable in respect of that dwelling as applicable prior to the complaint, or, if there has been an escalation prior to such complaint, the amount payable immediately *prior* (my emphasis) to such escalation. The landlord is furthermore during this period obliged to effect necessary maintenance to the leased dwelling[361].

The Tribunal is also empowered to make a ruling as to costs that may be just and equitable and, where a mediation agreement has been concluded pursuant to section 13(2)(c), it may make such an agreement a ruling of the Tribunal[362]. A ruling by the Tribunal is deemed to be an order of the magistrates' court in accordance with the Magistrates Court Act[363].

[360] S13(7)(a).
[361] S13(7)(c).
[362] S13(2)(a) and (b). It is submitted that the use of the word 'may' is indicative of a discretion that the Tribunal may exercise in this regard.
[363] Act 32 of 1944.

These powers of the Rental Housing Tribunal as set out in the principal Act have raised certain problematic issues. Uncertainty existed as to the scope of jurisdiction of the Rental Housing Tribunals and the interaction between the Rental Housing Tribunals and the civil magistrates' courts regarding leasing matters. It was also unclear how enforcement of the Rental Housing Tribunals rulings, which were deemed to be orders of the Magistrates courts, were to occur. As indicated hereinafter, the 2007 Amendment Act attempted to address these problems by expanding the definition of 'unfair practice' as well as the jurisdiction and powers of the Rental Housing Tribunals[364].

It is to be noted that the Act provides that, without prejudice to the constitutional right of any person to gain access to a court of law, the proceedings of a Tribunal may be brought under review before the high court within its area of jurisdiction[365].

7. Rental Housing Information Offices

In terms of section 14 of the Rental Housing Act, a local authority may establish a Rental Housing Information Office to advise tenants and landlords in regard to their rights and obligations in relation to dwellings within such local authority's jurisdiction area[366]. The local authority may appoint officials to carry out any duties pertaining to such Rental Information Office[367]. The functions of a Rental Housing Information

[364] See par 9 hereinafter.
[365] S17. This provision strikes one as a bit odd as one would have expected it to read to refer to the high court in whose jurisdiction area the specific Tribunal whose order is being reviewed, is situated. Nevertheless this provision gives effect to the principle that the high court has review powers in respect of lower courts and, given that a ruling by a Rental Housing Tribunal is deemed to be an order of the magistrates' court, this review provision is apposite.
[366] S14(1).
[367] S14(2).Such appointment must occur subject to the laws governing the appointment of local government officials.

Office are to educate, provide information and advise tenants and landlords with regard to their rights and obligations in relation to dwellings within its area of jurisdiction; provide advice to disputing parties on reaching solutions to problems relating to dwellings; refer parties to the Tribunal; comply with any request by the Tribunal in terms of section 13; and keep records of enquiries received by the office and to submit reports in relation thereto to the Tribunal on a quarterly basis[368].

8. Offences and Penalties

The Rental Housing Act makes provision in Chapter 5 thereof for specific offences and penalties. In terms of section 16 any person who

a) fails to comply with section 4 or 5(2) or (9);

b) has been duly summonsed under section 13 and who fails to attend at the time and place specified in the summons or remain in attendance until excused by the Tribunal form further attendance;

c) has been called upon in terms of section 13(3)(f) and who refuses to be sworn in or to make an affirmation as a witness;

d) fails , without sufficient cause to answer fully and satisfactorily any question lawfully put to any such person in terms of section 13(3) or to produce any book, document or object in any such person's possession or custody or under any such person's control which any such person was required to produce in terms of section 13(3)(e);

e) with intent to deceive the Tribunal, produces before the Tribunal any false, untrue , fabricated or falsified book or document;

[368] S14(3).

f) wilfully furnishes the Tribunal with information or makes a statement before the Tribunal which is false or misleading;

g) fails to comply with any ruling of the Tribunal in terms of section 13(4);fails to comply with a request of the Tribunal in terms of section 13(3)(a),(b) or (c) or

h) contravenes any regulation,

is guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years or to both such a fine and imprisonment.

The purpose of creating specific offences in the Rental Housing Act appears largely to be to assist the Rental Housing Tribunal in effectively disposing of matters. In order for the Tribunal to carry out its functions effectively it is necessary that it gets co-operation in respect of attendance upon summonses, answering of questions and so forth, even under threat of possible prosecution in the event of being convicted of an offence.

9. Amendments to the Rental Housing Act

9.1 The Rental Housing Amendment Act 2007

The Rental Housing Amendment Act[369] (hereinafter the 2007 Amendment Act) came into effect on 13 May 2008[370]. Its purpose is to 'amend' the Rental Housing Act, 1999, so as to substitute a definition ; to make further provision for rulings by Rental Housing Tribunals; to expand the provisions pertaining to leases; and to

[369] Act 43 of 2007 published in GG 31051 of 13 May 2008 (hereinafter the 2007 Amendment Act). See also the Memorandum on the Objects of the Rental Housing Amendment Bill 2007 in GG 30022 of 6 July 2007.
[370] For a comprehensive discussion of the changes brought about by the Rental Housing Amendment Act see Stoop" Aantekeninge oor die Gewysigde Wet op Huurbehuising 50 van 1999' 2011 (74) *THRHR* 319 (hereinafter Stoop).

extend the period allowed for the filling of vacancies in Rental Housing Tribunals ; and to provide for matters connected therewith."

For purposes of this dissertation only the amendment of the definition of "unfair practice" and certain relevant provisions relating to the rulings of the Rental Housing Tribunal will be dealt with. In terms of the 2007 Amendment Act the original definition of unfair practice was substituted with the following definition:

'unfair practice' means

a) any act or omission by a landlord or tenant in contravention of this Act; or

b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord.'

The definition of 'unfair practice' was thus extended to the effect that any act or omission in contravention of the Rental Housing Act now also constitutes an unfair practice for purposes of the Act. As a result the jurisdiction of the Rental Housing Tribunal has thus also been extended[371]. It is further to be noted that the amended of the definition of 'unfair practice' now also has the result that a lessor or lessee who infringes each other's rights as set out in section 4 of the Act commits an unfair practice. As such non-payment of rent by a lessee would constitute an unfair practice which can thus be dealt with by the Rental Housing Tribunal although Stoop remarks that it is still uncertain whether the Rental Housing Tribunal has exclusive jurisdiction in such instances which creates the need for the Act to be clearer on this aspect[372].

[371] See also Stoop at 320.See further Mohamed" The Rental Housing Amendment Bill 2007: What are some of the changes and challenges?' March 2008 (12.1) *Property Law Digest* 9 to 10.
[372] Stoop at 321. Stoop submits that a Rental Housing Tribunal would thus have exclusive jurisdiction in such instances of non-payment of rent. However he further remarks that although a Rental Housing

Section 4(1) and 4(4) of the Act were also amended to extend the protection of the Act to visitors *per se* of the tenant and thus to do away with the requirement that such visitors should be 'bona fide' visitors which would have added an onerous evidentiary burden in the context of application of the Act given that it would most likely have entailed a subjective test as to the intention of the visitors.[373] Notably section 4(3)(c) was also amended to provide that the tenant has the right not to have his possessions seized , except in terms of law of general application and having first obtained a ruling by the Tribunal or an order of court. Thus the Rental Housing Tribunal has also been given the power, similar to that of a court, to make a ruling that the tenants' property may be seized.

Section 5(3)(b) of the Act was further amended , insofar as it related to receipts in respect of rent payments, to provide that a Rental Housing Tribunal may , in exceptional cases, and on application by a landlord, exempt the landlord from providing the information contemplated in section 5(3)(b). The 2007 Amendment Act contains no indication of which type of cases would constitute 'exceptional cases' and it is thus submitted that what will constitute 'exceptional cases' will have to be determined on the facts of each particular case where the landlord applies for such exemption. Section 5(3)(d) was further amended to ensure that

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Tribunal has exclusive jurisdiction with regard to the adjudication of unfair practices, s10(13) provides that proceedings for the normal recovery of arrear rent ought not to be instituted with a Rental Housing Tribunal in the absence of a dispute regarding an unfair leasing practice. He further comments that it is however clear in terms of s4(5)(b) that a Rental Housing Tribunal can make orders with regard to arrear rent . He also refers to the provision of s13(11) in terms whereof a magistrates court may at any time, if proceedings before a court relate to a dispute regarding an unfair practice, refer that matter to a Rental Housing Tribunal. Thus he points out that even a dispute regarding arrear rent may be referred to a Rental Housing Tribunal, which may in many instances be a cheaper and faster method of obtaining redress than to have the matter dealt with by a court.

[373] See further Stoop at 326 and Thomas "the Rental Housing Act '2000 *De Jure* 235.

the interest rate applicable to the deposit paid by the lessee is the interest rate of the financial institution where the money was deposited. A further subsection (p) was added to section 5(3) to the effect that 'any costs in relation to the contract of lease shall only be payable by the tenant upon proof of factual expenditure by the landlord[374].'

Another notable amendment was the amendment to section 13(4) of the Act to the effect that a Rental Housing Tribunal may rule that a person must comply with a provision of the Rental Housing Act .Section 13(12) is further amended by the addition of a further subsection (c) which provides that the Rental Housing Tribunal may issue spoliation and attachment orders and grant interdicts. Stoop points out that this is in keeping with the purpose of the Act to provide access to redress Section 13(13) which provided that a ruling by the Tribunal is deemed to be an order of a Magistrates court in terms of the Magistrates Court Act was further amended to provide that an order by the Rental Housing Tribunal is enforced in terms of the Magistrates Court Act. Significantly a section 13(14) was added which provides that 'The Tribunal does not have jurisdiction to hear applications for eviction orders[375].

Of further note is also the amendment to section 16 of the principal Act by the insertion of a paragraph (hA) which in essence makes it an offence for a landlord to lock out a tenant or to shut off the utilities to rental housing property. This

[374] Stoop at 326 remarks that a lessor will thus for example have to keep receipt to prove the actual repair costs that he incurred in respect of the leased premises.
[375] Stoop at 322 is of the opinion that this ties in with the provision in s26(3) of the Constitution which provides that no one may be evicted from his home without an order of court. He indicates that because a Tribunal is not a court it does not have the jurisdiction to evict persons from premises.

provision will most certainly having a deterring effect on the aforementioned practices given the fact that the penalty for committing an offence in terms of the Act is quite severe and may even entail imprisonment, as indicated above.

Section 19 of the Act has also been repealed by the 2007 Amendment Act. This section protected lessees under the repealed Rent Control Act for a period of three years after the Rental Housing Act came into force.

Stoop remarks that although it appears that the issues which previously existed with regards to the Rental Housing Tribunal's lack of enforcement jurisdiction have been addressed by the amendment in section 13(13), this is not the case[376]. It is for instance uncertain whether an order of the Tribunal has to be transferred to the magistrates' court to be converted to a magistrate's court order or whether the Tribunal's order can immediately be enforced by the sheriff[377]. On the other hand it is uncertain whether a sheriff will be appointed in terms of the Sheriffs Act[378] to enforce such orders[379]. Stoop's eventual conclusion regarding this issue is however that a Rental Housing Tribunal can make orders which have the same legal force as a magistrates' court order and that it is not necessary to first transfer an order to a magistrates' court to give force thereto[380].

[376] Stoop at 322. See further Mohamed 11.
[377] Ibid.
[378] Act 90 of 1986.
[379] Ibid. It is thus unclear whether a Tribunal can give such orders to a sheriff.
[380] Stoop at 323 to 324. He further refers to the power of the Rental Housing Tribunal to make costs orders and concludes that it is likely that the legislature intended that orders of the Tribunal for all purposes must be orders of the magistrates' court and have the same effect but that they are not necessarily limited to the monetary jurisdiction of the magistrates' courts.

Stoop raises a number of further concerns regarding the 2007 Amendment Act, other than those already mentioned above. He indicates that insofar as jurisdiction is concerned, it is uncertain what would happen if the Rental Housing Tribunal had to make an order where more than R300 000 is granted given that such amount is the maximum amount that can be awarded by a (regional) magistrates court[381]. He poses the question whether such order will then still be deemed to be an order of the magistrates court[382].

9.2 Unfair Procedural and Unfair Practice Regulations

In accordance with section 15(1)(f) of the Act Draft Unfair Procedural and Unfair Practice Regulations were published for comment in 2008[383]. These regulations should assist lessors and lessees to identify 'unfair practices'. The regulations also create offences and penalties that may be imposed if a lessor or a lessee fails to comply with provisions of the Act, the regulations or an order of the Rental Housing Tribunal[384]. It further contains procedures to lodge complaints (regulation 2), aspects relating to jurisdiction (regulation 3), dispute resolution procedures (regulation 6) mediation (regulation 7), trials (regulation 8) and spoliation and interdicts (regulation 9).

An in depth discussion of these regulations is however not appropriate at this stage as the regulations have not yet been finalised and their current status is uncertain.

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[381] Stoop at 322.
[382] Ibid. He bases his question on the fact that a magistrates court is a creature of statute and thus has no jurisdiction regarding matters if such jurisdiction is not expressly conferred upon it by the Magistrates Court Act.
[383] Draft Unfair Procedural and Unfair Practice Regulations published by GN 340 in GG 30863 on 14 March 2008.
[384] Stoop at 325.

9.3 Further proposed amendments to the Rental Housing Act

The process of streamlining the Rental Housing Act seems to be an on-going task. Further amendments to the Act were proposed in July 2010[385]. The purpose of the 2010 Amendment Bill was to amend the Rental Housing Act by substituting certain definitions; extending the application of Chapter 4 to all provinces; to require MEC'S and local authorities to establish Rental Housing Tribunals and Rental Housing Information Offices; to extend the powers of the Rental Housing Tribunals to rescind any of its rulings[386] and to provide for matters connected therewith[387].The 2010 Amendment Act thus *inter alia* sought to extend the protection offered by the Rental Housing Act by introducing an amended section 14(1) of the Act to the effect that every local authority *must* (my emphasis) establish a Rental Housing Information Office.

Subsequent to the 2010 Amendment Bill another Amendment bill, the 2011 Amendment Bill which had the same objectives as the 2010 Bill was introduced[388]. This Bill inter alia seeks to amend section 14 of the Rental Housing Act by providing

[385] Rental Housing Amendment Bill as published for comment in GG 33384 of 23 July 2010.
[386] In this regard the 2010 Amendment Bill proposed the insertion of a s13(12A) into the Act which would read as follows:
' The Tribunal may, acting on its own accord or on application by any affected person, rescind any of its rulings if such rulings
a) Were erroneously sought or granted in the absence of the person affected by it;
b) Contain an ambiguity or patent error or omission, but only to the extent of clarifying that ambiguity or correcting that error or omission; or
c) Were granted as a result of a mistake common to all parties to the proceedings.

[387] As per the preamble of the Amendment Bill.
[388] See the Explanatory summary of the Bill published in GG 34703 of 28 October 2011.

that 'Every local municipality may establish a Rental housing Information Office to advise tenants in relation to dwellings within their area of jurisdiction'[389].

This Amendment Bill has however to date not been enacted.

10. The interaction between the Rental Housing Act and the Constitution

In *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*[390] the Constitutional Court reserved judgment and ruled that the tenants should approach the Gauteng Housing Tribunal for a ruling, with direct leave to approach the Constitutional Court again, depending on the decision of the Housing Tribunal[391].

The facts of the matter were as follows[392]. The Applicants were tenants of various flats in a ten storey block of flats in Braamfontein, Johannesburg, Gauteng. They lived there in terms of various leases and the flats were their homes. The Respondent bought the building, upgraded it and then wanted to increase the rent. The Respondent did so by cancelling the tenants' leases, offered them new leases on identical terms, but with a rent escalation of between 100% - 150% higher than the original rental, whilst the original leases allowed an annual increase of between 10% and 15%.

[389] As per s8 of the 2011 Amendment Bill.
[390] (CCT 57/11)[2012] ZACC 2 (13 March 2012)
[391] De Vos "Surprising insights on transformation from the Constitutional Court" (13-3-2012) *Constitutionally Speaking* <http://constitutionallyspeaking.co.za/surprising-insights-on-transformation-from-the-constitutional-court/> (accessed 21-3-2012)
[392] As summarized by De Vos "Surprising insights on transformation from the Constitutional Court" (13-3-2012) *Constitutionally Speaking* <http://constitutionallyspeaking.co.za/surprising-insights-on-transformation-from-the-constitutional-court/> (accessed 21-3-2012)

The narrow question[393] in this matter was whether a landlord could legally cancel a lease and evict the tenants, whilst the wider question was how the constitutional protection against arbitrary eviction[394] and the protection afforded by the Rental Housing Act limited the discretion of the landlord to raise the rent or to evict the tenants[395].

De Vos remarks that the majority judgment of the Constitutional Court did not develop the common law of contract, but relied on the Rental Housing Act in that it prescribed that a landlord may not engage in "unfair practices" with tenants[396]. The Supreme Court of Appeal had earlier found that an "unfair practice" was not a once-off termination of a contract aimed at escalating the rental, but "incessant and systemic conduct"[397]. The majority in the Constitutional Court had rejected this view and said that the Rental Housing Tribunal should have decided whether there was an unfair practice[398]. It also pointed out that the Rental Housing Act provides that an unfair practice-ruling "may include a determination regarding the amount of rental payable by a tenant" or may relate to any termination of the lease in respect of rental housing property "on grounds that do not constitute an unfair practice"[399].

[393] Para 1.
[394] Section 26(3) of the Constitution
[395] P de Vos "Surprising insights on transformation from the Constitutional Court" (13-3-2012) *Constitutionally Speaking* <http://constitutionallyspeaking.co.za/surprising-insights-on-transformation-from-the-constitutional-court/> (accessed 21-3-2012)
[396] P de Vos "Surprising insights on transformation from the Constitutional Court" (13-3-2012) *Constitutionally Speaking* <http://constitutionallyspeaking.co.za/surprising-insights-on-transformation-from-the-constitutional-court/> (accessed 21-3-2012)
[397] *Maphango (Mgidlana) and Others v Aengus Lifestyle Properties (Pty) Ltd* ([2011] 3 All SA 535 (SCA)) [2011] ZASCA 100; 611/2010 (1 June 2011)
[398] Para 42.
[399] Para 43.

The majority judgment dealt with the transformative effect of the Rental Housing Act and the Constitution on the relationship between landlords and tenants[400]. It also addressed the unequal power relations between landlords and tenants[401] and it attempted to empower the Rental Housing Tribunals to protect the rental housing market[402].

