

CORPORATE & COMMERCIAL AND REAL ESTATE ALERT



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RECENT PRONOUNCEMENT BY THE SUPREME COURT OF APPEAL ON THE WITHHOLDING OF RENTAL

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RECENT PRONOUNCEMENT BY THE SUPREME COURT OF APPEAL ON THE WITHHOLDING OF RENTAL

Where rental is payable in terms of a lease agreement monthly in advance, can the tenant withhold rental as a result of the landlord's failure to fulfil its obligations under the lease?

The tenant argued unsuccessfully before the High Court that its obligation to make payment of rental in advance (as opposed to in arrears) was suspended as a result of the landlord's failure to grant the tenant "vacant occupation or beneficial use of the entire leased premises".



Litigation over lease agreements is common in South Africa. In many instances it starts with a tenant who withholds the payment of rental because the landlord has failed to fulfil its obligations under the lease. This may lead to the landlord cancelling the lease and claiming damages.

In South African law, the default position is that rental is payable in arrears, unless specified otherwise, and a tenant may only withhold the payment of rental if the landlord has indeed failed to fulfil its obligations. However, the default position can be varied by a lease agreement. The landlord may require a tenant to pay rental monthly in advance and may include a clause in the lease agreement that precludes the tenant from withholding rental (typically referred to as a "withholding clause"). In such a case where rental is payable in terms of a lease agreement monthly in advance, can the tenant withhold rental as a result of the landlord's failure to fulfil its obligations under the lease?

Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd

In *Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd* (793/2016) [2017] ZASCA 111 (20 September 2017), the Supreme Court of Appeal (SCA) considered whether a tenant may lawfully withhold the payment of rental where the tenant has not been furnished with full occupation of the leased premises. The landlord, Hencetrade 15 (Pty) Ltd, brought an application before the Western Cape Division, Cape Town for the eviction of the tenant, Tudor Hotel Brasserie & Bar (Pty) Ltd, from premises used by the tenant for the operation of a

hotel. The High Court granted the eviction order on the basis that the landlord had validly cancelled the lease agreement after the tenant had fallen into arrears with the rental payments. The landlord had afforded the tenant an opportunity to remedy its breach of non-payment, but the tenant had failed to do so.

The tenant argued unsuccessfully before the High Court that its obligation to make payment of rental in advance (as opposed to in arrears) was suspended as a result of the landlord's failure to grant the tenant "vacant occupation or beneficial use of the entire leased premises". It was common cause that the landlord had retained a portion of the leased premises for storage purposes.

In dismissing the tenant's arguments, the court a quo referred to *Arnold v Viljoen* 1954 (3) SA 322 (C) which stated as follows:

A lessee who takes occupation of premises which are deficient in any respect is obliged, while it remains in occupation, to pay the full rental stipulated in terms of the lease. Its remedy is to claim compensation by way of an abatement of rental and/or damages. A lessee who, having taken occupation, fails to pay the full rental is exposed to the cancellation of the lease for non-payment.

RECENT PRONOUNCEMENT BY THE SUPREME COURT OF APPEAL ON THE WITHHOLDING OF RENTAL

CONTINUED

The provisions of the lease agreement altered the ordinary position that rental is payable in arrears, after the landlord has fulfilled its obligations, and may be withheld for non-performance.



The court *a quo* then referred to the decision in *Ethekwini Metropolitan Unicity Municipality (North Operational Entity) v Pilco Investments CC* [2007] ZASCA 62; [2007] SCA 62 (RSA), where the following was stated:

If the amount to be remitted was capable of prompt ascertainment, the plaintiff could have set this amount off against the defendant's claim for rent; if not, the plaintiff was obliged to pay the full rent agreed upon in the lease and could thereafter reclaim from the defendant the amount remitted.

The tenant then took the High Court's judgment on appeal. In the SCA, it argued that the landlord could only claim payment when it has performed in terms of the lease agreement by granting beneficial occupation to the tenant. Thus, as the landlord had failed to grant beneficial occupation to the tenant, no rental was payable in advance.

