LEASE

Introduction

Together with putting property up as security for a debt, letting property out in return for rent is one of the most important financial uses to which property is put. At its most fundamental, a contract of lease enables the owner,[1] (the lessor) to permit another person (the lessee) to use property in return for payment (rent). Contracts of lease may be entered into in respect of any moveable or immoveable property – and even, in principle, in respect of incorporeal rights (a praedial servitude of right of way may, for example, be let out).

A lease is accordingly the temporary grant of use rights over a piece of property in return for consideration, usually the payment of rent in money. The essentials of the contract are very simple. In addition to the usual requirements for the validity of contracts (parties with capacity, consensus, legality etc.), a contract of lease requires –

- The identification of the leased property; and
- A definite or ascertainable rent.

"Ascertainable" has been given a fairly broad meaning. Although a rent at the discretion of one of the parties is not an ascertainable rent, the courts have held that quite complicated provisions of a lease which do not specify a monetary sum to be paid, but set out lengthy procedures for the calculation of rent, nonetheless specify an "ascertainable" rent.

[1] Or others with owner-like powers, for example a usufructary, or a liquidator or trustee.

For a particularly complex example, see **Proud Investments v Lanchem**. In that matter a landlord and tenant of commercial premises entered into a six year lease of one floor of a multi-storey commercial office building in Rosebank. The lease specified the rent payable for the first year (a definite rent), a specified percentage increase for the second and third year (easily ascertainable), but thereafter rent was to be calculated "in accordance with an agreed method of ascertainment by valuers designated by the parties, or failing agreement by the valuers, by a third party appointed by the South African Council for Valuers".

That provision caused no difficulty in the case. At issue were further provisions of the lease dealing with the tenant's liability for rates, taxes and other expenses. At common law, rates, taxes and other expenses associated with ownership of the property are met by the owner, unless the lease specifically shifts responsibility to the tenant, and only then strictly to the extent that it does so. The lease in Proud Investments specified that the tenant was liable for –

- All water and electricity charges
- All of the following charges, in proportion to the size of the portion of the building occupied by the tenant ("the contribution quota") –
    - "any levies of whatever nature imposed in respect of the ownership of the property"
    - "the reasonable wages or other costs payable or incurred by the landlord in or about or in connection with the administration, cleaning, maintenance and/or security of the building, the property and the gardens thereof"

- "the reasonable costs of maintaining or servicing the lifts, electrical installations, safety and/or fire-fighting equipment"

- "the reasonable costs of maintenance of the water reticulation, internal or external finishes, roofs and other items and services essential to the effective and safe functioning of the building"

In the event of any dispute relating to the above charges, the landlord's auditors were to determine the amount payable.

It was assumed, for the purposes of the case, that all of these amounts fell within the definition of "rent". You might think that a faulty assumption, given that "rent" strictly speaking is only the landlord's consideration for the tenant's occupation of the property.

Remarkably, Joubert JA found all of these charges to be sufficiently ascertainable to found a valid lease. His reasons for doing so appear at pages 750 to 751 of the law report. Consider for yourself whether they are convincing.

Finally, a lease need not be in writing, save in the case of a residential lease, where the lease must be reduced to writing by a landlord at the request of the tenant,[2] and can even be concluded tacitly by conduct.

A lease is no ordinary contract. Because it so often serves to protect and fulfil important commercial and residential interests, leases have been subjected to extensive statutory control. This is deal with further below. However, the common law, too, recognises that leases regulate a special kind of relationship. One of the common law principles reflecting this is the general principle that an owner must

[2] Rental Housing Act 50 of 1999

deliver the leased property in a state fit for purpose. He is also responsible for the maintenance of leased property (unless the contrary is expressly agreed). Poor maintenance may found a lessee's claim for a remission in rent (relying on the principles applicable to the *exceptio non adimpleti contractus*). Although the right to remit rent may be contracted out of, there is a good argument that the exclusion of the right to remit rent is unconstitutional, at least in the case of a lease of residential property. Is it not a breach of the right of access to adequate housing that you should be compelled to pay to live in a place not fit for habitation?

Huur gaat voor koop

The common law also protects a lessee's interests in the event that the leased property is sold. In that event the principle of huur gaat voor koop applies. This High Dutch expression basically means that a lease survives a sale of the leased property to another by its owner (or, on a fairly literal translation "hire comes before sale").

In other words, a lessee's rights to use or occupy property remain intact, even if the lessor sells the property, or ownership changes in some other way. The new owner steps into the shoes of the previous owner and is bound to honour the lessee's right of occupation to the extent provided for in the lease.

There has been some controversy over the extent of the huur gaat voor koor principle. A purchaser of leased property succeeds to all the rights and obligations of previous owner in terms of the lease. But it has been held that a successor (i.e. a person who inherits the property) is only required to tolerate the occupation of the property by the lessee, and is not required to assume all of the obligations of his predecessor in title from whom he inherited the property.

In **Hirschowitz v Moolman** a lessee (Hirschowitz) entered into a contract of lease over a farm which included a right of pre-emption. In other words, if the lessor ever decided to sell the property, the lessee would have a right of first refusal. The property was co-owned by two brothers – the Moolmans. One of the brothers died a short time before the lease was entered into, but the property was not transferred to his successor for many months thereafter. Technically, therefore, the deceased estate still owned part of the property at the time the lease was entered into.