The majority judgment indicated that the Rental Housing Act states that when the Tribunal makes a determination about the rent charged, it "must be made in a manner that is just and equitable to both the tenant and landlord" and that the rent determination must take "due cognisance" of:

"(a) prevailing economic conditions of supply and demand;

(b) the need for a realistic return on investment for investors in rental housing; and

(c) incentives, mechanisms, norms and standards and other measures introduced by the Minister in terms of the policy framework on rental housing …"[403].

Therefore the majority found that the Rental Housing Act demands that a ground of determination of the rent must be specified in the lease[404]. Furthermore, even when it is specified in the lease, the ground of determination must not constitute an unfair

[400] Par 36.
[401] *Ibid.*
[402] P de Vos "Surprising insights on transformation from the Constitutional Court" (13-3-2012) *Constitutionally Speaking*<http://constitutionallyspeaking.co.za/surprising-insights-on-transformation-from-the-constitutional-court/> (accessed 21-3-2012)
[403] P de Vos "Surprising insights on transformation from the Constitutional Court" (13-3-2012) *Constitutionally Speaking*<http://constitutionallyspeaking.co.za/surprising-insights-on-transformation-from-the-constitutional-court/> (accessed 21-3-2012)
[404] P de Vos "Surprising insights on transformation from the Constitutional Court" (13-3-2012) *Constitutionally Speaking*<http://constitutionallyspeaking.co.za/surprising-insights-on-transformation-from-the-constitutional-court/> (accessed 21-3-2012)

practice[405]. The majority further held that a Tribunal can decide whether such a termination constituted an unfair practice.

Although both the High Court and the Supreme Court of Appeal interpreted the Rental Housing Act and concluded that the Respondent's right to cancel the leases was unaffected by its provisions, the majority found this interpretation to be wrong. It subsequently held that whether the Rental Housing Act applies to leases is a general matter of law, therefore the question of cancellation is as well[406].

The minority however found that the case was never argued on the basis of the Rental Housing Act, hence the majority could not have relied on the Act to come to the assistance of the tenants[407]. It relied on traditional contract law principles allowing the landlord to cancel the lease and to evict them, unless they agreed to a 150% escalation in the rental. The minority held further that whether the landlord engaged in unfair practices was not a legal question, but a value judgment requiring the Court to rely on moral values and not the law.

De Vos is of the opinion that the minority judgment is more formalistic and pre-constitutional towards the law between landlords and tenants, as it upheld the freedom of a landlord to cancel a lease, escalate rental and evict the tenants who cannot afford the huge escalation, regardless of how unfair the landlord might have

[405] Ibid.
[406] P de Vos "Surprising insights on transformation from the Constitutional Court" (13-3-2012) *Constitutionally Speaking*<http://constitutionallyspeaking.co.za/surprising-insights-on-transformation-from-the-constitutional-court/> (accessed 21-3-2012)
[407] P de Vos "Surprising insights on transformation from the Constitutional Court" (13-3-2012) *Constitutionally Speaking*<http://constitutionallyspeaking.co.za/surprising-insights-on-transformation-from-the-constitutional-court/> (accessed 21-3-2012)

acted[408]. He remarks that it disregarded the Rental Housing Act, hence, also disregarding the separation of powers in that a democratically elected Parliament passed a piece of legislation, which it refuses to take into consideration[409].

11 . Conclusion

The Rental Housing Act acknowledges rental housing as a key component of the housing sector - it has however not elevated leasing of residential property as the vehicle by which persons who cannot afford to pay rent, acquires access to adequate housing. As such the Act provides for a bar on eviction if a complaint regarding an unfair practice serves before the Tribunal but with the proviso that the bar is subject to payment of rent as contemplated by section 13(7)(b).

From the overview of the Rental Housing Act it appears that this Act operates in tandem with the common law of lease. As such it seeks to balance the rights of both parties and augments the protection afforded to them by the common law by providing legislative parameters within which certain rights may be exercised. Many of these rights are not new - such as the lessor's right to receive rent. The Act however lays down certain prescriptions peripheral to payment of rent such as that the lessor must provide the lessee with a receipt. In the same vein it confirms that a lessor may levy a deposit but contains provisions regarding the investment and refund of the deposit. It also attempts to prevent unfair practices surrounding the

[408] The reason that the minority held was that the tenants failed to plead their case correctly.

[409] De Vos *supra* is furthermore of the opinion that the various judgments illustrate a clear distinction between one set of judges who are engaged with the transformative project and with the transformation of legal culture and the interpretation and application of all law, displaying respect for the elected branches of government who passed the Rental Housing Act. He further remarked that another set of judges rejected the notion of constitutional values and the morals underpinning them, and that they are formalistic and colonial-inspired with possible adverse consequences for disempowered tenants.

deposit and possible claims for damages to the leased property by requiring inspections at certain stages of the lease. By statutorily entrenching the concept of the periodic lease the Act serves to provide legal certainty in those instances where the lessee and lessor acquiesce in the non-vacation by the lessee of the leased premises after termination of the lease. The stability of the rental market is thus enhanced by the legislative entrenchment of specific rights to which the parties are entitled which, due to the reciprocal nature of the lease agreement, creates corresponding statutorily delineated obligations for the lessor and lessee respectively.

It is submitted that the provisions in the Act which prohibit discrimination against lessees, their family or visitors as well as the emphasis on the lessee's right to privacy are salient features which are in keeping with the constitutional principles that persons should be treated equally and that all persons have a right to privacy[410]. Insofar as the tenant's rights against the landlord are concerned it appears that the Rental Housing Act has sought to extend the common law rights of the lessee to privacy (which was acknowledged by the common law requirement that the lessor had to give reasonable prior notice of inspection of the leased property) or at least to augment it by infusing it with constitutional principles relating to the right to privacy. As such the parameters of the right to privacy within the context of a lease agreement in respect of a dwelling is clearly set out by indicating that the tenant has a right not to have his person or home searched, his property searched, his possession seized through self-help or the privacy of his communications infringed.

[410] S 9 of the Constitution of the Republic of South Africa, 1996.

The rights of the landlord *inter alia* confirm his common law right to payment as well as the principle that a landlord may not resort to self-help in order to obtain payment of arrear rent. The common law right of the landlord to terminate a lease agreement is also confirmed but with the added proviso that such termination should not amount to an unfair practice as contemplated by the Rental Housing Act. The Act also confirms the landlord's common law right to receive the leased premises in a 'good state of repair'. It may however be remarked that it is not certain whether this so called 'good state of repair' is equivalent to the common law right to receive the goods in the same condition as it was in when the lease commenced. It is also to be noted that the Rental Housing Act does not limit the application of either the common law *huur gaat voor koop rule* or the lessor's tacit hypothec.

A further step towards legal certainty and one which affords greater protection especially to lessees in most instances, is the provision that is made for the lease to be reduced to writing on request of the lessee. This protection is enhanced by the obligatory content requirements for lease agreements set by section 5(6) which is further supplemented by the provisions in section 5(3)(which may not be waived) for aspects relating to proof of payment, investment and use and refund of the deposit, inspection and vacation of the leased premises.

The establishment of the Rental Housing Tribunal as a specialized forum to hear complaints in respect of unfair leasing practices will obviously extend the redress afforded to persons who are the victims of unfair leasing practices and who were

not afforded sufficient protection by the common law against such abuse. It is submitted that the establishment of Rental Housing Information Offices will also contribute to greater protection for lessees. The progressive extension of the jurisdiction of the Rental Housing Tribunals and the potential overlap between the jurisdiction of the Tribunal and the courts however causes one to wonder whether it would not eventually enhance access to justice if there was only one specialised body that dealt with all matters pertaining to leasing matters.

Against the background of the legislature's acknowledgement in the Rental Housing Act of the right of access to adequate housing and not to be evicted from one's home without an order of court, made after considering relevant circumstances, it is submitted that one would have expected the legislature, if it wanted to introduce any procedural and substantive limitations to the process of eviction of lessees as allowed by the common law, to have done so in the Rental Housing Act. The said Act, although it acknowledges the right of the lessor to evict a lessee on termination of the lease, however does not contain any provisions detailing procedures or other limitations to be applied in the context of eviction of lessees. It is submitted that the inference to be drawn from this is that although the legislature saw rental housing as a means to provide access to adequate housing, it was aware that the Constitution placed the responsibility to realize this right upon the shoulders of government and that the appropriate way to do this was to enact provisions which would enhance the rental market, not deprive lessors of their property rights by shifting the obligation to provide adequate housing onto them.

It is submitted that the application of the common law of lease has been curbed by the Rental Housing Act insofar as it introduces constitutional principles of access to adequate housing, equality and privacy into the realm of leases of residential property and confirms and delineates certain common law rights of the parties. As such the Rental Housing Act can thus be said to have augmented the protection afforded by the common law to the lessor and the lessee without being too procedurally invasive.

CHAPTER 4 THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT(PIE)

1. Introduction

An owner of property is in law entitled to possession of his or her property and to an ejectment order against a person who unlawfully occupies the property, except if that right is limited by the Constitution, another statute, a contract or on some or other legal basis.[411] Within the context of lease agreements thus, an owner of property has a common law right to evict a person who unlawfully occupies such property. The basis of an application to court for the eviction of an unlawful occupier is the *rei vindicatio*, as the owner of a property wants his property returned by virtue of his ownership therein[412]. In stating his claim for eviction the lessor need not allege that the lessee's possession is unlawful or against the lessor's will or that there was a lease that had been terminated as the onus is on the lessee to allege and establish any right to ' hold over' the property against the owner[413]. Delport however points out that in practice a lessor-owner suing for eviction (ejectment) will often include an allegation in his particulars of claim that he has granted the lessee-defendant a lease but that the lease has terminated[414].He points out that although this is strictly speaking an unnecessary allegation where eviction is sought based on ownership, it is a convenient way of anticipating the defendant's plea that he is in possession of the property by virtue of the lease, which will call for a replication

[411] *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[412] *Chetty v Naidoo* 1974 (3) SA 13 (A); *Akbar v Patel* 1974 (4) SA 104 (T).
[413] *Chetty v Naidoo supra* at 20A.
[414] Delport ' Eviction of a tenant after termination of a lease of residential premises" 2008 *Obiter* 472 at 472 to 473(hereinafter Delport).

that the lease has been terminated[415]. Either way, the onus is on the lessor to prove that the lease has been validly terminated[416].

An owner lessor is however not obliged to base a claim for eviction on his rights of ownership but may simply rely on his common law right as landlord in terms whereof the lessee has to vacate the premises after termination of the lease and restore the property to the lessor[417].

This right of the lessor-owner of property has apparently now been curbed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (in this chapter referred to as "PIE" or "the Act") which came into effect on 5 June 1998. The Act in essence serves to delay or suspend the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions such eviction may occur.[418] Obviously a lessor who is not the owner of the leased property has no choice but to base an eviction application on this ground[419].

Delport emphasises the fact that a lessee at common law has no defence based on equity considerations[420] and accordingly a court in terms of the common law, has

[415] Delport at 473. See also *Graham v Ridley* 1931 TPD 476.
[416] Delport at 473. See also *Chetty v Naidoo supra* at 21H to 22F; *Schnehage v Bezuidenhout* 1977 1 SA 362 (O).
[417] Delport at 473. He indicates that in this regard the fundamental allegations to be made are that the lessor had concluded a lease with the lessee; that the lease had been validly terminated on certain grounds mentioned in the particulars of claim and that the lessee has refused to vacate the premises and restore same to the lessor despite the termination.
[418] *Ndlovu v Ngcobo, Bekker and another v Jika* 2003 (1) SA 113 (SCA) par 17.
[419] Ibid.
[420] Ibid. See also *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd supra* where it was held that unless the lessee can establish some legal right to remain in occupation of

no discretion to refuse an order for eviction on the grounds that a lessee may suffer hardship following the eviction or that he will be rendered homeless[421]. He remarks the eviction of a lessee after termination of the lease is therefore a relatively straightforward exercise at common law with the caveat that the lessor is not entitled to resort to self-help but that due legal process should be followed[422].

PIE draws attention to two constitutional principles namely[423]:

a) No one may be deprived of property except in terms of law of general application , and no law may permit arbitrary deprivation of property[424]; and

b) No one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances[425].

This second constitutional principle, namely the right of access to adequate housing as embodied in section 26(1) of the Constitution, has received ample attention in the past couple of years given the South African context of large scale homelessness occasioned largely as a result of the country's previous apartheid dispensation. Section 26(1) does however not operate in isolation and must be read with section 26(2) which obliges the State to take reasonable legislative and other

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leased property after termination of a lease, such as a right of retention or useful improvements effected during the currency of the lease, an eviction order must be granted.

[421] Delport at 473. He points out that this position will apply whether the lessor is an organ of State, a large public company or a private individual and the fact that a premises will be left unoccupied for a lengthy period after the eviction is equally irrelevant.

[422] Ibid. See further *Blomson v Boshoff* 1905 TS 429; *Nino Bonino v De Lange* 1906 TS 120 and *Smith v Rand Bank Bpk* 1979 4 SA 228 (N).

[423] Kerr at 425.

[424] S25 of the Constitution of the Republic of South Africa, 1996.S 25 provies as follows

[425] S26 of the Constitution of the Republic of South Africa, 1996.S26 provides as follows:
'(1) Everyone has the right to have access to adequate housing;
(2) The State must must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right;
(3) No one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances.'

measures, within its available resources, to achieve the progressive realisation of this right. It is in this context that section 26(3) further provides that no-one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances and that no legislation may permit arbitrary eviction. In the *locus classicus*, *Government of the Republic of South Africa and Others v Grootboom and Others*[426] it was held that section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the rights of access to adequate housing.[427] In *Grootboom* Yacoob J spelled it out:"*… the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing …. to those unable to support themselves and their dependants."*[428] (own emphasis).

It is not the purpose of this dissertation to comprehensively solve the problems relating to the right of access to adequate housing as contemplated in section 26(1) of the Constitution or to solve its interrelation to the right not to be arbitrarily evicted from one's home as contemplated in section 26(3) of the Constitution. Such debate is complex and longwinded and beyond the scope of this dissertation. However, given that section 26 of the Constitution underlies PIE, one cannot ignore the rights embodied in this section and, as will be demonstrated later, the fact that via PIE, the right of access to adequate housing and its derivative right, namely not to be

[426] 2001 (1) SA 46 (CC).
[427] Par 99.
[428] Par 93.

evicted from one's home contrary to the requirements in section 26, have also impacted on the law of lease in South Africa insofar as the lessor's right to have a lessee evicted from a leased premises is concerned.

The main objectives of PIE are indicated in its preamble as follows[429]: First, that it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances. Second, that special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and it should be recognised that the needs of those groups should be considered.

In order to consider the impact of PIE on lease agreements of urban residential property, it is necessary to consider the scope and application of the Act and its definitions, content and procedures. In the context of the topic of this dissertation , namely lease of urban residential property, it is submitted that the relevant sections of PIE that require discussion are sections 4 and 5 which deal with eviction of unlawful occupiers and urgent eviction proceedings respectively. Note should however be taken that section 3 of the Act contains prohibitions on the receipt or solicitation of consideration in respect of unlawful occupation of land and thus clearly strives to prevent abuse of PIE.

2. Unlawful occupier

[429] Kerr at 425.

Given that PIE is directed at eviction of unlawful occupiers it is prudent to look at which persons would qualify as unlawful occupiers as contemplated by the Act. An unlawful occupier for purposes of PIE, means a person who occupies land without the express or tacit consent[430] of the owner[431] or person in charge[432], or without any other right to occupy such land[433]. A person who is an occupier in terms of the Extension of Security of Tenure Act (ESTA)[434] or whose informal right to land, but for the provisions of PIE, would be protected by the provisions of the Interim Protection of Informal Land Rights Act[435] are excluded from the aforesaid definition of unlawful occupier[436].

The definition of "land" for purposes of PIE is very cryptic and merely indicates that 'land includes a portion of land[437]. " Evict " is defined as ' to deprive a person of occupation of a building or structure[438] on the land on which such a building or a

[430] S1 of PIE defines consent in this context as ' the express or written consent whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question.'
[431] In terms of s1 of PIE 'owner' means the registered owner of land including an organ of state.
[432] In terms of s1 of PIE 'person in charge' means a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.
[433] S1 of PIE.
[434]Act 3 of 1997. Both PIE and the Extension of Security of Tenure Act ("ESTA") regulate the circumstances and conditions under which unlawful occupiers of land may be evicted. However, the two acts have different areas of application. According to s2(1) thereof ESTA does not apply to land incorporated in an established township.[434]The Land Claims Court has jurisdiction to deal with cases determined in terms of ESTA, whilst a Magistrate's Court has jurisdiction to entertain matters in terms of PIE.In *Randfontein Municipality v Grobler and Others* (543/08) [2009] ZASCA 129 (29 September 2009). It was held that both ESTA and PIE regulate the conditions and circumstances under which occupiers of land may be evicted and that both acts have the objective of giving effect to the objectives of section 26 and 27 the Constitution. With relation to ESTA it was held that it applies to rural land outside townships. A discussion of ESTA thus falls outside the scope of this dissertation which focuses on lease of urban residential property.
[435] Act 31 of 1996.
[436] Ibid.
[437] Ibid.
[438] In terms of s1 of PIE a ' building or structure' includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter.

structure is erected, against his or her will" and ' eviction" has a corresponding meaning[439].

3. Application of PIE

On a geographical level, PIE applies to all land throughout the Republic[440]. This much is expressly stated in the Act regarding its application.

The application of PIE does however not hinge solely on the determination of its geographical application. Obviously the definition of" land 'and of 'unlawful occupier' plays a pivotal role in determining whether the Act applies in a specific instance or not. It is submitted that the cryptic definition of land as indicated above, does not aid the interpretation of the field of application of the Act to the extent which a more comprehensive definition would have done.

Unfortunately neither the definition of 'unlawful occupier' nor the section dealing with the application of the Act makes any reference to persons who remain in occupation of a leased residential property after lawful termination of the lease (so called "holding over"). As such the application of PIE has been the subject of contention for a number of years spesifically with regard to the question which persons qualify as unlawful occupiers for purposes of the Act. This question is especially relevant in the context of lease agreements of residential property as it is clear that the application of PIE in such instances would add an extremely onerous

[439] Ibid.
[440] S2.

compliance layer to the obligations of a lessor who wishes to evict a lessee from his property once a lease agreement has been lawfully terminated.

