

Rights, duties and responsibilities of a letting agent, landlord and tenant

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WHAT AN OWNER/ LESSOR MUST LOOK FOR

A letting agent, when appointed by an owner/ lessor, plays a crucial role in a tenant-landlord relationship or at least, in initiating one. A letting agent does not have to be an estate agent but it is advisable to establish the agent's credentials, performance and its portfolio of the property market. The owner or lessor should also request a list of old and current clients to verify the capability and efficiency of the agent whose services are to be hired.

The extent of the mandate will determine what is expected of the agent. It could be one or several duties or a combination that may include advertising the dwelling, screening of the prospective tenant, drawing up a lease contract, rent collection and maintenance. In rare instances, an owner appoints an agent to act as the lessor in concluding the contract with the tenant. A copy of the terms of the mandate relating to the agent and the tenant should be attached to the written contract or, in the case of an oral agreement, handed over to the tenant. This would inform the tenant what the agent's responsibilities and duties are and would protect the lessor against a recalcitrant tenant who would want to apportion blame to the agent or deliberately want to create confusion.

In summary, the owner or lessor ought to identify a reputable agent and confirm the duties and obligations of the parties. A written document, in simple, clear language (without ambiguities and without unnecessary legal jargon) that spells out the terms and conditions between the contracting parties (owner and agent, owner/ lessor and tenant) will go a long way to ensure success.

THE LEASE CONTRACT

The dwelling is let for the full use and enjoyment of the tenant for a temporary duration but for the owner, it is her or his investment that must be in a habitable condition. The Rental Housing Act 50 of 1999(RHA) regulates the relationship between tenant and landlord, having modified certain aspects of the common law.

Certain provisions of the RHA can operate independent of provincial Rental Housing Tribunals (RHT). These are the deemed provisions. These are the two sections (4 and 5) in Chapter 3 titled, "relations between tenants and landlords" and the general provisions in Chapter 5 dealing with "offences and penalties" (section 16). A tenant or landlord can approach any court where a Tribunal does not exist or can approach a court to enforce the provisions of these sections in the absence of an unfair practice.

Section 3 contains the rights and duties under general provisions such as the recovery of unpaid rentals, discriminating against a prospective tenant or during the duration of the lease, the tenant's right to privacy, the landlord's right to prompt and regular rental income, to terminate a lease and to claim compensation for damage to the dwelling. Discrimination is extended to the tenant's household and *bona fide* visitors; and a wide definition of discrimination is given that includes race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth.

Provisions pertaining to leases include receipts for all payments received from a tenant, inspection of the dwelling; reducing to writing a verbal lease if requested by a tenant, what must be included in a lease and copies of the house rules and defects to be given to a tenant. Offences and penalties relate to the failure by a tenant or landlord to comply with the provisions of section 4 and section 5(2) and (9), and a request made by the RHT and its ruling.

It is to the inspection of the dwelling that the lessor needs to pay diligent attention to ensure that the dwelling is not damaged or vandalised, or in the event this occurs to be able to have a claim against the tenant. The landlord can bring an action through the RHT, or, if aggrieved with its outcome, to have the ruling of the RHT taken on review for its procedure or on appeal on the merits if its findings. In the case of an agent authorised by the lessor to manage the lease but fails to carry out an inspection, the lessor will have a civil claim against the agent. It is unlikely that the lessor will succeed lodging a complaint at the RHT against the tenant. The RHT has no jurisdiction between the lessor and the third party (agent) and accordingly, cannot provide any relief to the lessor.

GENERAL PROVISIONS

4. (1) 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 or tenants, or the members of such tenant's household or the *bona fide* visitors of such tenant, on one or more grounds, including race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth.
- (2) A tenant has the right, during the lease period, to privacy, and the landlord may only exercise his or her right of inspection in a reasonable manner after reasonable notice to the tenant.
- (3) The tenant's rights as against the landlord include his or her right not to have:
 - (a) his or her person or home searched;
 - (b) his or her property searched;
 - (c) his or her possessions seized, except in terms of law of general application and having first obtained an order of court; or
 - (d) the privacy of his or her communications infringed.
- (4) The rights set out in subsection (3) apply equally to members of tenant's household and to *bona fide* visitors of the tenant.
- (5) The landlord's rights against the tenants include his or her right to-

- (c) prompt and regular payment of a rental or any charges that may be payable in terms of a lease;
- (d) recover unpaid rental or any other amount that is due and payable after obtaining a ruling by the Tribunal or an order of a court of law;
- (e) terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease;
- (f) on termination of a lease to-
 - (i) receive the rental housing property in a good state of repair, save for fair wear and tear; and
 - (ii) repossess rental housing property having first obtained an order of court; and
- (g) 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.

PROVISIONS PERTAINING TO LEASES

5. (1) A lease between a tenant and a landlord, subject to subsection (2), need not be in writing or be subject to the provisions of the Formalities in Respect of Leases of Land Act, 1969 (Act No. 18 of 1969).

(2) A landlord, must if requested thereto by a tenant, reduce the lease to writing.