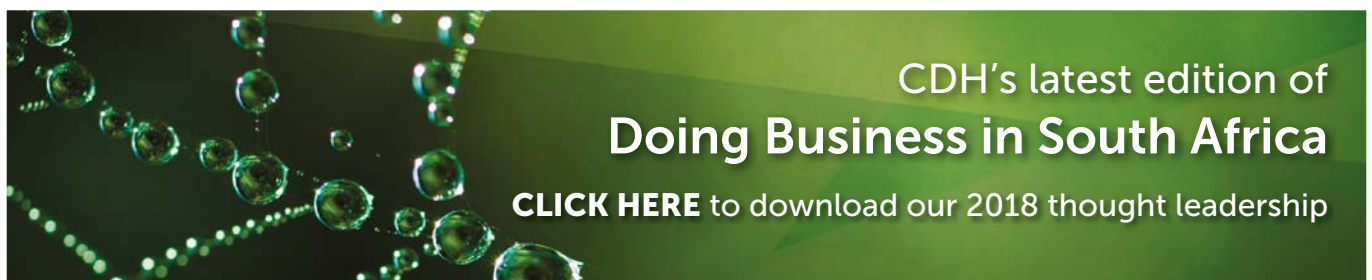
The lease agreement in question stipulated that, "all payments in terms of this lease to be made by the tenant to the landlord shall be made on or before the first day of each month without demand, free of exchange, bank charges and without any deductions or set off whatsoever".

The lease agreement also contained a limitation of liability clause that stipulated that:

The tenant shall not have any claim of any nature whatsoever against the landlord whether for damages, remission of rent or otherwise, for any failure of or interruption in the amenities and services provided by the landlord, any local authority and/or other service provider to the leased premises, building and/or property unless such failure or interruption is caused by the negligent or wrongful act or omission by the Landlord or its agent or representative, notwithstanding the cause of such failure or interruption; *and not be entitled to withhold or defer payment of any amounts due in terms of this lease for any reason whatsoever.*"

Thus, the lease contained a so-called "withholding clause".

In other words, the provisions of the lease agreement altered the ordinary position that rental is payable in arrears, after the landlord has fulfilled its obligations, and may be withheld for non-performance. It, thus, altered the reciprocal nature of



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RECENT PRONOUNCEMENT BY THE SUPREME COURT OF APPEAL ON THE WITHHOLDING OF RENTAL

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If rental is payable in advance, the obligation of the tenant to make payment of the rental is no longer reciprocal to the obligation of the landlord to grant beneficial occupation of the premises and the tenant cannot apply set off.



the obligations of the landlord and the tenant. The obligation of the tenant to make payment of the rental was no longer reciprocal to the obligation of the landlord to grant beneficial occupation of the premises to the tenant. Furthermore, the limitation of liability provision expressly precluded the tenant from withholding rental as a result of a "failure of or interruption in the amenities and services provided by the landlord."

In the circumstances the SCA held that the tenant was precluded from withholding payment of rental, notwithstanding the fact that the landlord had failed to grant the tenant beneficial use of the entire premises. The SCA held that the principle of reciprocity in contracts is a matter for interpretation and, in this case, the parties had expressly altered the ordinary position that rental is payable in arrears, after the landlord has discharged its obligations. The SCA, accordingly, dismissed the appeal.

Conclusion

In summary, the SCA decision affirms the default position: where a lease agreement stipulates that rental is payable in arrears and, to the extent that the landlord has failed to grant the tenant beneficial occupation of the premises, if the amount is capable of being ascertained, the tenant can set off this amount against the rental payable. If not, the tenant is obliged to pay the full rental and can, thereafter, claim the relevant amount from the landlord.

If rental is payable in advance, the obligation of the tenant to make payment of the rental is no longer reciprocal to the obligation of the landlord to grant beneficial occupation of the premises and the tenant cannot apply set off. In these circumstances, the tenant is obliged to pay the full rental and can only, thereafter, claim from the landlord the relevant amount. This applies even where the landlord has breached its obligation to provide beneficial use of the entire leased premises.

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