The court sought to provide clarity on this aspect in *Absa Bank Ltd v Amod*[441]. It was common cause in this matter that the agreement in terms whereof the respondent occupied a house in a residential area had terminated[442]. The respondent however resisted eviction *inter alia* on the basis that PIE applied to such eviction and that the procedures prescribed by PIE had not been complied with[443]. The court declared the basis for its reasoning as follows[444]: "It is permissible to look at the law at the time of the enactment and the reason for passing the Act. It is similarly permissible to look at the preamble to an Act or other express indications in it to ascertain the object sought to be achieved by the Act. That a statute must not be presumed to change the common law. That once it is clear that that is its object, effect must be given thereto to the extent that the statute clearly alters the common law. A statute must not be interpreted to lead to an absurdity which the legislature did not intend."

Kerr remarks that the views expressed in the *Amod* case appears to be correct and to be a modern version of the fundamental rule that has been in existence for more than 400 years which was approved by the then Appellate Division in *Harris and Others v Minister of the Interior and Another*[445]*.*Although the *Amod* decision was thereafter followed in a number of cases there were also cases in which it was

[441] [1999] 2 All SA 423 (W).
[442] At 425h.
[443] At 426d to e.
[444] At 428d to f.
[445] 1952 2 SA 428 (A).

rejected with the result that case law was divided on the question whether PIE applies to a person who remains in occupation of a leased property after the lease was lawfully terminated[446].

In an attempt to settle the conflicting position in case law, the question regarding the application of PIE to so called 'holders over' was thereafter addressed by the Supreme Court of Appeal in *Ndlovu v Ncgobo: Bekker and another v Jika*[447] *(hereinafter referred to as Ndlovu and Bekker*). The facts in the Ndlovu matter were briefly that the lessee in respect of a lease of urban residential property refused to vacate the premises after the lease had been lawfully terminated[448]. The Magistrates court held that PIE did not apply to the eviction of the lessee. In the *Bekker*-matter the facts were that the owner of an urban residence mortgaged it to the Bank[449]. He fell into arrears with his payments in terms of the mortgage agreement as a result whereof the Bank obtained default judgment against him[450]. The Bank thereafter obtained a warrant of execution and the property was subsequently sold in execution to the appellants who obtained transfer into their names[451]. The respondent (i.e. the person who mortgaged the property and against whom default judgment was obtained) however refused to vacate the property maintaining that the default judgment should be rescinded[452]. The appellants applied for the eviction of the Respondent. The court of first instance held that the

[446] For a detailed exposition of these cases see the minority judgment by Olivier J in *Ndlovu v Ngcobo; Bekker v Jika supra* .
[447] 2003 1 SA 113 (SCA).Also reported as [2002] 4 All SA 384 (SCA).
[448] Kerr at 428.
[449] Ibid.
[450] ibid
[451] Ibid.
[452] Ibid.

requirements of PIE applied and, finding that the requirements of PIE had not been complied with, it dismissed the application for eviction.

In the Supreme Court of Appeal, the matter resulted in a majority and a minority judgment. For purposes of this dissertation only the parts of the judgment relevant to lease agreement and not those spesifically applicable to mortgages, will be discussed. The majority ruled that PIE indeed applies to eviction of tenants from residential leased property. According to Harms JA, who delivered the majority judgment, PIE textually applies to all unlawful occupiers irrespective of whether or not their possession was at an earlier stage lawful[453]. The majority subsequently concluded that it cannot be discounted that Parliament intended to extend the protection of PIE to cases of holding over of dwellings and the like[454] .

The minority however came to the opposite conclusion by means of a comprehensively researched and instructive judgment that considered a wide variety of applicable legislation and case law as alluded to the judgment of Olivier JA The minority indicated that the application of PIE to cases of holding over such as in the context of lease agreements would be extremely injurious to landowners[455].

[453] Par 11 of the majority judgment.
[454] Par 23 of the majority judgment.
[455] Par 24 of the minority judgment. Olivier JA used the example of a widow with dependents holding over in respect of a lease agreement that terminated. He remarked: Suppose that section 4(7) is applicable and that no other land can be found to accommodate the widow and her family. The consequence is that they must remain on the property , obviously to the detriment of the owner…".

Subsequent to *Ndlovu* and *Bekker* a draft amendment Bill was published for comment[456] which *inter alia* sought to exclude narrow down the scope of application of PIE by providing as follows[457]:

'2. Application of Act

(1) This Act applies in respect of all land throughout the Republic.

(2) This Act does not apply to a person who occupied land

(a) *as a tenant* (my emphasis);

(b) an terms of any other agreement;

(c) as the owner of land

and who continues to occupy the land in question despite the fact that the tenancy or agreement has been validly terminated or the person is no longer the owner of the land.

(3) Notwithstanding subsection 2 a court may order that this Act applies if the court is satisfied that the plight of a person is of such a nature that any act or omission by the owner or person in charge of land was calculated to avoid the application of this Act."

From the Amendment Bill the legislature's intention to take lease agreements of residential property out of the scope of application is clear .However

It is not the objective of this dissertation to comprehensively criticize the correctness of the *Ndlovu* and *Bekker*–majority and minority judgments. That it was apparently never the intention of the legislature to draw lease agreements into the

[456] PIE Amendment Bill published in GG 29501 of 22 December 2006.
[457] S2 of the PIE Amendment Bill *supra.*

scope of application of PIE is evident from the effort thereafter to slice such agreements out of the scope of application of PIE by means of the express provision contained in section 2(a) of the PIE Amendment Bill which has to date not materialized any further. The fact of the matter is however that the effect of the majority judgment in *Ndlovu* and *Bekker* prevails with the result that the application of PIE has been extended to the realm of leases of residential property. Thus lessors will have to observe the procedures contemplated in PIE when they wish to evict a lessee from leased premises, failing which such eviction will be rife with procedural impediments which may bar the lessor from obtaining eviction of a lessee who refuses to vacate a leased premises.

4. Procedural and related implications of PIE

One important fact to bear in mind, whether the application for the eviction of an unlawful occupant is brought in terms of section 4 or section 5 of the Act as discussed hereinafter, is that the owner or person in charge of the land in question still needs to prove that the occupant is unlawfully occupying the land in question. In the context of lease agreements the occupant occupies property in accordance with a lease agreement. Pure non-payment of the agreed rental does not place the lessee in unlawful occupation. In terms of general principles of contract law, the lessee must first be placed in *mora* and then, thereafter, if the occupant does not timeously perform in full, the lease agreement may be terminated[458]. Therefore the Applicant for eviction purposes also needs to prove valid termination of the lease agreement.

[458] Some lease agreements contain a *lex commissoria*, entitling the landlord to terminate the lease agreement immediately. However, in this regard, see the discussion in chapter 5 about the Consumer Protection Act.

4.1 *Locus standi*

Locus standi is an essential element for an applicant to prove in an eviction application. For purposes of PIE persons having *locus standi* in eviction proceedings are either the owner of the said property or the person in charge of the said property[459]. In *Meyer N.O. v Sifile*[460] the Court granted an appeal against an order made in the Magistrate's Court, in which an application for eviction in terms of section 4(1) of PIE was brought[461]. The Magistrate's Court dismissed the application and granted a point *in limine* due to a lack of *locus standi* of the Applicant, being the Appellant *in casu*[462]*.* It is this decision that the Appellant appealed against. The Appellant was the executor of a deceased estate, duly appointed by the Master of the High Court[463]. The Magistrate relied on the *dictum* in *Reddy v Decro Investments CC t/a Cars African and others*[464] to arrive at his judgment[465]. In terms of this decision it was held that:

"In an ordinary lease a lessee of premises not yet in possession thereof who having no real right to such property does not have *locus standi* to bring an application for the ejection of occupiers"[466].

The Court of Appeal, however, was of the opinion that the definition of an "owner or person in charge of land" as stipulated in the act did not arise in the *Reddy*

[459]S 4(1).
[460] (A355/11) [2011] ZAWCHC 528 (24 November 2011).
[461] See the discussion of s4 hereinafter.
[462]Par 10.
[463]Par 20.
[464]2004(1) SA 618 D+CLD.
[465]Par 10.
[466]Par 10 to 15.

matter[467]. The Court pointed out that a person in charge of a property is "*a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question*"[468]. Therefore this included the executor of a deceased estate. It is submitted that by analogy this will include a curator of an insolvent estate, a member of a close corporation or a director of a company.

In *United Apostolic Faith Church v Boksburg Christian Academy*[469] ownership of the land had been registered in the name of the parent body of the Church in England in 1945. The applicant sought the eviction of a school operating from its land. The church gained administrative autonomy from the English governing body, although it had its origins in England. The school argued that the church failed to establish *locus standi* in that it failed to prove ownership of the property[470]. The Court, however, held that the church was an *universitas* capable of acquiring rights and obligations, including the power to own land and buildings, separately from its members, as its constitution provided for perpetual succession[471]. Therefore it is also capable of suing and being sued in its own name[472]. The Court was satisfied that the church was the owner of the property in question and therefore had the necessary *locus standi*[473]*.* It is interesting to note that the Court held further that, even if it were accepted that ownership remained vested in the English church or its governing body, a person in *bona fide* possession of immovable property acquired a right *in rem* giving rise to a right to apply for an eviction order.[474]*In casu* the

[467]Par 15.
[468]Par 10.
[469]2011 (6) SA 156 (GSJ).
[470]Par 12.
[471]Par 10.
[472]Par 11.
[473]Par 15.
[474]Par 16.

church was clearly the *bona fide* possessor of the property and therefore entitled to apply for an eviction order[475].

To conclude, for purposes of an eviction application *locus standi* of the applicant is the first procedural hurdle that must be passed. PIE spells out the requirements for such *locus standi* by confining it to the owner of property or the person in charge of such property who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.

4.2 Eviction proceedings

Section 4 of PIE in brief requires that a landowner seeking an order to evict an unlawful occupant from his land must prove ownership of the land, that the person occupying the land does so unlawfully, that the procedural provisions of the act has been complied with and that the eviction order is just and equitable after considering all relevant circumstances[476]. For purposes of bringing eviction proceedings in terms of PIE, ‘ court” refers to any division of the high court or magistrates court in whose area of jurisdiction the land in question is situated[477].

Section 4(1) provides that notwithstanding anything to the contrary contained in any law or the common law, the provisions of section 4 apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier. The

[475] Par 31.
[476] It is to be noted that the suggested amendment to section 4 of PIE , as contained in the PIE Amendment Bill published in GG 29501 of 22 December 2006 will not be discussed due thereto that the Amendment Bill sought to exclude lessees from the application of PIE.
[477] S1 of PIE.

procedure in section 4 requires the following: at least 14 days[478] before the hearing of the eviction proceedings the court must serve written and effective notice of the proceedings[479] on the unlawful occupier and the municipality[480] having jurisdiction[481]. The procedure of serving of notices and filing of papers is as prescribed by the rules of the Court[482]. However, subject to section 5(2), if a Court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the Court, it can direct a manner for service to be effected[483]. The Court must consider the rights of the unlawful occupier to receive adequate notice and to defend his case[484].

The notice of proceedings contemplated in section 4(2) must [485]

a) State that the proceedings are being instituted in terms of section 4(1) for an order for the eviction of the unlawful occupier;

b) Indicate on what date and at what time the court will hear the proceedings;

c) Set out the grounds for the proposed eviction;

d) State that the unlawful occupier is entitled to appear before the court and defend the case an where necessary has the right to apply for legal aid.

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[478] Days are calculated as business days, excluding Saturdays, Sundays and public holidays. See further the Interpretation Act 33/1957 for the calculation of days.
[479] Section 4(5) states that the notice of proceedings must state that the proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier. It must further indicate on what date and time the Court will hear the proceedings. It must set out the grounds for the proposed eviction. It must state that the unlawful occupier is entitled to appear before the Court and defend his case and it must state that the unlawful occupier has the right to apply for legal aid.
[480] Municipality is defined in the Act as a municipality in terms of section 10B of the Local Government Transition Act 209/1993, which includes a local council, a metropolitan council, a metropolitan local council, a representative council, a rural council and a district council.
[481] S 4(2).
[482] S 4(3).This provision is subject to s5(2).
[483] S4(4).
[484] Ibid.
[485] S4(5).

If the Court is satisfied that the requirements[486]have been complied with and that there is no valid defence raised by the unlawful occupier, it may grant an order for the eviction of the unlawful occupier[487]. The Court may also then determine a just and equitable date on which the unlawful occupier must vacate the said premises and also a date on which an eviction order may be carried out if the unlawful occupier has failed to vacate the premises on the date determined by the Court (*supra*)[488]. In determining the just and equitable date, the Court regards all the relevant factors, including the period that the unlawful occupier and his or her family have resided on the land in question[489].

An important aspect that should be noted is that sections 4(6) and section 4(7) distinguish between a period of less than six months of occupancy at the time of initiation of the eviction proceedings and a period of more than six months at such time. If the land in question is occupied for a period of less than six months at the time when the eviction proceedings are instituted, section 4(6) provides that a court may grant an eviction order if it is of opinion that it is right and equitable to do so after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women. If the occupancy exceeds a period of six months at the time of initiation of the proceedings, section 4(7) however provides that the Court must then also consider whether land has been made available or can reasonably be made available by a

[486] The requirements are set out in section 4 of the Act.
[487] S 4(10) provides further that the Court may order for the demolition or removal of the buildings or structures that were occupied by the unlawful occupant. However, section 4(12) provides that it is subject to conditions deemed reasonable and the Court may, on good cause shown, vary any condition for an eviction order.
[488]S 4(8).
[489]S 4(9).

municipality or other organ of state or another land owner for the relocation of the unlawful occupier including the rights and needs of the elderly, children, disabled persons and households headed by women. However, if the land is sold in a sale of execution pursuant to a mortgage, section 4(7) will not be applicable[490].

In *Theart and Another v Minnaar NO; Senekal v Winskor 174 (Pty) Ltd*[491] two appeals against eviction orders were heard together. In the *Theart* case[492] the appellants were served with two notices, both served at the same time, being a notice of motion as well as a notice in terms of section 4(2) of PIE. The notice of motion informed the appellants of:

(a) the fact that an application is made for their eviction;

(b) the grounds for their eviction;

(c) the date and place of the hearing;

(d) their right to defend the matter and seek legal representation;

(e) their right to adduce relevant facts before the Court; and

(f) their Constitutional right to adequate housing in terms of section 26(3) of the Constitution.

In the *Senekal* case[493] only the notice of motion was served, but it contained the same information as indicated above in the *Theart*-matter. Appeals against the

[490] Proviso to s 4(7).
[491] 2010 (3) SA 327 (SCA), [2010] 2 All SA 275 (SCA).
[492] Par 3.
[493] Par 4.

eviction orders were dismissed by the High Court. The appellants were only appealing against the procedure followed and not against the merits[494].

It was held by the Court[495] that the judgment in *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others*[496] was no authority that section 4(2) required two separate notices to be served in the Magistrate's Court. It was held further that the object of section 4(2) is to give the occupiers sufficient and effective notice of the intended eviction. *In casu* it had been achieved. The Court was accordingly satisfied that effective notices had been given to the appellants and held that to hold otherwise would promote slavish adherence to form above substance[497].

As indicated above, the availability of suitable alternative accommodation is of importance if an occupier resided on the land in question for a period exceeding six months[498]. In the *Port Elizabeth Municipality v Various Occupiers*[499] Sachs CJ held the opinion that this is not an inflexible requirement[500]. As discussed in *Occupiers of Mooiplaats v Golden Thread Ltd and Others* below, the Constitutional Court held in a unanimous judgment delivered by Yacoob J that a court is not expressly obliged to investigate if a municipality could reasonably make land available for people who faced eviction, where the residents had been in occupation of the land for less than six months.

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[494]Par 5.
[495]Par 15.
[496]2001 (4) SA 1222 (SCA), [2001] 4 All SA 479 (SCA).
[497]De Rebus (August 2010) 31.
[498] S 4(7).
[499] 2005 (1) SA 217 (CC).
[500]Par 28.

If it is necessary to evict the unlawful occupant or to carry out a demolition or removal order, the only person to carry out the order is the sheriff of the Court that made the order[501]. Such sheriff must at all times be present, but the Court can authorise, at the request of the sheriff, any person to assist the sheriff[502].

4.3 Urgent eviction proceedings

Section 5 of Pie provides for urgent eviction proceedings. Notwithstanding the provisions of section 4 of PIE, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of land, pending the outcome of a final order[503].

The Court may grant such an order if it is satisfied that[504]

a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;

b) the likely hardship to the owner or another affected person, if the eviction order is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and

c) there must be no other effective remedy available.

[501] S 4(11).
[502] Ibid.
[503] S5(1).
[504] S5(2).

As with the procedure in terms of section 4 of PIE, the Court must give written and effective notice[505] of the intention of the owner or person in charge to obtain an eviction order against the unlawful occupier, to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated[506]. The notice of urgent eviction proceedings contemplated in section 5(2) must[507]

a) state that proceedings will be instituted in terms of section 5(1) for an order for the eviction of the unlawful occupier;

b) indicate on what date and at what time the court will hear the proceedings;

c) set out the grounds for the proposed eviction;

d) state that the unlawful occupier is entitled to appear before the court and defend the case and where necessary , has the right to apply for legal aid.

It is submitted that an application for an eviction order in terms of section 5 is a *sui generis* application which resembles an *ex parte* application in that the eviction order is an order pending the outcome or a final order. However, it differs from an ex parte order in that the Court must give written and effective notice of the intended application to the unlawful occupant. The application also has similarities to an application for an interdict as the likely hardship to the owner or another affected person, if the eviction order is not granted, has to exceed the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted. With an interdict application, the balance of convenience must favour the applicant. A further similarity is that there must be no other remedy available.

[505] S5(3).
[506] S5(2).
[507] S5(3).

4.4 Application of the Constitution: Eviction to be just and equitable

As indicated in the introduction to this chapter, section 26 of the Constitution provides every individual with the right of access to adequate housing and states that no one may be evicted from their home or have their home demolished without an order of Court and after the Court have considered all relevant circumstances.[508] This right forms the backdrop to PIE and explains the requirement in PIE that evictions of unlawful occupiers be just and equitable. PIE consequently makes provision for a private prosecution if this constitutional provision is contravened[509]; as such contravention constitutes a criminal offence in terms of the Act.[510] It may consequently be asked when an eviction will be 'just and equitable' for purposes of PIE. Sachs J dealt with the concept "just and equitable" in the context of PIE in *Port Elizabeth Municipality v Various Occupiers*[511] where he referred with approval to the *dictum* of Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others*[512].Horn AJ remarked that there are two diametrically opposed fundamental interests in PIE. On the one hand is the real right inherent in ownership and on the other hand there is also the genuine despair of people in dire need of adequate accommodation[513]. According to him it is the duty of the Court, when the requirements of PIE are applied, to balance these opposing interests and to bring out a decision that is just and equitable[514]. Therefore the term "just and

[508] S 8(1) of the Act also confirms this. See also *Cape Killarney Property Investments (Pty) Ltd v Mahamba and others supra at* 1229E.
[509]S 8(4).
[510]S 8(3).
[511] 2005 (1) SA 217 (CC) Par33 to 34.
[512]2000 (2) SA 1074 (SE). .In this regard see also *Wormald N.O. v Kambule* 2006 (3) SA 562 (SCA) par 17.
[513] Par 33.
[514] Ibid.

equitable" refers to both interests, being to the interests of the persons who occupied the land unlawfully, but also to the landowner as well[515].