The deceased Moolman's son inherited a share of the farm, and together with his co-owner (his uncle) granted a prospecting right over the farm to a third party, which itself contained an option to purchase. At this point, Hirschowitz objected, saying that the prospecting rights essentially amounted to a conditional offer to sell the property in frustration of his right of pre-emption.

The High Court decided that where a successor (as opposed to a purchaser) of property took transfer of leased property, he did not assume all of the obligations of his predecessor in title, and was only required to tolerate the lessee's continued occupation of the property – not to honour any other ancillary obligations under the lease, for example a right of pre-emption. Poor Hirschowitz lost his right of pre-emption when the deceased estate transferred the property to the deceased's son.

The decision in Hirschowitz broke from a long line of contrary authority, and it seems, at first blush, an unwarranted limitation of the huur gaat voor koop principle. The Judge was trying to reconcile the huur gaat voor koop principle with the principle against onerous succession (i.e. you don't inherit your parent's debts – just what, if anything, is left over after their debts have been paid out of their estates). In other

words, Moolman's son did not inherit his father's obligation under the lease to offer the farm to Hirschowitz in the event of a sale, but, because of huur gaat voor koop, he did inherit the obligation to continue to tolerate Hirschowitz's occupation of the property. Whether or not the decision was right, it was certainly not elegant. Consider its merits for yourself.

Residential Leases and the Constitution

The limitations on a landlord's contractual rights under a lease are at their greatest in the case of leases of residential property. The law has long recognised that a residential contract of lease serves an important social purpose. It is an essential mechanism for people who cannot afford to buy property to provide housing for themselves.

As set out above, a lease is temporary. It does not provide an endless right of occupation. A lease that purports to do so is not a lease, but something else: an "erfpag" or usufruct etc.[3] A lease can, though, be for an indefinite duration. In practice, most residential leases last for a fixed period (usually a year or two) and are then just renewed indefinitely. Where no specific agreement to renew is reached, a lease will continue "month-to-month", terminable on reasonable notice by either party.

Obviously, the terms of an indefinite lease may place the landlord in a very powerful position indeed, especially when there is a shortage of rental housing. Where there is such a shortage, landlords are in a strengthened position to demand substantial rent increases. As with any other market situation, the equilibrium price of rental housing will increase if supply does not match demand.

[3] See Maphango v Aengus Lifestyle Properties (the SCA decision) at para 27.

In other words, if there is not enough rental housing to go around, the price of rental housing increases, and the landlord is entitled to demand a higher price from his tenants, or simply exercise his right to terminate their leases. The landlord's right to terminate a lease on notice can, without more, lead to substantial injustice, as poorer tenants are squeezed out of the rental housing market by a scarcity of housing, and the ability and willingness of richer tenants to pay more for the housing that is available.

In order to prevent poor tenants from being squeezed out of the rental housing market, Parliament has, since at least the First World War, closely regulated the residential landlord/tenant relationship. Early rent control legislation strictly regulated how much a landlord can charge (it essentially fixed letting prices for residential property), and virtually forbade the termination of a lease on notice. A lease could, though, still be terminated on breach (a failure to pay rent etc.).

At present, the situation is regulated by the Rental Housing Act 50 of 1999. That Act empowers provincial rental housing tribunals to determine fair rents on a case by case basis, and to set aside the termination of a lease if to do so would be "just and equitable". The current situation is illustrated in the case of **Maphango v Aengus Lifestyle Properties**

In Maphango 15 tenants lived in a building called Louwliebenhof in Braamfontein. They had been living at the property for lengthy periods. In 2009, the building was sold to a property company called Aengus Lifestyle properties. Aengus wanted to increase the tenants' rents by between 100% and 150%, but could not do so in terms of their existing leases, because the increments provided for were generally no more than 15%.

Instead, Aengus terminated each of the tenants' leases and invited them to enter into new leases of between double and triple their previous rents. The tenants resisted and laid a compliant with the Rental Housing Tribunal for Gauteng. Before the complaint could be determined, Aengus applied for the tenants' eviction. The matter eventually reached the Constitutional Court, where Cameron J, writing for the majority, found that –

- Section 4 (5) (c) of the Rental Housing Act prohibits the termination of a lease on grounds which constitute an unfair practice.

- Section 13 (5) of the Act permits a rental housing tribunal to determine rents which are just and equitable. It also permits a tribunal to set aside a termination if it violates section 4 (5) (c) of the Act.

- The termination of a lease to obtain a rent which might not be just and equitable may amount to oppressive or unreasonable conduct, which is itself defined as an unfair practice in the Rental Housing Act Unfair Practice Regulations.

- The residents' original complaint to the Tribunal should have been allowed to run its course, and proceedings should be suspended until it has done so.

The residents' complaint was accordingly referred back to the Rental Housing Tribunal. Cameron J's decision is worth reading because it elegantly sums up the provisions of the Rental Housing Act and the impact they have on the common law of lease.