(3) A lease will be deemed to include terms, enforceable in a competent court, to the effect that-

- (a) the landlord must furnish the tenant with a written receipt for all payments received by the landlord from the tenant;
- (b) such receipt must be dated and clearly indicate the address, including the street number and further description, if necessary, of a dwelling in respect of which payment is made, and whether payment is made, and whether payment has been made for rental, arrears, deposit or otherwise, and specify the period for which payment is made;
- (c) the landlord may require a tenant, before moving into the dwelling, to pay a deposit which, at the time, may not exceed an amount equivalent to an amount specified in the agreement or otherwise agreed to between the parties;
- (d) the deposit contemplated in paragraph (c) must be invested by the landlord in an interest-bearing account with a financial institution and the landlord must subject to paragraph (g) pay the tenant interest at the rate applicable to such account which may not be less than the rate applicable to a savings account with a financial institution, and the tenant may during the period of the lease request the landlord to provide him or her with written proof in respect of interest accrued on such deposit, and the landlord must provide such proof on request. Provided that where the landlord is registered estate agent as provided for in the Estate Agents Affairs Act, 1976 (Act No. 112 of 1976), the deposit and any interest thereon shall be dealt with in accordance with the provisions of that Act;
- (e) the tenant and the landlord must jointly, before the tenant moves into the dwelling, inspect the dwelling to ascertain the existence or not of any defects or damage therein with a view to determining the landlord's responsibility for rectifying any defects or damage or with a

view to registering such defects or damage, as provided for in subsection (7);

- (f) at the expiration of the lease the landlord and tenant must arrange a joint inspection of the dwelling at a mutually convenient time to take place within a period of three days prior to such expiration with a view to ascertaining if there was any damage caused to the dwelling during the tenant's occupation thereof;
- (g) on the expiration of the lease, the landlord may apply such deposit and interest towards the payment of all amounts for which the tenant is liable under the said lease, including the reasonable cost of repairing damage to the dwelling during the lease period and the cost of replacing lost keys and the balance of the deposit and interest, if any, must then be refunded to the tenant by the landlord not later than days of restoration of the dwelling to the landlord;
- (h) the relevant receipts which indicate the costs which the landlord incurred, as contemplated in paragraph (g), must be available to the tenant for inspection as proof of such costs incurred by the landlord;
- (i) should no amounts be due and owing to the landlord in terms of the lease, the deposit, together with the accrued interest in respect thereof, must be refunded by the landlord to the tenant, without any deduction or set-off, within days of expiration of the lease;
- (j) failure by the landlord to inspect the dwelling in the presence of the tenant as contemplated in paragraphs (e) of (f) is deemed to be an acknowledgement by the landlord that the dwelling is in good and proper state of repair, and the landlord will have no further claim against the tenant who must then be refunded, in terms of this subsection, the full deposit plus interest by the landlord;
- (k) should the tenant fail to respond to the landlord's request for an inspection as contemplated in paragraph (f), the landlord must, on expiration of the lease, inspect the dwelling within seven days from such expiration in order to assess any damages or loss which occurred during the tenancy;
- (l) the landlord may in the circumstances contemplated in paragraph (k), without detracting from any other right or remedy of the landlord, deduct from the tenant's deposit and interest the reasonable cost of repairing damage to the dwelling and the cost of replacing lost keys;
- (m) the balance of the deposit and interest, if any, after deduction of the amounts contemplated in paragraph (l), must be refunded to the tenant by the landlord not later than 21 days after expiration of the lease;
- (n) the relevant receipts which indicate the costs which the landlord incurred, as contemplated in paragraph (l), must be available to the tenant for inspection as proof of such costs incurred by the landlord; and
- (o) should the tenant vacate the dwelling before expiration of the lease, without notice to the landlord, the lease is deemed to have expired on the date that the landlord established that the tenant had vacated the dwelling but in such event the landlord retains all his or her rights arising from the tenant's breach of the lease.

- (4) The standard provisions referred to in subsection (3) may not be waived by the tenant or the landlord.
- (5) 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, 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.
- (6) A lease contemplated in subsection (2) must include the following information:
 - (a) The names of the tenant and the landlord and their addresses in the Republic for purposes of formal communication;
 - (b) the description of the dwelling and reasonable escalation, if any, to be paid in terms of the lease;
 - (c) the amount of rental of the dwelling and reasonable escalation, if any, to be paid in terms of the lease;
 - (d) if rentals are not paid on 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, which must not detract from the provisions of subsection (3) or the regulations relating to unfair practice;
 - (h) the amount of the rental, and any other charges payable in addition to the rental in respect of the property.
- (7) A list of defects registered in terms of subsection (3)(e) must be attached as an annexure to the lease as contemplated in subsection (2).
- (8) A copy of any House Rules applicable to a dwelling must be attached as an annexure to the lease.
- (9) A landlord must ensure that the provisions of subsection (6), (7) and (8) are complied with.

Mohamed, S. I. 'Rights, duties and responsibilities of a letting agent, landlord and tenant.' In *LexisNexis Butterworths Property Law Digest*, 10(3): 3-6, September 2006. Durban, South Africa.