Sachs J subsequently held that the emphasis on justice and equity underlines the central philosophical and strategic objective of PIE[516]. According to him PIE treats these values as interactive, complementary and mutually reinforcing, rather than to envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other[517]. Sachs J furthermore indicated that PIE has to be understood and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix[518]. According to him the analysis must be to affirm the values of human dignity, equality and freedom[519].

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)*[520] it was held by the Constitutional Court in a unanimous judgment that the eviction and relocation of the unlawful occupants was just and equitable. Yacoob J held that the relocation made provision for the safe, dignified and humane treatment of all the people involved. The purpose of the relocation was to make way for appropriate housing development, also to comply with the constitutional obligation of the state to provide access to suitable housing[521].

[515] Ibid.
[516] Ibid.
[517] Par 35.
[518] Par 14.
[519] Par 15.
[520] 2010 (3) SA 454 (CC).
[521] De Rebus (August 2010) 31-32.

Furthermore the state provided the following in this matter:

(a) free transport for the relocation;

(b) temporary accommodation during the transition; and

(c) permanent accommodation as part of its programme to eliminate informal settlement.

The Court thus held that the eviction was a reasonable measure, facilitating the housing-development programme[522].

In *Occupiers of Mooiplaats v Golden Thread Ltd and Others*[523] the Constitutional Court held in a unanimous judgment delivered by Yacoob J that a court is not expressly obliged to investigate if a municipality could reasonably make land available for people who faced eviction, where the residents had been in occupation of the land for less than six months, in terms of section 4(6) of PIE. That was not decisive to the 'justice and equity' enquiry[524]. It was further held that a Court has to consider all the relevant circumstances if land was occupied for less than six months[525]. *In casu* about 200 families would have been evicted, leaving them homeless in all probability. The Court held that it was thus of crucial importance to investigate if the municipality was reasonably capable of providing alternative land or housing[526]. The Court also held that, due to the fact that the municipality owned land that could be made available for that purpose, it was

[522] De Rebus (August 2010) 31 to 32.
[523] 2012 (2) SA 337 (CC).
[524] Par 8.
[525] Par 15.
[526] Par 16.

impossible for the High Court to conclude that the eviction was just and equitable without investigating this aspect[527].

5 Conclusion

The decision in *Ndlovu* and *Bekker* regarding the application of PIE to residential lease agreements has dire consequences for lessors who are desirous to evict unlawful occupiers who refuse to vacate leased premises after lawful termination of a lease agreement. It has made serious inroads to the lessor's common law right to evict a lessee after termination of a lease by placing various procedural impediments in the way of a lessor who seeks eviction and by further dumping the obligation to provide adequate housing onto the lessor in certain circumstances.

It is submitted that the context and wording of PIE is such that it is clear that the aim of the Act was to alleviate the plight of homeless persons who invaded land without consent, erecting structures and dwellings to inhabit due to their lack of access to other adequate housing. This is also demonstrated by the fact that 'building or structure' for purposes of PIE includes huts, shacks, tents or similar structures. Persons who lease residential property will usually not need to erect any building or structure as they will in terms of the lease agreement be leasing an already erected dwelling, such as a house or flat. Usually with lease agreements there is no inherent danger of abuse in the form of persons receiving money or soliciting other person to occupy the leased premises. In essence a lease normally amounts to organised business regulated by contract between the lessor and the lessee. However, where an Act seeks to address occupation of land by homeless

[527] De Rebus (June 2012) 47.

persons the need to curb abuse by prohibiting solicitation of persons to occupy such land, make sense. Furthermore, it is the duty of the State to attend to its citizens right of access adequate housing, not the plight of the unfortunate lessor who has his ownership compromised by a lessee who wishes to vacate a leased premises after lawful termination of the lease agreement. Surely the legislature, if it considered that Pie should apply to residential leases, would have considered the possibility of such application giving rise to widespread abuse by lessees who would be able to stay on in the leased premises until the onerous PIE-procedures have been complied with by the lessor. In those instances where lessees managed to stay on in the leased premises for longer than six months after the application for eviction was initiated it could have grave results for the lessor as it could happen that a court would not order eviction for instance due thereto that a female lessee who is a single parent with dependent children who had lost her job, had nowhere else to stay. It is submitted that the fact that the Rental Housing Act, despite its acknowledgement of the right of access to adequate housing, does not deal with the concept of eviction and prescribes no procedures for eviction or does not contain a provision that eviction of a lessee who 'holds over' must occur in terms of PIE, is indicative thereof that the legislature did not intend the onerous procedures of PIE to apply in the case of 'holding over' by lessees.

What PIE apparently clearly provides and that it does not seem to have been intended that it should apply to residential lease agreements however becomes blurred when the unintended consequences of the right of access to adequate housing as provided for in section 26 of the Constitution take effect. Surely all persons especially vulnerable persons such as children and the elderly should have

access to adequate housing and should not be arbitrarily evicted from their homes. However, the result of the judgment in *Ndlovu* and *Bekker* is that the duty of the State to realize this right of access to adequate housing has now been diverted to lessors to be absorbed by them under the guise of the prohibition against arbitrary eviction. It is submitted that this situation can be potentially damaging to the South African economy as owners of property will be reluctant to enter into lease agreements with potential lessees who may in their turn not be able to acquire adequate housing other than by means of the mechanism of lease.

It is thus submitted that the application of PIE to lease agreements of residential property cannot be condoned and that the best solution would be to put the PIE Amendment Bill into effect at least insofar as it excludes lease agreements from the scope of application of PIE. In the meantime though, lessors will find their right to eviction of lessees hampered by the eviction procedures laid down in PIE as well as the absorption of the duties of the State to provide its citizens with adequate housing. Obviously from the viewpoint of the lessee the protection offered by PIE is advantageous and can alleviate the plight of vulnerable lessees who find themselves without any other means to acquire access to housing. This is however not a tenable situation as, apart from the possibility of abuse by lessees who can actually afford alternative housing, the intention behind the law of lease, as is clear from the common law exposition thereof in Chapter two of this dissertation, was never to make the lessor of provider of housing to a lessee outside of the essential rights and obligations which traditionally characterize lease agreements. Delport most aptly summarises the situation when he remarks[528]: ‘ ..not every landlord is a

[528] Delport at 484.

slumlord and not every tenant is a victim of misguided land tenure policies of the past".

CHAPTER 5 THE CONSUMER PROTECTION ACT

1. Introduction

In South Africa consumer protection was to a certain extent the Cinderella of the law for a considerable period of time. No comprehensive piece of legislation that regulated the relationship between suppliers and consumers in general existed and examples of consumer exploitation were rife. Consumer legislation was disjointed , being provided for by the common law[529] as well as in certain industry specific legislation which dealt with matters such as finance charges, weights and measures, trade descriptions on goods and false and misleading advertising[530]. Harmful or unfair business practices were generally regulated by the Harmful Business Practices Act[531] which was later renamed the Consumer Affairs (Unfair Business Practices) Act[532]. The Consumer Affairs (Unfair Business Practices Act) was however an enabling act rather than a prescriptive one and although its purpose was to provide for the prohibition or control of unfair business practices it did not contain a list of practices that could be considered unfair[533]. An 'unfair business practice' was broadly defined as 'any business practice which, directly or indirectly, has or is likely to have the effect of harming the relations between business and consumers; unreasonably prejudicing any consumer; deceiving any consumer; or unfairly affecting any consumer'[534].

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[529] Woker 'Why the Need for Consumer Protection Legislation?' 2010 *Obiter* 217 at 223 (hereinafter Woker (2010)).
[530] Woker *(*2010) at 218.
[531] Consumer Affairs (Harmful Business Practices Act) 71 of 1988.
[532] The title of the Act and certain of its provisions were amended by the Harmful Business Practices Amendment Act 23 of 1999. According to Woker one of the difficulties with the aforesaid legislation was that the legislature was attempting to protect the public not only from lawful business practices but also from practices that were lawful yet unfair or harmful to consumers and that this resulted in complaints by suppliers that the Act violated their constitutional rights, particularly the right to freedom of trade, occupation and profession.

[533] Woker 'Business Practices and the Consumer Affairs (Harmful Business Practices) Act 71 of 1988 (2001) 1 *SA Merc LJ* 315(hereinafter Woker 2001) at 316.
[534] Woker (2001) 1 *SA Merc LJ* 315 at 317 where she points out that the words ' unfairly affecting any consumer ' were added to the definition by the 1999-amendments with the effect of broadening the definition even further since it was not required that the business practice had to be harmful, merely that it was unfair. The Consumer Affairs (Unfair Business Practices) Act authorised a committee, known as the Consumer Affairs Committee[534], to investigate business practices and report to the

Apart from national legislation, provinces too have enacted provincial legislation regulating consumer affairs[535] and a number of consumer courts have been established in certain provinces[536]. Various industry regulators exist that have also attempted to provide a measure of consumer protection[537]. Woker however points out there has always been a lack of co-ordination between these regulators and also that the disjointed pieces of legislation were often unknown to consumers and suppliers alike[538].

The Consumer Protection Act [539] (hereinafter CPA or Act) which came into full operation on 31 March 2011, has now repealed many of these fragmented pieces of pre-existing consumer legislation[540]. It seeks to address consumer protection in one comprehensive act[541] that places a high premium on accessible, transparent and efficient redress for consumers[542]. As indicated in chapter one of this dissertation the scope of matters that the CPA seeks to regulate is broad and it protects a wide range of consumer rights namely: the right of equality in the consumer market; the

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Minister of Trade and Industry and to make certain recommendations to the Minister if it found any business practices to be unfair. A major drawback of the Act was that the Consumer Affairs Committee had no power to order redress. If the Minister accepted the Committee's recommendations, a notice was published in the Government Gazette declaring the business practice to be unfair and directing that parties or businesses refrain from applying those unfair practices. This publication of the aforesaid notice had the effect that certain practices merely had to be amended but that in some instances it meant that the entire business had to cease operating. Non-compliance with the published notice was an offence and upon conviction a person was liable to a fine not exceeding R200 000 or to imprisonment not exceeding 5 years or both.

[535] Du Plessis 'Toward Better Service Delivery by Consumer Courts' (2008) 20 *SA Merc LJ* 74.

[537] Woker' Why the Need for Consumer Protection Legislation?' 2010 *Obiter* 217 at 219

[538] Woker (2010) at 223.

[539] Act 68 of 2008.

[540] See the preamble to the Act as well as Schedule 1 Part C.

[541]The acts or parts thereof that were repealed are section 2 to 13 and sections 16 and 17 of the Merchandise Marks Act 17 of 1941, the Business Names Act 27 of 1960, the Price Control Act 25 of 1964, the Sales and Service Matters Act 25 of 1964, the Trade Practices Act 76 of 1976, the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 as well as section 54 of the Lotteries Act 57 of 1997. The Act, in Schedule 1 thereof, also makes sequential amendments to the National Credit Act 34 of 2005,the Electronic Communications and Transactions Act 25 of 2002 and to section 1 of the Lotteries Act 57 of 1997.

[542] Preamble to the Act.

consumer's right to privacy; the consumer's right to choose; the right to disclosure and information; the right to fair and responsible marketing; the right to fair and honest dealing; the right to fair, just and reasonable terms and conditions and the right to fair value, good quality and safety.

In essence a lessor is a supplier of leasing services and a lessee is a consumer of those services. As indicated in previous chapters, the lessor-lessee relationship had received considerable attention in South African law, especially in recent years when the impact of the Rental Housing Act and The Prevention of Illegal Eviction of and Occupation of Land Act (PIE) on the common law of lease became evident. Compared to the CPA, the aforesaid Acts contain only a few sections each and they each have a very specific focus as evidenced by their titles. The CPA, in comparison, is a voluminous piece of legislation that covers a wide variety of supplier-consumer matters. The question consequently arises whether the CPA applies to the specific relationship between a lessor and a lessee and whether it has any impact on the common law of lease as supplemented and limited by the Rental Housing Act and the Illegal Eviction and Unlawful Occupation of Land Act.

To answer this question one *inter alia* has to have regard to the objectives of the Act and to its scope of application. Once it has been determined that the CPA does apply to lease agreements , it will be necessary to have regard to sections of the Act that specifically apply to lease agreements. Regard should however also be had to those sections of the Act with general application to the supplier-consumer

relationship which may also impact on the rights and obligations of the lessor and the lessee.

2. Early and general effective date and retrospectivity of the CPA

Before one proceeds with a discussion of the Act, it is important to note the following: the CPA was signed by the State President on 24 April 2009 and was Gazetted on 29 April 2009[543]. The Act was put into effect incrementally: Chapter 1 and 5 of the Act, as well as section 120 and any other provision authorising the Minister to issue regulations, as well as Schedule 2, came into operation on the "early effective date", which is one year after the President signed the Act and thus is 24 April 2010[544]. The rest of the provisions of the Act came into operation on 31 March 2011 (the general effective date) and the main (general) set of regulations that were issued in terms of the Act were published on 1 April 2011[545].

In the context of the application of the CPA one has to take into account the possibility of the Act having retrospective application as such retrospectively is specifically provided for by the Act[546]. The effect of retrospective application of the Act is that in certain specified instances, it extends the application of the Act to agreements that were concluded before the Act came into existence. The CPA states that it does not apply to the promotion of any goods or services prior to the general effective date and also not to any transaction or agreement entered into or

[543] Van Heerden in Nagel et al Commercial Law (4th ed) 705 hereinafter (Van Heerden Commercial Law).
[544] Item 2 Schedule 2 of the Act.
[545] Ibid. Various other regulations dealing with specific matters have subsequently been published.
[546] For a discussion of the retrospective application of the Act see Van Heerden Commercial Law 705.

any goods or services supplied to a consumer prior to the general effective date[547]. The Act however contains a table in Schedule 2 thereof that lists certain sections of the Act in the first column thereof. The sections of the Act so listed applies, to the extent indicated in the second column thereof, to a pre-existing agreement between a consumer and a supplier, if that pre-existing

(a) would have been subject to the CPA had the Act been in effect at the time that the agreement was entered into; and

(b) contemplates that the parties to it will be bound for a fixed term until a date that is on or after the second anniversary of the general effective date, which is on or after 31 March 2013 [548].

The table that is referred to in item 3(2) contains the following information:

Section of Act	Extent of application to pre-existing agreement
14	Only subsections (1) *(b)* to *(d)* and (2) apply with respect to the expiry and possible renewal of the agreement, on or after the general effective date.
18 to 20	Apply only with respect to goods that are deliverable or delivered to the consumer in terms of the agreement, on or after the general effective date.
22	Applies only to a notice, document or visual representation that is required to be produced, provided or displayed to the consumer, on or after the general effective date.
25	Applies only with respect to any goods supplied to the consumer in terms of the agreement, on or after the general effective date.

[547] Item 3(d) Schedule 2 of the Act.
[548] Item 3(2)(a) and (b), Schedule 2.

26	Applies only with respect to any transactions occurring in terms of the agreement, on or after the general effective date.
31	Applies only to any purported amendment to the agreement made, on or after the general effective date.
44	Applies only with respect to any goods supplied to the consumer in terms of the agreement, on or after the general effective date.
53 to 58	Apply only with respect to any goods or services supplied to the consumer in terms of the agreement, on or after the general effective date.
64 (1) and (2)	Apply only to an amount paid or payable by the consumer in terms of the agreement, on or after the general effective date.
64 (3) and (4)	Apply only with respect to any closure of a facility contemplated in those provisions, if it will occur on or after the effective date.
65	Applies only with respect to an amount paid or payable by the consumer, or to property that comes into the possession of the supplier, on or after the general effective date.

3. Purpose of the CPA

The purposes of the Consumer Protection Act were set out in chapter one of this dissertation. Such purposes are *inter alia* to promote and advance the social and economic welfare of consumers in South Africa by establishing a legal framework for the achievement and maintenance of a consumer market that is fair and accessible ;reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by various types of vulnerable consumers and promoting fair business practices.

4. Preservation of common law rights

Section 2(10) of the CPA is of pivotal importance as it states that no provision of the Consumer Protection Act must be interpreted so as to preclude a consumer from exercising any rights afforded to such consumer in terms of the common law . Within the context of the law of lease which is to a large extent based on the common law, this provision must thus be kept in mind throughout when considering the impact of the CPA on lease agreements. It is to be noted that this provision is cast in terms which preserves the consumer's common law rights and that no similar provision is made for the preservation of the common law rights of the supplier. In essence it means that a consumer, with regard to a matter to which the CPA applies retains the right to rather seek redress in terms of his common law remedies than under the remedies provided by the Act.

5. Scope of Application of CPA

5.1 Important definitions

As indicated in the introduction to this chapter, the CPA in broad terms applies to the marketing and supply of goods and services by a supplier, who is acting in the ordinary scope of his business, to a consumer. To a consumer from the moment goods and services are promoted to him, right through the transaction and even thereafter. As such it seeks to extend the protection of the Act. It is to be noted that it is not required that the consumer must be acting in the ordinary course of his business for the CPA to apply to the marketing and supply of such goods or

services. It is only the supplier who must be acting in the ordinary course of his business for purposes of the potential application of the CPA[549]. In order to comprehend the scope of application of the CPA it is however necessary to first have a look at specific important definitions which are relevant to such application.

According to the extended definition of 'consumer', a consumer in respect of any particular goods or services, means

(a) a person to whom those goods or services are marketed in the ordinary course of the supplier's business;
(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of the Act by section 5(2) or in terms of section 5(3);
(c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).

It is thus clear that a lessee in terms of a lease agreement would meet the definition of 'consumer' as contemplated by the CPA.

In the context of the definition of " consumer' which refers to natural persons as well as juristic persons, the concept of 'juristic person' is also given a wide definition and

[549] As is evident from the definition of 'consumer' as discussed below.

apart from traditional juristic persons such as companies and close corporations it includes a body corporate, a partnership or association or a trust as defined in the Trust Property Control Act 57 of 1988[550]. As indicated hereinafter, this definition plays an important role in determining whether a specific consumer falls within the scope of application of, and is entitled to the protection of the CPA.

For purposes of the CPA, "supplier" means a person who markets any goods or services[551]. "Supply" when used as a verb in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or in relation to services, means to sell the services, or to perform or cause them to be performed or provided or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration[552] "Market" when used as a verb, means to promote or supply any goods or services[553].

At this stage , in view of the requirement that the supplier must be acting in the ordinary course of his business in order to attract the application of the CPA, it is appropriate to point out that the words ' ordinary course of business' are not defined in the Act. The Act however contains a definition of 'business' as the 'continual marketing of goods and services. As has been indicated above, marketing is a wide concept which covers both the promotion and supply of goods and services. Due to the lack of a definition of 'ordinary course of business 'in the Act it can be expected that disputes regarding the interpretation of this concept will arise. There is

[550] Ibid.
[551] Ibid.
[552] S1.
[553] S1. It is to be noted that marketing also includes direct marketing as defined in s 1 of the Act.

uncertainty whether a lease agreement between a lessor, who is for example a teacher, and a lessee will enjoy the protection of the CPA[554]. Obviously the question whether a supplier acts in the ordinary course of his business will entail a case by case facts–based inquiry[555]. Therefore it is submitted that once-off transactions will fall outside the scope of application of the CPA and that one needs to apply a wide interpretation to the words 'ordinary course of business'. The focus needs to be on continuity[556]. Therefore if a lessor, who is a teacher for instances leases a number of immovable properties, a court may probably hold that such person has more than one ordinary course of business. Each transaction therefore needs to be evaluated on its own merits to ascertain whether the CPA will be applicable or not.

'Goods' for purposes of the Act, includes

(a) anything marketed for human consumption;

[554] If one applies the "test" for the application of the CPA narrowly, one will argue that it is not in the ordinary course of business of a teacher to let a property, therefore the CPA will not be applicable.
[555] Van Heerden Commercial Law at 709. See also Naude "' The Consumer's Right to Safe Good Quality Goods and the Implied Warranty of Quality under Sections 55 and 56 of the Consumer Protection Act 68 of 2008' (2011) 23 SA Merc LJ (hereinafter referred to as Naude) where she refers to *Amalgamated Banks of South Africa Bpk v De Goede en 'n ander* 1997 (4) SA 66 (SCA) in which the phrase ' ordinary course of business' in the context of the Matrimonial Property Act 88 of 1984 was interpreted. In this case the court held that it was irrelevant whether or not the person in question conducted such transactions regularly- the issue was whether the person performed the juristic act in question in the ordinary course of his business. Naude remarks that a single isolated activity could under proper circumstances be regarded as being performed in the ordinary course of business. The test for determining whether a contract falls within the scope of a party's business is whether the conclusion of that contract falls within the scope of that business and whether the transaction is one with commonly used terms which that ordinary businessmen would normally have entered to in the circumstances. She further indicates that case law on income tax accepts that if rental income is 'the product of a bona fide investment with the purpose of earning an income from the investment', income tax is payable on profit made or any rental loss may be deducted from rental income for the purpose of income tax. Thus, according to Naude, an individual who, apart from her own residence, owns only one flat which she rents out is supplying that flat to the tenant in the ordinary course of her business. The lessor has to pay income tax on the rental derived and therefore is running a business of leasing out the flat, even though this may not be her only or main occupation.
[556] The term 'continual' is not defined in the Act.

(b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;

(c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;

(d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of "service" in this section; and

(e) gas, water and electricity;

It is thus clear that goods have an extended definition: it not only covers the wide range of goods enumerated in the above definition, but the word 'includes' indicates that the goods specified in the definition do not constitute a closed list.

The definition of 'services' also does not contain a finite list and includes but is not limited to

(i) any work or undertaking performed by one person for the direct or indirect benefit of another;

(ii) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);

(iii) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service constitutes

advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002) or is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 53 of 1998).

(iv) the transportation of an individual or any goods;

(v) the provision of any accommodation or sustenance; any entertainment or similar intangible product or access to any such entertainment or intangible product; access to any electronic communication infrastructure; access, or of a right of access, to an event or to any premises, activity or facility; or access to or use of any premises or other property in terms of a rental;

(vi) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and

(vii) rights of a franchisee in terms of a franchise agreement to the extent applicable in terms of section 5(6)(b) to (e).

For purposes of this dissertation it is thus important to note that the CPA regards the supply of access to or use of any premises in terms of a 'rental" as a service for purposes of the Act. A 'rental' is defined as an agreement for consideration[557] in the

[557] Consideration means anything of value given and accepted in exchange for goods or services, including money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object; labour, barter or other goods or services;

ordinary course of (the supplier's) business, in terms of which temporary possession of any premises or other property is delivered, at the direction of or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer, but does not include a lease within the meaning of the National Credit Act 34 of 2005.

An 'agreement' means an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them[558]. An 'agreement' however has to be distinguished from a "consumer agreement" which means an agreement between a supplier and a consumer other than a franchise agreement[559]; and from a "transaction" which means

(a) in respect of a person acting in the ordinary course of business

(i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or

(ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or

(iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or

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loyalty credit or award, coupon or other right to assert a claim; or any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer.

[558] S1.
[559] S1.

(b) an interaction contemplated in section 5 (6), irrespective of whether it falls within paragraph (a).

Thus a 'rental' as defined in the CPA would in principle cover a lease agreement between a lessor and a lessee in respect of immovable property as contemplated in this dissertation[560]. It should however be noted that this conclusion does not necessarily imply that every lease agreement of immovable property will necessarily fall within the scope of the CPA, as explained hereinafter.

5.2 Section 5(1) of the CPA

In more specific terms, section 5(1) of the CPA provides that the Act applies to:

(a) every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);

(b) the promotion of any goods or services, or of the supply of any goods or services, within the Republic unless

  (i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (1); or

  (ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);

(c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services or separate from any other goods or services; and

[560] I.e a short term lease of urban residential property.

(d) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided in subsection (5)[561].

5.3 Transactions that are exempt from the application of the CPA

The CPA expressly provides that certain transactions, even if they entail the marketing and supply of goods and services by a supplier in the ordinary course of his business, to a consumer, are nevertheless exempt from the application of the Act. In this regard section 5(2) provides that the CPA does not apply to any transaction

(a) in terms whereof goods and services are promoted or supplied to the State[562];

(b) in terms whereof the consumer is a juristic person whose asset value or annual turnover, at the time of the agreement, is equal to or exceeds R2 million[563];

(c) if the transaction falls within an industry wide exemption granted by the Minister to a particular industry;

(d) that constitutes a credit agreement under the National Credit Act 34 of 2005, but the goods and services that are the subject of the credit agreement are not excluded from the ambit of the Act;

(e) pertaining to services to be supplied under an employment contract;

[561] This means that goods which are supplied in terms of transactions that are exempt from the application of the Act are nevertheless subject to s60 and 61 of the Act which deal with product recall and strict product liability.
[562] Thus where the State is a supplier in the ordinary course of business the CPA will apply but not where a supplier in the ordinary course of business supplies goods to the State as a consumer.
[563] See the notice regarding determination of the threshold published under GN 294 in GG34181 of 1 April 2011.

(f) giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution 1996 and the Labour Relations Act, 66 of 1995; or

(g) giving effect to a collective agreement as defined in section 213 of the Labour Relations Act, 66 of 1995.

Within the context of lease agreements it is submitted that the most relevant exemption will prove to be the exemption in respect of juristic persons as contained in section 5(2)(b). It is further submitted that it is clear from this exemption that the legislature intended to afford the protection of the CPA only to 'small' juristic persons. i.e with an asset value or annual turnover of less than R2 Million. Evidently the CPA was not enacted to protect 'Big Business' in its capacity as a consumer.

5.4 Conclusion on general application of CPA to lease agreements

5.4.1 General

The CPA thus applies to a lease of immovable property ("rental") as being a service for purposes of the Act, provided that the general conditions for the application of the Act as set out in section 5(1) and 5(2) read together with the relevant definitions alluded to above, are met. In essence this means the following[564]:

- Where a person (natural or juristic) leases immovable property to another person (natural or juristic) but the lessor is not acting in his ordinary course of

[564] Van Heerden Lease Notes (Unpublished document September 2011) 5(hereinafter Van Heerden Lease Notes).

business (i.e it is a so called once off transaction), the CPA does not apply to the transaction.

- Where a person (natural or juristic) leases immovable property to another person (natural) in the ordinary course of the lessor's business, the CPA will apply.
- Where a person (natural or juristic) leases immovable property to another person (juristic) in the ordinary course of the lessor's business the CPA will apply if the juristic person consumer has an asset value or annual turnover of less than R2 Million . If the juristic person consumer has an asset value of more than R2 million then the CPA will not apply even if the lessor was acting in his ordinary course of business because the transaction is exempt from the application of the Act by virtue of section 5(2)(b) of the Act which does not protect' big business'.

It is to be noted that the CPA may apply to a lease agreement in two ways[565]: in the first instance there may be provisions of the CPA which apply to lease agreements as a specific type of agreement, but which provisions do not apply generally to all types of agreements in commerce. In the second instance, there may be provisions of the CPA which are of general application to any type of agreement that falls within the scope of the CPA. Where the CPA does apply to a lease agreement based on the test for application as set out above, the specific section which might apparently impact most severely on lease agreements, is section 14 of the Act, which deals with fixed term agreements. There are also various other sections which apply to a lease agreement that falls within the scope of the CPA as an agreement in general, such

[565] Van Heerden Lease Notes 5.

as provisions pertaining to plain language, unfair contract terms and so forth. It is however important to note that section 14 of the CPA can only apply to a lease agreement if the lease agreement itself falls within the scope of application of the CPA. However, it may happen that a lease agreement can fall within the scope of the CPA but that section 14 of the Act may not apply to the lease agreement because the agreement itself does not meet the requirements set by section 14 for application of the said section to a specific lease agreement.

Thus if one applies the "test" for application of the CPA as set out above to a lease agreement and comes to the conclusion that the CPA does not apply to a lease agreement, because the lessor is not acting in the ordinary scope of business, it obviously raises no CPA-compliance concerns because the CPA does not apply in such instance[566]. If, however, one applies the "test" for application and comes to the conclusion that the CPA does apply to a specific lease agreement, it does not necessarily mean that section 14 of the CPA will apply to that agreement. In such instance, although it will then not be necessary to comply with the onerous provisions of section 14 as discussed hereinafter, it will still be necessary to comply with the other more general provisions of the CPA that applies to agreements within its scope of application.

5.4.2 Where a rental agent is used

Determining the application of the CPA and the exact extent to which it applies in the context of lease agreements is no easy task. This is exacerbated by the fact that

[566] Ibid.

many lessors make use of the services of so called 'rental agents' to rent out their properties. The questions thus arises as to the impact of a rental agent on the application of the CPA to a lease agreement, i.e does the fact that a lessor, who in a specific instance does not qualify as a supplier of leasing services in the ordinary course of business, makes use of a rental agent for purposes of letting out his property to natural persons or small juristic person consumers, bring such once-off transaction within the scope of application of the CPA? Where a person is not a lessor in the ordinary course of business, but he rents out his house and makes use of the services of a rental agent, it is important to note that the rights and obligations in respect of the lease of the property are established between the lessor and the lessee. It is submitted that in such instance the agent is merely the agent of the lessor and does not attract the rights and obligations in terms of the agreement of lease to him or herself[567]. Therefore the lease agreement itself will fall outside the scope of the CPA, because the lessor was not acting in the ordinary course of business. However, the estate agent renders his or her specific services in the ordinary course of his or her business and as such the services by the estate agent will be subject to the application of the Act. This situation however does not cause the lease agreement between the lessor and lessee to be drawn into the scope of the application of the CPA. The services of the estate agent will then be subject to section 54 of the Act which entitles consumers to quality services as well as to the general provisions of the Act as discussed hereinafter[568].

[567] Van Heerden Lease Notes 6.
[568] A detailed discussion of the position of a leasing agent is beyond the scope of this dissertation. For more information on this topic see Botha: Caveat vendor: The Consumer Protection Act and Typical Property Transactions 2009 *Property Law Digest* 3.

6. The application of section 14 (Fixed term agreements) to lease agreements

6.1 Introduction

Section 14 of the CPA deals with fixed term agreements that fall within the scope of application of the Act. Unfortunately the CPA does not define the concept 'fixed term' agreement thus leaving any agreement which endures for a fixed term to potentially fall within the scope of application of the Act. It is submitted that lease agreements are by nature fixed term agreements due thereto that a lease entails temporary possession of the leased premises for a specific time period. As indicated, the CPA applies to 'rental' agreements under which the concept of a short term lease of urban residential property can be brought home. Thus, once it is established that a lease agreement falls within the scope of the CPA (for instance because the lessor is a person who in the ordinary course of business lets his immovable property to natural and small juristic persons) it raises the possibility that section 14 may potentially apply to that lease agreement being a fixed term agreement.

Section 14 is innovative and, from the lessor's perspective, very onerous. It contains provisions regarding its scope of application, limitations on the time periods of fixed term agreements, provisions relating to termination and early termination and pre-expiry notices as well as periodic continuation of lease agreements which undoubtedly serve to protect the lessee as consumer. The section must be read together with regulation 5.

6.2 Non-application to transactions between juristic persons

The first aspect to be noted about section 14 is that it does not apply to transactions between juristic persons regardless of their annual turnover or asset value.[569] Therefore, depending on the nature of the parties to the lease agreement, section 14 of the CPA might or might not apply to a specific lease agreement. Once it is ascertained that the CPA in fact applies to a lease agreement, another requirement must thus be met for section 14 to apply to that agreement, namely that both parties to the agreement should not be juristic persons. If for instance both parties to the lease agreement are juristic persons and the lessor is acting in the ordinary course of business, then the CPA will apply but section 14 will not apply. This means that various general sections of the CPA applicable to lease agreements as discussed hereinafter, will apply to the lease agreement but that the agreement will not be subject to the onerous provisions of section 14 of the Act. However, if one of the parties is a natural person and the other is a juristic person, regardless of whether the juristic person is the supplier or the consumer, as long as the supplier is acting in the ordinary course of business, then the CPA as well as section 14 will apply to the agreement.

Some practical examples[570] of the application of section 14 are:

(a) A juristic person who is a supplier in ordinary course of business of rental services leases property to consumer who is an individual. In such instance the CPA will apply and section 14 will apply.

[569] S14(1).
[570] Van Heerden Lease Notes 6.

(b) A juristic person who is a supplier in the ordinary course of business of rental services leases property to a consumer who is a small juristic person. In such instance the CPA will apply, but section 14 will not apply.

(c) A juristic person who is a supplier in the ordinary course of business of rental services leases property to a large juristic person. In such instance the CPA will not apply and because the CPA does not apply section 14 will also not apply.

(d) An individual (a non-juristic person) who is a supplier in the ordinary course of business leases property to another individual. In such instance the CPA will apply and section 14 will apply.

(e) An individual who is a supplier in the ordinary course of business leases property to a small juristic person. In such instance the CPA will apply and section 14 will apply.

(f) An individual who is a supplier in the ordinary course of business leases property to a large juristic person. In such instance the CPA will not apply, and because the CPA does not apply, therefore section 14 will not apply.

(g) A juristic person who is not a supplier in the ordinary course of business leases property to an individual or to a small juristic person or to a large juristic person. In such instance the CPA will not apply, because the supplier is not acting in the ordinary course of business. Because the CPA does not apply, section 14 will also not apply.

6.3 Limitation on time period of fixed term agreement

If a consumer agreement is for a fixed term, that term may not exceed the prescribed maximum period[571]. Such prescribed period is 24 months from date of signature by the consumer[572]. There is however a few exceptions to this time period provided for in the regulations, namely[573]:

a) unless a longer period is expressly agreed with the consumer and the supplier can show a demonstrable financial benefit to the consumer;

b) unless otherwise provided by regulation in respect of a specific type of agreement, type of consumer, sector or industry; or

c) as determined in an industry code contemplated in section 82 of the Act in respect of a specific type of agreement, consumer, sector or industry.

This time restriction effectively means that a lessor in the ordinary course of business will have to agree with the consumer to a longer time period, if he so chooses and will also have to show that this longer lease holds a demonstrable financial benefit for the consumer. It is important to note that both these requirements must be met before a supplier will be able to rely on regulation 5(1)(a) as justification for entering into a lease agreements that exceeds 24 months. Van Heerden is of the opinion that this will have to be reflected in the lease agreement. She is also of the opinion that the mere fact that a consumer is able to rent a property for longer than 24 months without having to incur the expense of entering

[571] S14(2)(a).
[572] This limitation on the time period of a lease is of course problematic in the context of a long term lease which usually is in excesss of 10 years and is registered against the title deed of the leased premises. As indicated this dissertation is limited to short term urban residential leases but it is submitted that the possible influence of the Act on long terms leases requires further investigation and might eventually necessitate a spesific exemption by means of the regulations.
[573] Regulation 5(1).

into another lease agreement, most likely at a higher monthly rental than the rent charged in terms of the current lease, amounts to financial benefit[574]. It is however submitted that one has to be careful with this last approach, because the Act stipulates that the financial benefit has to be demonstrable. Therefore, a saving of an expense to merely conclude another lease agreement might not be held to constitute a demonstrable benefit in terms of the Act.[575] With respect to lease agreements it is submitted that a more appropriate example of such benefit would be if a property is rented for less than the market value or if the agreed rental payable by the consumer will escalate with a lesser annual percentage[576].

6.4 Early termination by (lessee) consumer

One of the most innovative measures introduced by section 14 is the right to early termination of a fixed term agreement by the consumer. In terms of section 14 the consumer may terminate the agreement upon the expiry of the fixed term, despite any provision of the consumer agreement to the contrary[577]. The consumer may also, subject to sections 14(3)(a) and (b) terminate the agreement at any other (earlier) time by giving the supplier twenty business days' notice in writing or other recorded manner or form[578].

If the consumer elects to terminate the agreement prior to the expiry thereof, he however still remains liable to the supplier for any amount owed to the supplier in

[574] Van Heerden Lease notes 6..
[575] See also 5.3*supra*.
[576] See also 5.4.2 *infra*.
[577] S 14(2)(b)(i)(*aa*).
[578] S 14(2)(b)(i)(*bb*).

terms of the agreement up to the date of termination[579]. The supplier may further impose a reasonable cancellation penalty with respect to any goods supplied, services provided or discounts granted to the consumer in contemplation of the agreement for its intended fixed term, if any[580]. The supplier must also credit the consumer with any amount that remains the property of the consumer as of the date of the cancellation[581].

Regulation 5 does not stipulate what a reasonable cancellation charge would be[582]. It merely stipulates that a reasonable credit or charge[583] may not exceed a reasonable amount taking into account the following:

(a) the amount the consumer is still liable for to the supplier up to the date of cancellation[584];

(b) the value of the transaction up to the date of cancellation[585];

(c) the value of the goods which will remain in the possession of the consumer after cancellation[586];

(d) the value of the goods that are returned to the supplier[587];

(e) the duration of the consumer agreement as initially agreed[588];

[579] S 14(3)(a).
[580] S 14(3)(b)(i).
[581] S 14(3)(b)(ii).
[582] In the Third Draft of the General Regulations to the CPA that was circulated in September 2010 draft reg 6 dealt with fixed term agreements and indicated that a reasonable credit or charge' may not exceed 10% of the amount which would have been payable by the consumer for the remainder of the intended fixed term, excluding interest, if any.
[583] S 14(4)(c).
[584] Reg 5(2)(a).
[585] Reg 5(2)(b).
[586] Reg 5(2)(c).
[587] Reg 5(2)(d).
[588] Reg 5(2)(e).

(f) losses suffered or benefits accrued by the consumer as a result of the consumer entering into the consumer agreement[589];

(g) the nature of the goods or services that were reserved or booked[590];

(h) the length of notice of cancellation provided by the consumer[591];

(i) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation[592]; and

(j) the general practice of the relevant industry[593].

It is important to note that notwithstanding these factors, a supplier may not charge a cancellation charge which would have the effect of negating the consumer's right to cancel a fixed term consumer agreement as afforded to the consumer by the Act[594]. Another aspect that should be noted is that it will not be possible for a lessor in respect of a lease agreement to which section 14 applies, to get the lessee to waive his right to early termination of the agreement. This is because 51(b)(i) prohibits any term or condition in an agreement to which the CPA applies which directly or indirectly purports to waive or deprive a consumer of a right in terms of the CPA. Should such a term or condition be inserted into a lease agreement the term or condition will be void[595].

[589] Reg 5(2)(f).
[590] Reg 5(2)(g).
[591] Reg 5(2)(h).
[592] Reg 5(2)(i).
[593] Reg 5(2)(j).
[594] Reg 5(3).
[595] As per s51(3) .

Clearly the lack of laying down a cancellation charge in more specific terms such as for instance 10% of the outstanding amount in terms of the unexpired months of the agreement, will give rise to legal uncertainty. Thus South African courts will most likely on a case by case basis, with reference to specific types of fixed term agreements, have to apply the considerations enumerated in regulation 5(2).

It is submitted that with respect to lease agreements one has to approach this reasonable cancellation charge practically. Often rental agencies have a waiting list of tenants. If a tenant, who has no arrear rental to pay, terminates a lease agreement prior to the agreed expiry thereof and a new suitable tenant can be placed, without the rented property standing empty for a month and without a supplier losing the rental income for a month, it would not be reasonable to charge a termination penalty. Of course it is not always possible to know in advance whether a rental property is going to be rented out immediately once it is vacated prior to the expiry date of an existing lease in respect of such premises. Therefore it would be prudent for lessors to include a standard cancellation charge (i.e equal to two month's rent) clause in their lease agreements, with a proviso that the lessee consents that such cancellation charge may be deducted from the lessee's deposit. The clause could further stipulate that if the deposit is insufficient because it for instance has to be applied to damages and replacement of keys, then the lessee will pay the cancellation fee within a specified amount of days and that should the premises immediately be let again without it standing vacant the cancellation charge will be refunded to the lessee.

Section 14 thus provides legislative sanction to early termination of a contract. This is now a right that a consumer is entitled to whereas, prior to the coming into operation of the CPA, if a consumer opted out a lease agreement prior to expiry thereof it would have amounted to breach of contract. Under the common law the consumer would have been liable for damages - now , however it appears that the consumer's liability is capped to the extent that he will only be liable for the amounts mentioned in section 14(2)(b)(i)(bb) read with section 14(3)(a) and (b) and regulation 5(2).

6.5 Lessor's right to terminate agreement

In terms of section 14 the supplier may terminate the fixed term agreement twenty business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time[596]. It is to be noted that only a material failure which usually occurs in the form of default with payment of rent instalment that are due will suffice for this purpose. From a lessor's perspective this statutory imposition of a right to terminate a lease agreement is onerous as it can effectively lock a lessor into a lease agreement in respect of which the consumer frequently defaults as long as the consumer remedies the default within twenty business days as contemplated[597].

On a practical level it is further to be noted that a lessor will not be able to circumvent this cancellation provision by for instance getting the lessee to agree that the lease

[596] S14(2)(b)(ii).
[597] Van Heerden Lease Notes 7.

can be terminated when the material default persists for a shorter period, eg seven days or that in the event of a second or further default the period within which the agreement can be cancelled by the lessor is reduced to a lesser period eg seven or fourteen days. Should such a clause appear in a lease agreement that is subject to the CPA and to which section 14 applies it will constitute a prohibited deprivation of a right to which the consumer is entitled and it will be void in accordance with section 51(3) of the Act.

6.6 Lessor's obligation in respect of notice of impending expiry

In the past consumers were often exploited by not being informed of the expiry day of a fixed term agreement with the effect that in practice the fixed term agreement carried on well after the expiry day and the consumer ended up paying for goods or services for a far longer period than he actually contracted to do. Section 14 attempts to put an end to this situation as it provides that a supplier is obliged to give the consumer written notice of the impending expiry of the agreement in the manner prescribed in the regulations[598]. The prescribed form for the impending expiry notice appears in Annexure B to the Regulations. This notice must be delivered to the consumer a maximum of 80 and minimum of 40 business[599] days prior to the impending expiry[600]. Such a pre-expiry notice must indicate the material changes that will apply of the agreement is to be renewed or otherwise continues beyond the

[598] S 14(2)(c).
[599] S 2(6) provides that when a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by
a) excluding the day on which the first such event occurs;
b) including the day on or by which the second event is to occur; and
c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b) respectively.
[600] Ibid.

expiry date and the options available to the consumer[601] upon expiry of the agreement[602]. The effect is that a lessor will have to keep record of when a lease is close to its expiry date so that the prescribed impending expiry notice can be sent to the consumer.

When one has regard to the prescribed notice in terms of Annexure B to the regulation, it becomes clear that although the notice purports to be a notice of the impending expiry date of the fixed term agreement, it actually appears to go much further than merely giving notice of impending expiry along the terms required by section 14(2)(c)(i) and (ii). As such it contains a so called ' Note to consumer' which reads as follows:' Despite any provision of the agreement to the contrary or whatever anyone, including the supplier , may say to you, you have the right to cancel the agreement *upon the expiry of its fixed term* (my emphasis), *without penalty or charge* (my emphasis) but subject to

- you remaining liable to the supplier for any amounts owed to the supplier in terms of the agreement up to the date of cancellation, if any, and
- the supplier having the right to impose a reasonable cancellation penalty with respect to any goods supplied, services provided or discounts granted, to the consumer, in contemplation of the agreement enduring for its intended fixed term, if any; and
- the supplier having the duty to credit you with any amount that remains your property as at the date of cancellation.'

[601] S 14(2)(d).
[602] S 14(3)(c) read with annexure B to the regulations.

It is submitted that this 'Note to the consumer' which appears as part of the prescribed impending expiry notice, is not correct. It informs the (lessee) consumer of his right to cancel the contract upon the expiry of its fixed term and then makes reference to the (lessor) supplier's right to impose a reasonable cancellation which clearly does not apply in the context of cancellation of such agreement upon expiry of its fixed term but applies in the event of early termination of the agreement. It can further be remarked that by the time the supplier delivers the impending expiry notice to the consumer the agreement is actually so close to its agreed expiry date that it can hardly be said that there is opportunity for 'early termination' which would carry the imposition of a 'reasonable cancellation charge'. It is thus submitted that the prescribed form for the impending expiry notice be revisited in order to correctly align it with the provisions of section 14 of the Act.

Section 14(2)(d) provides that on expiry of the fixed term, it will be automatically continued on a month-by-month basis, subject to any material changes of which the supplier has given notice, as contemplated in section 14(2)(c) unless the consumer expressly directs the supplier to terminate the agreement on the expiry date; or agrees to a renewal of the agreement for a further fixed term. The Act is silent on the situation where the lessor fails to send the notice referred to in section 14(2)(c) to the lessee and the lease agreement has reached the expiry date with a lessor that is not interested to renew the agreement or to enter into new agreement. It is submitted that the word "must" in the section 14(2)(c) obliges the lessor to send the impending expiry notice but the continuation of the lease on a month by month basis after expiry of the agreement is not dependent upon an expiry notice having been sent. Thus, where the lessor fails to send an expiry notice, and in the absence of a direction by

the consumer to the supplier to terminate the agreement on the expiry date or in the absence of agreement between the parties to a renewal of the lease for a further fixed term, the effect of section 14(2)(d) will kick in. This will mean that if on the expiry date the lessee fails to vacate the premises, the lease will continue automatically on a month to month basis and either of the parties will then be able to terminate the lease agreement by giving the other party one month's prior notice. This automatic continuation of the lease agreement follows *ex lege* as a result of the provisions of section 14(2) (d) in both those instances where an impending expiry notice was sent as well as where it was not sent. The main difference between the two situations would be that where an impending expiry notice was sent and the consumer did not direct the supplier to terminate the agreement on the expiry date or did not agree to a renewal but nevertheless stays on in the leased premises, such month by month lease will proceed on the terms as indicated in the impending expiry notice which will in for instance include an increased monthly rental[603]. Where however the lessor has not sent an impending expiry notice and the agreement continues beyond its expiry date on a month to month basis such agreement will then continue on the same terms as the original agreement because the lessee was not informed of any material changes that would occur if the lease continued beyond its expiry date.

It is further submitted that the wording of section 14(2)(d) may be problematic and may warrant interpretation by the courts. The reason for this submission is that section 14(2)(d) indicates that the agreement will continue automatically on a month

[603] This is because the impending expiry notice in terms of s14(2)(c)(i) expressly informs the lessee of any material changes to the agreement if the agreement carries on past its expiry date.

to month basis after expiry unless, *inter alia,* the lessee directs the lessor to terminate the agreement on the expiry date. This provision thus requires the lessee to act positively to put an end to the agreement.

This situation however creates some unease due to the fact that the whole idea behind an expiry date to an agreement is also to create legal certainty as to when the agreement comes to an end. By placing the ball in the hands of the lessee to 'make the call' whether the agreement gets terminated on the expiry date the legislature has failed to take cognisance of the fact that the Rental Housing Act specifically provides in section 5(5) that where a lessee stays in a leased premises after expiry of the lease, ostensibly with the permission of the lessor, it gives rise to a periodic lease. In such instance both the lessor and the lessee acquiesce in the fact that the lessee remains in the leased premises after expiry of the original lease. There is thus an element of agreement to the specific arrangement. However, section 14(2)(d) creates the impression that it is the lessee who (in the absence of a mutual agreement for renewal of the lease) can control whether the lease proceeds on a month by month basis or not. Even if one argues that the lessor can still give the lessee a month's notice of termination of the automatic section 14(2)(d) lease in practice it will usually mean that an unscrupulous lessee can abuse the CPA to stay in a premises for a month or longer whilst not paying rent and that at least for a month after expiry of the lease agreements, probably two months thereafter, the lessor will not be able to evict him. It is thus submitted that the legislature should revisit the wording of section 14(2)(d) to give effect to section 5(5) of the Rental Housing Act, which was most likely what the actual intention behind section 14(2)(d) was.

6.7 Section 14: Conclusion

From the discussion of the provisions of section 14 it is clear that this section makes serious inroads to the common law of lease as supplemented by the Rental Housing Act. The lessee as consumer is afforded extensive protection as a lessee is now lawfully able to revert to early termination of a lease agreement in terms of section 14. This statutorily entrenched right to early termination has been the cause of widespread concern in the leasing industry as it undermines certainty previously associated with the mechanism of lease - at least in the sense that prior to the coming into operation of the CPA lessees did not have the legislative sanction to terminate a lease agreement prior to its expiry date.

The common law right of the lessee to terminate a lease agreement has been severely curbed by the 'lock in' clause contained in section 14(2)(b)(i)(bb) which effectively prevents the lessor from terminating the lease agreement due to breach by the consumer as long as the consumer remedies his breach within 20 business days. A new statutory duty (which translates into a reciprocal right for the lessee) has also been imposed on the lessor in the form of delivery of an impending expiry notice. From a lessor's perspective the CPA has weighed down heavily on his perceived 'dominant' position as it previously was under the common law as supplemented by the Rental Housing Act and even as impeded by the eviction prescriptions of PIE. A lessor thus appears to be at the receiving end of legislative obligations where section 14 applies whereas the legislature apparently bent backwards, via section 14, to protect the consumer.

6.8 Retrospective application of section 14

As indicated in paragraph 2 above the CPA does not apply to the promotion of any goods or services prior to the general effective date and also not to any transaction or agreement entered into or any goods or services supplied to a consumer prior to the general effective date[604]. However in terms of the table in Schedule 2 of the Act the sections of the Act listed in the table apply, to the extent indicated in the second column thereof, to a pre-existing agreement between a consumer and a supplier, if that pre-existing agreement would have been subject to the CPA had the Act been in effect at the time that the agreement was entered into; and contemplates that the parties to it will be bound for a fixed term until a date that is on or after the second anniversary of the general effective date, which is on or after 31 March 2013[605].

As indicated above, the table that is referred to in item 3(2) contains the following information regarding section 14:

Section of Act	Extent of application to pre-existing agreement
14	Only subsections (1) *(b)* to *(d)* and (2) apply with respect to the expiry and possible renewal of the agreement, on or after the general effective date.

[604] Item 3(d), Schedule 2.
[605] Item 3(2)(a) and (b), Schedule 2.

Van Heerden submits that because the CPA does not contain a section 14(b) to (d) these references in the above table are wrong and should rather refer to sections 14(2)(b) to (d) and the reference to section 14(2) in the table should be section 14(3)of the Act[606]. Thus the provisions relating to the lessee's right to termination upon expiry of a fixed term agreement and early termination, the lessor's right to terminate, the lessor's duty in respect of the impending expiry notice and the automatic renewal of the lease agreement has retrospective effect but apparently not the prohibition against a fixed term agreement that exceeds 24 months.

Thus, the onerous provisions of section 14 relating to expiry and renewal of fixed term agreements will only apply to a pre-existing agreement[607] that falls within the scope of application of the Consumer Protection Act if that agreement was entered into before 31 March 2011 and will expire after 31 March 2013. If the agreement was for instance entered into before 31 March 2011 but during 2012, section 14 will not apply to it. It will also not be possible to attempt to circumvent the application of section 14 to a pre-existing agreement by providing for continual renewal of the original agreement on its original terms[608]. It is clear that the intention of the legislature is to afford the rights in section 14 to consumers who enter into agreements that meet the requirement of section 14 and which extend beyond 31 March 2013 and waiver or deprivation of these rights will thus in any event be void in terms of section 51 of the Act as discussed.

[606] Van Heerden Lease Notes 7.
[607] In terms of reg 1 a pre-existing agreement is an agreement that was made before the general effective date, i.e before 31 March 2011.
[608] See further s 51 of the CPA.

7. Other general sections of the CPA that are relevant to lease agreements

7.1 Introduction

From the aforementioned discussion it may be concluded that since the introduction of the CPA into South African law one can generally distinguish between three broad categories of short term lease agreements in respect of urban residential property for purposes of the CPA, namely:

(a) Type one: Lease agreements that fall outside the scope of application of the CPA and thus do not attract any CPA-compliance issues.

(b) Type two: Lease agreements that fall inside the scope of application of the CPA, but to which section 14 will not apply because both parties are juristic persons. Although this second type of lease agreements will thus not be subject to the provisions of section 14 of the Act , they will nevertheless have to comply with various other general provisions of the CPA that apply in general to agreements that fall within the scope of the Act regardless of their specific nature.

(c) Type three: Lease agreements that fall inside the scope of the CPA, and to which section 14 will also apply because one of the parties is a natural person. These third type agreements appear to attract the most onerous compliance provisions and extend the widest consumer protection to the consumer.

Thus, once it is established that a lease agreement falls within the scope of application of the CPA, it will have certain general compliance implications for the

lessor regardless whether the agreement also falls within the scope of section 14 or not[609]. These provisions entail the following:

- The lessee is entitled to protection against discriminatory marketing[610];
- The lessee has a right to restrict unwanted direct marketing[611];
- The lessee has a right not to be contacted outside certain regulated time periods for purposes of direct marketing[612];
- The lessee has a right to cooling off after direct marketing[613];
- The agreement should be in plain and understandable language[614];
- The supplier should comply with the general requirements for marketing of services[615];
- The supplier must not resort to unconscionable conduct[616];
- The supplier must not make false misleading or deceptive representations[617];
- The agreement should not contain unfair, unjust or unreasonable contract terms[618];
- The agreement should comply with the prescribed requirements as set out in section 49 whenever the lessee is required to acknowledge a fact, accept a liability, waive rights, indemnify the lessor or when a penalty is imposed[619];
- The lease agreement may not contain any of the prohibited provisions listed in section 51 otherwise such provision will be void. The lessee may also not be required to waive any consumer right conferred by it to the CPA, therefore the

[609] Van Heerden Lease Notes 8.
[610] S8 read with s9 and 10.
[611] S11.
[612] S12
[613] S13
[614] S 22.
[615] S29.
[616] S40.
[617] S41.
[618] S48.
[619] S49.

lessee may for instance not be required to waive rights in terms of section 14[620];

- The lessee has a right to quality service in terms of the rental[621];
- The consumer is entitled to good safe quality goods which means that the leased premises or components thereof should not be defective[622];
- The lessor is strictly liable for damage caused to the lessee by the premises (product) , for example if the roof of a house collapses on the lessee[623].

It is to be noted that each of these provisions can in itself be the topic of a dissertation. To address each one in meticulous detail is therefore beyond the scope of this dissertation. For purposes of this dissertation however these provisions will be discussed in as much detail as would provide a comprehensive idea as to what they entail. This discussion will commence by first addressing the provisions that will generally apply to all lease agreements that fall within the scope of the application of the CPA, regardless of whether they were the result of direct marketing or not. Thereafter, for purposes of completeness, provisions relating to marketing in the context of lease agreements will be discussed as the CPA places a lot of emphasis on marketing in view thereof that it is often with marketing of goods or services that many consumers are exploited. In practice it occasionally happens that lease agreements are concluded as a result of direct marketing, and thus the impact of the CPA on lease agreements that fall within the scope of application of the Act and that were entered into as a result of direct marketing, will also briefly be addressed.

620 S51.
621 S54.
622 S55 and 56.
623 S61.

7.2 Plain and understandable language

Section 22 of the CPA protects the right that the consumer has to information in plain and understandable language. It provides that the producer of a notice, document or visual representation that is required, in terms of the CPA or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation in the form prescribed in terms of the CPA or any other legislation, if any, for that notice, document or visual representation; or in plain language, if no form has been prescribed for that notice, document or visual representation[624]. For the purposes of the CPA, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to

(a) the context, comprehensiveness and consistency of the notice, document or visual representation;

(b) the organisation, form and style of the notice, document or visual representation;

(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and

[624] S22(1)(a) and (b).

(d) the use of any illustrations, examples, headings or other aids to reading and understanding[625].

The Act further provides in section 22(3) that the National Consumer Commission may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1) (b)[626]. To date however no guidelines for methods to access whether a notice, document or visual representation satisfies the requirements of section 22(1)(b) have been published.

Where a lease agreement thus falls within the scope of the CPA, a lessor when he reduces such agreement to writing, either on own initiative or on request by the lessee as envisaged by the Rental Housing Act, will have to ensure that the agreement meets the requirements of plain language as set out in section 22. This means that the use of so called 'small print' and complicated legal terminology, often in Latin, should be refrained from. Some compliance relief for lessors at least exist in the fact that the CPA does not prescribe the use of specific official languages. Nevertheless, lessors who reduce their lease agreements to writing should be prudent to record the lease agreement in a language which the lessee understands failing which their failure to do so might in specific instances possibly constitute unconscionable conduct under section 40 of the Act. As discussed below, section 40 *inter alia* provides that it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect his interest because of inability to understand the language of an agreement.

[625] S22(2)(a) to (d).
[626] In terms of s22(4) guidelines published in terms of subsection (3) may be published for public comment.

7.3 Unconscionable conduct

The term “unconscionable” is a new concept in South African consumer legislation. For purposes of the CPA it refers to conduct of a nature as set out in section 40 of the Act or that is otherwise unethical or improper to an extent that would shock the conscience of a reasonable person[627]. Section 40(1) states that a supplier or an agent of a supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct in connection with any marketing of any goods or services; supply of goods or services to a consumer; negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer; demand for or collection of payment for goods or services by a consumer or recovery of goods from a consumer. Section 40(1) has to be read with section 40(2) which further provides that it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement or any other similar factor.

A lessor will thus, as pointed out under the discussion of the plain language requirement set by the CPA, have to take care that a lease agreement is in plain language as it is not impossible that failure to do so may open him up to a claim of unconscionable conduct. It further appears that the type of unconscionable practices that qualify as ‘unfair practices ‘for purposes of the Rental Housing Act , may also fall

[627] S1.

squarely into the unconscionable type of conduct prohibited by section 40 of the CPA.

7.4 False, misleading or deceptive misrepresentations

In relation to the marketing(which includes the promotion as well as the actual supply) of any goods or services, the supplier must not, by words or conduct directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer; use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person to do so on behalf of the supplier[628]. Section 41(3) provides a comprehensive list of statements that are deemed to be false. In the context of lease agreements it is submitted that section 41(3)(c) is the most relevant. The latter subsection provides that it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that

'any land or other immovable property has characteristics that it does not have; may lawfully be used, or is capable of being used, for a purpose that is in fact unlawful or impracticable; or has or is proximate to any facilities, amenities or natural features that it does not have, or that are not available or proximate to it'.

[628] S41 (1). In terms of s41(2) a person acting on behalf of a supplier of any goods or services must not falsely represent that the person has any sponsorship, approval or affiliation; or engage in any conduct that the supplier is prohibited from engaging in under section 41(1) .

Clearly where rental property is promoted or leased on the false pretense that the property can be used for a purpose which it may not be used for, such as a residential property which is leased on the basis that it can also be used for business purposes by the lessee, it will constitute a contravention of section 41.

7.5 Unfair, unjust or unreasonable contract terms

7.5.1 Section 48

Section 48 of the CPA prohibits unfair, unjust or unreasonable contract terms. To this end it provides that a supplier must not offer to supply, supply, or enter into an agreement to supply, any goods or services at a *price* (my emphasis) that is unfair, unreasonable or unjust[629]; or on terms that are unfair, unreasonable or unjust[630]. Goods or services may not be marketed or a supplier may not negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust[631]. A supplier may also not require a consumer, or any other person to whom any goods or services are supplied, at the direction of the consumer to waive any rights; assume any obligation; or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction[632].

Section 48(2) indicates that a transaction, agreement, term or condition will be regarded as unfair, unjust or unreasonable if[633]:

[629] S 48(1)(a)(i).
[630] S48(1)(a)(ii).
[631] S48(1)(b).
[632] S48(1)(c).
[633] S48(2).

(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;

(b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;

(c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or

(d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1), and the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

South African courts have generally, subject to a few exceptions, been reluctant to tamper with contract terms on the basis that they are unfair [634]. However, since the coming of operation, suppliers, and thus also now lessors, are burdened with the added compliance layer of ensuring that their agreements do not contain unfair, unjust or unreasonable contract terms, as such terms are not statutorily prohibited and courts will have the power to make extensive orders regarding such terms[635].

[634] Sharrock 298. For exceptions see eg *Barkhuizen v Napier* 2007 (5) SA 323 (CC) and Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1(A).
[635] S52 of the Act sets out the powers of the court regarding unfair, unreasonable contract terms. For an overview of these powers see Van Heerden *Commercial Law* 756 and 757.

Sharrock submits that the words 'unfair', 'unreasonable' or 'unjust' are not individually defined and that they overlap considerably in meaning[636]. According to him it is a pity that the legislature adopted this cumbersome triad as the unfairness standard when the word 'unfair' on its own (or 'unreasonable' or 'unjust') would have served the purpose equally well[637]. He submits further that the legislature could have defined 'unfair' as including 'unreasonable' and 'unjust'[638].

Van Eeden indicates that the basic one-sidedness standard of this section has three elements, being[639]

(a) a contractual provision;

(b) that contractual provision being one-sided in favour of a person other than the consumer;

(c) and the contractual provision being excessively so one-sided.

He submits further that a determination about whether a contractual provision is one-sided for the purposes of section 48(2)(a) may relate to the entire transaction or agreement or even to a single term[640]. He also submits that a balancing exercise is required to apply the criterion of one-sidedness, but that it is not restricted to the balancing of positive and negative factors[641].

[636]Sharrock 'Judicial Control of Unfair Contract Terms: The Implications of Consumer Protection Act' (2010) 22 *SA Merc LJ* 307.
[637] Ibid.
[638] Ibid.
[639] Van Eeden *A Guide to the Consumer Protection* Act (2009) 184(hereinafter Van Eeden).
[640] Ibid.
[641] Ibid. He points out that a particular term may be so one-sided that it may not be redeemed by an overall balance of fairness.

As indicated, if a contractual provision is so adverse to the consumer that it is inequitable, it is unfair, unreasonable or unjust[642]. Van Eeden submits that the basic standard of this section has three elements too, being:

(a) a contractual provision;

(b) the contractual provision being adverse to the consumer; and

(c) the contractual provision being so adverse to the extent of it being inequitable[643].

Van Eeden further submits that the standard laid down by section 48(2)(b) enables a court to consider whether a term or an entire agreement is adverse to the consumer[644]. He indicates that this criterion must be applied against the background of the remainder of and the total effect of the transaction or agreement within its commercial setting[645].

7.5.2 Regulation 44

Note should also be taken of regulation 44 which provides that a term of a consumer agreement between a supplier, operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession, and an individual consumer or individual consumers, who entered into it for purposes wholly or mainly *unrelated* (my emphasis) to his or her business or profession, is presumed to be unfair if it has the purpose or effect of a term listed in terms of regulation 44(3). Thus

[642] Section 48(2)(b).
[643] Van Eeden at 184.
[644] Ibid.
[645] Ibid.

the terms listed in regulation 44(3) has a limited application which differs from the general test for application of the CPA which does not involve looking at the purpose for which a consumer enters into an agreement and which could thus be for private or business purposes.

Regulation 44(3) provides a list of instances when a term in a consumer agreement will be presumed to be unfair. Only those that may have relevance in the context of lease agreements will be alluded to. As such, in respect of lease agreements, a term will be deemed to be unfair if it has the purpose or effect of:

(a) excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier subject to section 61(1)[646] of the Act;

(b) excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement, including the right of the consumer to set off a debt owed to the supplier against any claim which the consumer may have against the supplier;

(c) limiting the supplier's obligation to respect commitments undertaken by his or her agents or making his or her commitments subject to compliance with a particular condition which depends exclusively on the supplier;

[646] S61 of the Act provides for strict product liability.

(d) limiting, or having the effect of limiting, the supplier's vicarious liability for its agents;

(e) forcing the consumer to indemnify the supplier against liability incurred by it to third parties;

(f) excluding or restricting the consumer's right to rely on the statutory defence of prescription;

(h) allowing the supplier to increase the price agreed with the consumer when the agreement was concluded without giving the consumer the right to terminate the agreement;

(i) enabling the supplier to unilaterally alter the terms of the agreement including the characteristics of the product or service;

(j) giving the supplier the right to determine whether the goods or services supplied are in conformity with the agreement or giving the supplier the exclusive right to interpret any term of the agreement;

(k) allowing the supplier to terminate the agreement at will where the same right is not granted to the consumer;

(l) enabling the supplier to terminate an open-ended agreement without reasonable notice except where the consumer has committed a material breach of contract;

(m) obliging the consumer to fulfil all his or her obligations where the supplier has failed to fulfil all his or her obligations;

(n) permitting the supplier, but not the consumer, to avoid or limit performance of the agreement;

(o) permitting the supplier, but not the consumer, to renew or not renew the agreement;

(q) allowing the supplier to retain a payment by the consumer where the latter fails to conclude or perform the agreement, without giving the consumer the right to be compensated in the same amount if the supplier fails to conclude or perform the agreement (without depriving the consumer of the right to claim damages as an alternative);

(r) requiring any consumer who fails to fulfil his or her obligation to pay damages which significantly exceed the harm suffered by the supplier;

(s) permitting the supplier, upon termination of the agreement by either party, to demand unreasonably high remuneration for the use of a thing or right, or for performance made, or to demand unreasonably high reimbursement of expenditure;

(t) giving the supplier the possibility of transferring his or her obligations under the agreement to the detriment of the consumer, without the consumer's agreement;

(v) providing that the consumer must be deemed to have made or not made a statement or acknowledgment to his or her detriment, unless a suitable period of time is granted to him or her for the making of an express declaration in respect thereof; and at the commencement of the period the supplier draws the attention of the consumer to the meaning that will be attached to his or her conduct;

(w) providing that a statement made by the supplier which is of particular interest to the consumer is deemed to have reached the consumer, unless such statement has been sent by prepaid registered post to the chosen address of the consumer;

(x) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, including by requiring the consumer to take disputes exclusively to arbitration not covered by the Act or other legislation;

(y) restricting the evidence available to the consumer or imposing on him or her a burden of proof which, according to the applicable law, should lie with the supplier;

(z) imposing a limitation period that is shorter than otherwise applicable under the common law or legislation for legal steps to be taken by the consumer (including for the making of a written demand and the institution of legal proceedings);

(aa) entitling the supplier to claim legal or other costs on a higher scale than usual, where there is not also a term entitling the consumer to claim such costs on the same scale;

(bb) providing that a law other than that of the Republic applies to a consumer agreement concluded and implemented in the Republic, where the consumer was residing in the Republic at the time when the agreement was concluded.

Naude submits that these terms are not set out in logical order, but rather to reflect their origin[647]. She furthermore submits that these lists strengthen the hands of the consumers and consumer watchdog bodies when negotiating with businesses to remove unfair terms, which is essential in view of the prohibitive costs, risk and effort

[647]Naude 'Enforcement procedures in respect of the consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective' 127 (2010) *SALJ* 540 (hereinafter Naude Enforcement).

of litigation for consumers[648]. She furthermore submits that international experience was not taken into account when the CPA was initially drafted and that section 51 contains a relatively short list of prohibited terms[649]. She pointed out that the grey list of contractual terms is absent in the text of the legislation[650]. According to her many of the problematic terms commonly blacklisted or grey listed in the legislation of other countries are not named in the CPA[651].

7.8 Notice required for certain terms and conditions

Section 49 of the CPA deals with notice required for certain terms and conditions and provides that any notice to consumers or provision of a consumer agreement must be drawn to the attention of the consumer if it purports to:

a) limit in any way the risk or liability of the supplier or any other person;

b) constitute an assumption of risk or liability by the consumer;

c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or

d) be an acknowledgement of any fact by the consumer.

In addition to subsection 49(1) of the CPA, section 49(2) provides that if a provision or notice concerns any activity or facility that is subject to any risk of an unusual character of nature, the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinary alert consumer could not reasonably be expected to notice or contemplate in the circumstances, or that could

[648]Naude Enforcement 536.
[649]Ibid.
[650]Ibid.
[651]Ibid.

result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of sections 49(3) to (5). It is further required that the consumer must have assented to that provision or notice by signing or initialling the provisions or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision[652].

In terms of section 49(3) a provision, condition or notice contemplated in section 49(1) or (2) must be written in plain language as described in section 22.Section 49(4) provides that the fact, nature and effect of the provision or notice must be drawn to the attention of the consumer in a conspicuous manner that is likely to attract the attention of an ordinarily alert consumer; and before the earlier of the time at which the consumer enters into the transaction or agreement, begins to engage in the activity or enters or gains access to the facility, or is required or expected to offer consideration for the transaction or agreement.

It is to be noted that where a supplier fails to comply with the provisions of section 49 the courts have the power to make an order severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction[653]. In addition the court can make any further order that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be[654].

[652] S 49(2).
[653] S52(4)(a)(ii).
[654] S52(4)(b).

In view thereof that most lease agreements have clauses containing waivers and indemnities, lessors will thus have to take care that they comply with the requirements of section 49. This will entail that those clauses be drawn to the specific attention of the consumer at the time and in the manner contemplated by section 49[655].

7.9 Prohibited contractual provisions

Section 51 of the Act sets out various prohibited contractual provisions which will be regarded as void if they appear in an agreement. In the context of lease agreements, a lessor would thus be prohibited from making a transaction or agreement subject to any term or condition if[656]:

(a) its general purpose or effect is to defeat the purposes and policy of the Act; mislead or deceive the consumer; or subject the consumer to fraudulent conduct[657];

(b) it directly or indirectly purports to waive or deprive a consumer of a right in terms of the Act; avoid a supplier's obligation or duty in terms of the Act; set aside or override the effect of any provision of this Act; or authorise the supplier to do anything that is unlawful in terms of the Act; or fail to do anything that is required in terms of the Act[658];

[655] The current practice is to bold these clauses or frame them with a block and get the consumer to sign next to each clause. See Centre for Conveyancing Practice Seminar Notes: Drafting Property Agreements in line with the Consumer Protection Act November 2011 available at www.aktepraktyk.co.za at 67 to 70.
[656] S 51(1).
[657] S 51(1)(a).
[658] S 51(1)(b).

(c) it purports to limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier; constitute an assumption of risk or liability by the consumer for a loss due to the aforementioned gross negligence or impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier, except to the extent contemplated in section 18(1)[659];

(d) it results from an offer prohibited in terms of section 31[660];

(e) it requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by section 51(2)(a)[661];

(f) it falsely expresses an acknowledgement by the consumer that before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or the consumer has received goods or services, or a document that is required by the Act to be delivered to the consumer[662];

(g) it requires the consumer to forfeit any money to the supplier if the consumer exercises any right in terms of the Act; or to which the supplier is not entitled in terms of the Act or any other law[663];

(h) it expresses, on behalf of the consumer an authorisation for any person acting on behalf of the supplier to enter any premises for the purposes of taking

[659] S51(1)(c).
[660] S51(1)(d).
[661] S51(1)(e).
[662] S51(1)(g).
[663] S51(1)(h).

possession of goods to which the agreement relates; an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed; or a consent to a predetermined value of costs relating to enforcement of the agreement, except to the extent that is consistent with the Act[664].

A lessor as supplier may not directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a prohibited provision as set out above.[665] A transaction or agreement, provision, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes section 51[666].

7.10 Protection against discriminatory marketing

The right to equality in the consumer market is protected in Part A of Chapter 2 of the Consumer Protection Act. Section 8 deals with protecting consumers against discriminatory marketing[667]. In terms of section 8(1) a supplier of goods or services,

[664] S 51(1)(i).
[665] S51(2)(a).
[666] S51(3).
[667] It is to be noted that s8(3) provides that the provisions of s8(1) and 8(2) also apply in respect of a consumer which is an association or juristic person and serves to prevent unfair discrimination against that association or juristic person based on the characteristics of any natural person who is a member, associate, owner, manager, employee, client or customer of that association or juristic person . In terms of s10(1) an accredited consumer protection group or any person contemplated in section 20(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 3 of 2000, may either institute proceedings in respect of an alleged contravention of Part A of Chapter 2 before an

and thus a lessor in respect of a lease agreement to which the CPA applies, must not unfairly:

(a) exclude any person or category of persons from accessing any goods or services offered by the supplier;

(b) grant any person or category of persons exclusive access to any goods or services offered by the supplier;

(c) assign priority of supply of any goods or services offered by the supplier to any person or category of persons;

(d) supply a different quality of goods or services to any person or category of persons;

(e) charge different prices for any goods or services to any persons or category of persons;

(f) target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or

(g) exclude a particular community, district, population or market segment from the supply of any goods or services offered by the supplier,

on the basis of one or more grounds of unfair discrimination[668] contemplated in section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act[669].

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equality court or file a complaint with the National Consumer Commission, which must refer the complaint to the equality court if it appears to be valid .

[668] S10(2) provides that in any proceedings contemplated in Part A of Chapter 2 of the CPA, there is a presumption that any differential treatment contemplated in section 8 is unfair discrimination, unless it

Section 8(2) further provides that, subject to section 9, a supplier must not directly or indirectly treat any person differently than any other, in a manner that constitutes unfair discrimination on one or more grounds set out in section 9 of the Constitution, or one or more grounds set out in Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act, when:

(a) assessing the ability of the person to pay the cost, or otherwise meet the obligations, of a proposed transaction or agreement;

(b) deciding whether to enter into a transaction or agreement, or to offer to enter into a transaction or agreement;

(c) determining any aspect of the cost of a transaction or agreement to the consumer;

(d) interacting with the consumer-

(i) in the supplier's place of business; or

(ii) in the course of displaying or demonstrating any goods, testing or fitting any goods, or negotiating the terms of a transaction or agreement; or

(e) selecting, preparing, packaging or delivering any goods for or to the consumer, or providing any services to the consumer;

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is established that the discrimination is fair and a court may draw an inference that a supplier has discriminated unfairly if

(a) the supplier has done anything contemplated in section 8 with respect to a consumer in a manner that constituted differential treatment compared to that accorded to another consumer;

(b) in the circumstances, the differential treatment appears to be based on a prohibited ground of discrimination; and

(c) the supplier, when called upon to do so, has refused or failed to offer an alternative reasonable and justifiable explanation for the difference in treatment.

[669] Act 3 of 2000.

(f) proposing or agreeing the terms and conditions of a transaction or agreement;

(g) assessing or requiring compliance by the person with the terms of a transaction or agreement;

(h) exercising any right of the supplier under a transaction or agreement in terms of this Act or applicable provincial consumer legislation;

(i) determining whether to continue, enforce, seek judgment in respect of, or terminate a transaction or agreement; or

(j) determining whether to report, or reporting, any personal information of such person.

Section 9 however provides reasonable grounds for differential treatment of consumers in specific circumstances and thus provides 'justification' for certain instances of discrimination.

Where a lessor thus decides to market residential property for lease he has to take cognisance of the provisions of section 8 to ensure that he does not engage in discriminatory marketing. It is further to be noted that in terms of section 10 of the CPA the equality court has exclusive jurisdiction in respect of matters arising from discriminatory marketing as contemplated by section 8.

7.11 General standards for marketing

As indicated, 'market' in terms of the CPA, includes promotion[670] as well as *supply* (my emphasis) of goods or services. Section 29 of the Act sets out general standards for marketing of goods and services in terms whereof a supplier is prohibited from marketing goods in a manner reasonably likely to imply a false or misleading representation concerning those goods and services as contemplated in section 41[671]. It is also prohibited to do marketing in a manner that is misleading, fraudulent or deceptive in any way, including in respect of the nature, properties, advantages or uses of goods or services; the manner in or conditions on which those goods or services may be supplied; the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services; the sponsoring of any event or any other material aspect of the goods or services[672].

Thus a lessor will have to observe the standards set out in section 29 both in respect of the promotion and the supply of the rental services under a proposed lease agreement. It will thus for instance mean that a lessor cannot advertise a rental property as being close to schools and other amenities if it is not in fact the case neither can he make any misrepresentations about the amount of rental.

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[670] In terms of s 1 "Promote" means to

(a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration;

(b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or

(c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.

[671] S29(a).Van Heerden Commercial Law. See further the discussion of s41 hereinafter.

[672] S29(b).Van Heerden Commercial Law

7.12 Consumer's right to demand quality service

Given that leasing (rental) of immovable property is regarded as a service for purposes of the CPA, a consumer has the right to quality service as contemplated by section 54. When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer thus has a right to[673]:

(a) timeous performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;

(b) performance of the services in a manner and quality that persons are generally entitled to expect;

(c) the use, delivery or installation of goods that are free of defects[674] and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and

(d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

[673] S54(1).

[674] A defect is defined in s53 as any material imperfection in the manufacture of the goods or components , or in performance of the services, that renders the goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances. Alternatively it refers to any characteristics of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be entitled to expect in the circumstances. See also s55 and s56 with regard to defective goods.

If a supplier fails to perform a service to the aforementioned standards, the consumer may require the supplier to either remedy any defect in the quality of the services performed or goods supplied; or refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure[675].

Within the context of lease agreements it is submitted that section 54(1)(c) which refers to the use of goods that are free from defects, is most relevant. Where a consumer under a lease agreement that falls within the scope of application of the CPA thus leases a premises and it transpires that the premises is defective, for example the roof leaks, he will be entitled in terms of section 54 to demand that the lessor repair the roof . Alternatively, if one has regard to the wording of section 54(2) it appears that the lessee will be able to subtract money from the rent to the extent of the failure.

7.13 Strict product liability

Section 61(1) of the CPA introduces product liability for any harm caused as a result of the supply of unsafe products, product failure, or inadequate warnings and instructions.[676] In this regard section 61(1) provides that except to the extent contemplated in section 61(4)[677], the producer or importer, distributor or retailer of any goods (thus the whole supply chain) is liable for any harm, as described in section 61(5), caused wholly or partly as a consequence of

[675] S54(2).
[676] The concepts “warning” and “instruction” is not defined in the CPA.
[677] This section sets out defences available to the supply chain as discussed hereinafter.

a) supplying any unsafe goods;

b) a product failure, defect or hazard in any goods; or

c) inadequate instructions or warnings provided to the consumer pertaining to any hazard[678] arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence or the part of the producer, importer, distributor or retailer, as the case may be.

It thus appears that section 61 introduces strict product liability or no fault in respect of the whole supply chain into South African law as negligence is no longer a requirement to prove a product liability claim if such claim is instituted in terms of the CPA. Section 61(2) extends the scope of such product liability as it provides that a supplier of services[679], who applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer . Section 61(3) furthermore imposes joint and several product liability on the supply chain [680].

Harm for which a person may be held liable in terms of section 61 is broad and includes the death of, an injury to, any natural person[681]; an illness of any natural person[682]; any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable[683]; and any economic loss that results from harm contemplated as aforementioned[684]. Nothing in section 61 however limits the

[678] In terms of s53 a "hazard" means a characteristic that has been identified as, or declared to be a hazard in terms of any other law or presents a significant risk of personal injury to any person or damage to property, when the goods are utilised.
[679] See also the definition of 'service provider' in s 1 of the Act which means a person who promotes, supplies or offers to supply any services.
[680] S 61(3). Joint and several liability implies that if one party pays the judgment debt the other party is absolved from payment.
[681] S61(5)(a).
[682] S61(5)(b).
[683] S61(5)(c).
[684] S61(5)(d).

authority of a court to assess whether any harm has been proven and adequately mitigated,[685] determine the extent and monetary value of any damages, including economic loss[686] or apportion liability among persons who are found to be jointly and severally liable[687].

The strict product liability introduced by section 61 is however not absolute as section 61(4) of the CPA provides a number of defences that the supply chain may raise against a product liability claim. A discussion of these defences is however beyond the scope of this dissertation.

Within the context of a lease agreement thus, section 61(2) has the result that the lessor is regarded a supplier of any goods that are defective and cause harm to the consumer, giving rise to a product liability claim against the lessor. As such the lessor who leases a residential property with a defective roof to a consumer will be liable in terms of the CPA if the consumer is injured when the roof collapses on him. It is further to be noted that the strict liability provisions of the CPA applies even where the transaction in terms of which goods or services are supplied is exempt from the application of the Act[688].

7.14 Lease agreements entered into as a result of direct marketing

7.14.1Right to restrict unwanted direct marketing

[685] S61(6)(a)
[686] S61(6)(b).
[687] S61(b)(c).
[688] S5(1)(d) read with s5(5).

Direct marketing for purposes of the CPA, means to approach a person, either in person or by electronic mail or communication, for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the person or requesting the person to make a donation of any kind for any reason.

Section 11(1) states that the right of every person to privacy includes the right to

a) refuse to accept;
b) require another person to discontinue ; or
c) in the case of an approach other than in person , to pre-emptively block

any approach or communication to that person , if the approach or communication is primarily for the purpose of direct marketing.

Pre-emptive blocking will occur by means of a pre-emptive blocking register[689]. Regulation 4 deals with mechanisms to block direct marketing and a detailed discussion thereof is beyond the scope of this dissertation. Of note however , is regulation 4(3)(g) which provides that " except in repsect of those existing clients where the direct marketer has proof that the existing client has after the commencement of these regulations expressly consented to receiving direct marketing from the direct marketer, a direct marketer must assume that a comprehensive pre-emptive block has been registered by a consumer unless the administrator of the registry has in writing confirmed that a pre-emptive block has not been registered in respect of …."

Thus within the context of direct marketing of lease property the lessor will have to observe the provisions of section 11 read with regulation 4**.**

[689] S11(3).

7.14.2 Time for contacting consumers

A lessor who does direct marketing of lease property will further also have to adhere to the times for contacting consumers at home for purposes of direct marketing as set out in section 12 read with the Notice of the Prohibited Time for Contacting Consumers . The latter notice indicates that a supplier may not engage in any direct marketing to a consumer at home on Sundays or public holidays; Saturdays before 9h00 and after 13h00 and all other days between 20h00and 08h00 the following day, except to the extent that the consumer has expressly or implicitly requested or agreed otherwise.

7.14.3 Cooling off right

Section 16 of the CPA gives the consumer a cooling off right that applies only if the CPA applies to the transaction or agreement *and* (my emphasis) the transaction or agreement was entered into as a result of direct marketing[690]. It entails that a consumer may rescind a transaction resulting from any direct marketing without reason or penalty , by notice to the supplier in writing, or another recorded manner and form, within 5 business days after the later of the date on which[691]

a) the transaction or agreement was concluded ; or
b) the goods that were the subject of the transaction were delivered to the consumer.

[690] Van Heerden *Commercial Law* 707.
[691] S16(3)(a) and (b).

Where a consumer exercises this cooling off right the supplier must return any payment received from the consumer in terms of the transaction within 15 business days after

a) receiving notice of the rescission, if no goods had been delivered to the consumer in terms of the transaction; or
b) receiving from the consumer any goods supplied in terms of the transaction.

It is to be noted that the supplier may not attempt to collect any payment in terms of a rescinded transaction except to the extent provided in section 20(6) of the Act[692].Section 16 has to be read together with section 32 which requires the supplier to draw the consumer's attention to this specific cooling off right where goods or services are being directly marketed.

It thus appears that where a lessor engages in direct marketing of a leased premises he will have to comply with the duty to inform the consumer of his cooling off right and , should the cooling off right be timeously exercised he will have to acquiesce in the fact that he will not be able to sue the consumer for breach of contract.

8. Enforcement issues

A discussion of the impact of the CPA on lease agreements will not be complete without brief reference to the complicated enforcement provisions of the Act.In this regard section 69 is pertinent. It provides that a person may seek to enforce any right in terms of the CPA or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier by

[692] S16(4)(a) and (b).

(a) referring the matter directly to the Tribunal, if such a direct referral is permitted by the Act in the case of a particular dispute;

(b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud; and

(c) if the matter does not concern a supplier contemplated in paragraph (b) a person may:

(i) refer the matter to the applicable industry ombud, accredited in terms of section 86(2), if the supplier is subject to any such ombud; or

(ii) apply to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing the consumer court; or

(iii) refer the matter to another dispute resolution agent contemplated in section 70 of the CPA ; or

(iv) file a complaint with the Commission in accordance with section 71 of the CPA.

(d) Approaching a court with jurisdiction over the matter , if all other remedies available to that person in terms of national legislation have been exhausted.

The CPA thus has its own hierarchy of forums to be approached in order to enforce the rights contained in the Act. Of specific note is the fact that civil courts appear to be an instance of last resort as they may only be approached once all other remedies available in terms of national legislation have been exhausted. Van Eeden submits that access to court is thus restricted and the other available remedies must

be identified and it must be shown that they have been exhausted before a court will entertain a matter[693]. In a case that involves a claim for damage or loss due to prohibited conduct, a finding by the National Consumer Tribunal and a certification by the chairperson thereof is required.[694]

Van Heerden and Barnard submit that it can be expected that many disputes between consumers and suppliers, that cannot be resolved without eventual court intervention, will involve small amounts, which can be adjudicated by Small Claims Courts if the amount in dispute falls within their jurisdiction[695]. They submit further that too many avenues of redress are available to the consumer, leaving it open for suppliers to direct the flow of consumer queries and disputes to the most convenient avenue for them[696]. They also submit that consumers need to be educated about the various routes of redress, especially the more vulnerable consumers, like illiterate consumers[697].

The point to be made regarding enforcement in terms of the CPA and its impact on the law of lease is that the CPA has its own range of institutions that will deal with infringement of consumer rights contained in the Act. This means that eventually other forums than the courts and the Rental Housing Tribunals will become involved in disputes arising from lease agreements.

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[693] Van Eeden 235.
[694] S 115(2)(b).
[695] Van Heerden and Barnard 'Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion' (2011) *Journal of International Commercial Law and Technology* Vol 6, Issue 3, 136(hereinafter Van Heerden and Barnard).
[696] Van Heerden and Barnard 144.
[697] Ibid.

9.Conclusion

It is clear that the introduction of the CPA has added a totally new dimension of compliance to the leasing of property in those instances where the Act applies. On a general level it has introduced extensive compliance with *inter alia* plain language requirements, fair contract terms and certain notices in the event of indemnities, waivers and acknowledgements. It has entrenched the consumer's right to receive non-defective lease property as part of the right to quality service and it has brought damage caused by defective leased property within the realm of strict product liability. It has further elevated the consumer's right to privacy by means of the provisions regulating direct marketing. The concept of direct marketing for purposes of the CPA is clearly broad and it is yet to be seen how wide the courts will interpret this concept. It is further foreseeable that the cooling off right in section 16 will require judicial interpretation on certain aspects such as the question whether a consumer will be able to exercise this right between the two time periods provided for by section 16(3) (a) and (b). It is to be noted though that the CPA has not tampered with the sui generis provisions in the common law of lease , namely the *huur gaat voor koop* rule and the lessor's tacit hypothec.

Within the context of a lease agreement as a fixed term agreement the CPA has made serious inroads on the relatively comfortable position crafted for the lessor by the common law of lease. In addition to the limitation on the time period of a lease to 24 months, lessors to whose lease agreements section 14 applies now find themselves in the uncertain position that the lessee is afforded a right to early

termination of the lease agreement which clearly jeopardises any certainty that lessors previously had that lease agreement would run its agreed course or if not, that they would be able to rely on breach of contract for relief. The unfortunate lessor is now locked into a lease agreement where the lessee can commit regular breach by for instance failing to pay rental on agreed dates-as long as the lessee at least remedies his default every time within the time period contemplated by section 14(2)(b)(ii). Furthermore the lessor is saddled with a compliance obligation in the form of the impending expiry notice contemplated by section 14(c) and may find himself in the position where a lease that he wishes to terminate continues at least a month or two after the termination date as a result of the provisions of section(d).

It is further conceivable that the imposition of a reasonable cancellation charge in the event of early termination as envisaged by section 14(2) read with regulation 5 will be problematic due to the lack of a clear formula for the calculation of such charge .It is submitted that it is foreseeable that unless the lessor has some leverage on the consumer in the form of an extensive deposit, disagreements about what constitutes a reasonable cancellation charge will result in the lessor walking down the “long and winding” road of expensive and time-consuming litigation.

Whether the legislature actually had lease agreements in mind when section 14 was conceived is of course another question. Regardless of its answer the fact remains that lease agreements as fixed term agreements have been drawn into the application of section 14 in specific instances.

It is interesting to note that although the CPA in section 50 thereof authorises the Minister of Trade and Industry to make regulations prescribing categories of consumer agreements to be in writing, the Minister has not yet done so. It appears that the position in terms of the common law of lease that a contract of lease is not required to be in writing thus still prevails subject to the stipulation in the Rental Housing Act that the lessor of residential property must reduce a lease agreement to writing if so requested by a lessee. It is submitted that the protection offered to lessees by the CPA would be enhanced if regulations are introduced in terms of which a lease agreement is required to be in writing as a matter of course. Such requirement would then, in accordance with section 2(9) of the CPA, override the provisions of the Rental Housing Act as it would extend greater protection to lessees.

It is further submitted that the protection of the lessee in instances where the CPA applies is safeguarded by the provision in section 51(1)(b) of the CPA which prohibits the waiver of any rights to which the consumer is entitled in terms of the Act. It is to be noted that this restriction applies to the situation where the supplier (lessor) is the party attempting to incorporate such waiver into the lease . Thus , where the consumer decides not to rely on the rights afforded to him by the CPA but to rather fall back on his common law rights as preserved by section 2(10), the aforementioned prohibition will not find application.

It however needs to be remembered that the CPA does not apply to “once off transactions which means that the scope of the impact of the Act on the law of lease may not be as vast as one would be inclined to think. Also, section 14, due to it only being applicable if the CPA applies to the transaction and not being applicable to fixed term agreements between juristic persons, has a limited scope of application.

The CPA has undoubtedly complicated the enforcement of disputes that arise from lease agreements by introducing new institutions such as the National Consumer Commission and Tribunal, alternative dispute resolution agents and consumer courts onto the scene. This complication is aggravated by the relegation of the civil courts as an instance of last resort and it is yet to be seen how this complicated interaction between the courts, the Rental Housing Tribunal and the institutions mentioned in the CPA will play out in practice. Whether the Rental Housing Act will slot in under the CPA as a consumer tribunal has yet to be determined although it is submitted that it will most likely be the case.

Finally sight should not be lost of the implications of section 2(10) which preserves the consumer’s common law rights. From the perspective of the common law rights of the consumer it thus appears that the CPA has not changed those rights but has supplemented them with the rights contained in the Act. A lessee in respect of a lease agreement to which the CPA applies will thus in an instance where a right is involved that is dealt with in the common law as well as the CPA, have the choice of either relying on his common law rights or relying on the rights afforded to him by the CPA. Given the extensive consumer protection afforded by the CPA it is submitted

that most consumers will in such instance rather seek their protection in the CPA, especially where section 14 is concerned. As pointed out earlier in this dissertation, the same privilege of preservation of common law rights have not been extended to the lessor in his capacity as supplier of services.

9 Final remarks

If one considers the impact of the CPA and related legislation on the common law of lease it leads to the conclusion that the common law of lease has lost its original fairly uncomplicated character that was free from the constraints of constitutional rights and the exigencies of consumer protection. The effect of all the aforementioned legislation is that the law of lease has become excessively fragmented and will now have to be applied on an integrated level where the combined changes brought about by the Constitution, the Rental Housing Act, PIE and the CPA will have to be taken into account. It also appears that jurisdiction on matters arising from lease agreements will now be spread across various forums depending on the nature of the dispute and it is submitted that this overlapping of jurisdiction may be detrimental to legal certainty insofar as redress within the law of lease is concerned.

A legal system is of course a creature that has to evolve to keep up with modern developments and the law of lease is no exception to this evolutionary process. It was thus clearly inevitable that the common law of lease in a country such as South Africa where the dynamics of change are rapidly at play, could not remain

unchanged. It may however be asked whether the changes brought about by the legislation discussed in this dissertation were all really necessary and whether it will eventually benefit the rental housing market .

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