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DISPUTE RESOLUTION
ALERT

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Lockdown not lock-out: Revisiting the principles of eviction in terms of the PIE Act

Standing in the hallways of various Magistrates' Courts, it is not uncommon to hear a person bemoaning the fact that their landlord, due to non-payment of rentals, has locked the tenant's possessions in the property or evicted them without a court order. The devastating effect of the economic impact of the coronavirus has had a domino effect on the ability of people to keep up with their rental payments which has led to lessors, who are suffering the same fate, to resort to extreme measures to recoup outstanding rentals. However, notwithstanding the severity of the economic climate, the legalities surrounding evictions must be carefully considered.

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The Victorian writer Mary Ann Evans who wrote under the pseudonym, George Eliot, obviously wasn't a lawyer. Generally, lawyers delight in formal and technical language; a tool in daily use at the bar or side bar. Many ordinary people – and some lawyers - consider traditional legal speak to be outdated, cluttered, wordy, indirect, irritating, difficult to understand and a persistent obstacle to accessible justice.

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CLIFFE DEKKER HOFMEYR

Lockdown not lock-out: Revisiting the principles of eviction in terms of the PIE Act

Where a lessee has breached the terms of the rental agreement such that the lessor has opted to exercise its right to terminate the contract, but the lessee does not vacate the property, rendering the lessee an unlawful occupier in terms of the Act, the lessor must follow the procedures as provided for in the Act.

Standing in the hallways of various Magistrates' Courts, it is not uncommon to hear a person bemoaning the fact that their landlord, due to non-payment of rentals, has locked the tenant's possessions in the property or evicted them without a court order. The devastating effect of the economic impact of the coronavirus has had a domino effect on the ability of people to keep up with their rental payments which has led to lessors, who are suffering the same fate, to resort to extreme measures to recoup outstanding rentals. However, notwithstanding the severity of the economic climate, the legalities surrounding evictions must be carefully considered.

The primary elements of a lease are that the lessor gives the lessee use and enjoyment of the property; and the lessee pays the lessor rent for such use and enjoyment of the property. Therefore, these obligations must be performed one against the other. In light of that, the non-payment of rental constitutes non-performance on the part of the lessee to comply with their contractual obligations in terms of the lease agreement concluded with the lessor.

In the case of commercial leases, tenants could, during the different stages of the national lockdown, and in specific instances, claim for a reduction or suspension of rental payment due to vis major as tenants suffered a loss of beneficial occupation which loss was objective, direct and an immediate result of vis major. However, this is not the case in respect of residential leases as the lessee remained in occupation of the property.

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (Act) provides for the prohibition of unlawful eviction and for procedures for the eviction of unlawful occupiers. Where a lessee has breached the terms of the rental agreement such that the lessor has opted to exercise its right to terminate the contract, but the lessee does not vacate the property, rendering the lessee an unlawful occupier in terms of the Act, the lessor must follow the procedures as provided for in the Act.

In terms of section 4(2) the Act, at least 14 days before the hearing of the proceedings by an owner or person in charge of land for the eviction of a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. This notice must, of necessity, state that proceedings are being instituted for an order for the eviction of the lessee; indicate on what date and at what time the court will hear the proceedings; set out the grounds for the proposed eviction; and

Lockdown not lock-out: Revisiting the principles of eviction in terms of the PIE Act...*continued*

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

In terms of section 8 of the Act, no person may evict an unlawful occupier except on the authority of an order of a competent court. Therefore, lessors may not evict non-paying tenants unless they to comply with the procedure set out in section 4 of the Act.

Of significance, in terms of section 8(3) of the Act, any person who contravenes the provisions of the Act, and evicts an unlawful occupier without the authority of an order of a competent court is guilty of an offence and liable on conviction to a fine, or to imprisonment not exceeding two years, or to both such fine and such imprisonment.

In order to avoid the prescribed penalties of the Act, it is imperative that lessors adhere its prescripts. Finally, various promulgations relating to evictions have been made by the relevant ministers pursuant to each pronounced lockdown level. These must be carefully considered in conjunction with the above.

Eugene Bester and Nomlayo Mabhena

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"The finest language is mostly made up of simple unimposing words" - George Eliot

An article entitled *"Nothing plain about plain drafting"* in De Rebus 2013 (April) DR 19 by plain language practitioner writer and columnist Caryn Gootkin lists problematic styles of writing that lawyers employ.

The Victorian writer Mary Ann Evans who wrote under the pseudonym, George Eliot, obviously wasn't a lawyer. Generally, lawyers delight in formal and technical language; a tool in daily use at the bar or side bar. Many ordinary people – and some lawyers - consider traditional legal speak to be outdated, cluttered, wordy, indirect, irritating, difficult to understand and a persistent obstacle to accessible justice.

The Oxford dictionary defines *legalese* as language used in legal documents that is difficult to understand. Perhaps a sublanguage, it is legal jargon used by lawyers in various types of writing including academic, judicial, legislative, contract and advisory. This sublanguage includes Latin phrases, words drawn from South Africa's Roman-Dutch law heritage, legal maxims developed over years, made-up or archaic words and phrases that remain popular despite often having neither meaning nor purpose. American writer, editor, literary critic, and teacher William Zinsser, in his book On Writing Well, complained that "*We are a society strangling in unnecessary words, circular constructions, pompous frills and meaningless jargon*".

An article entitled "*Nothing plain about plain drafting*" in De Rebus 2013 (April) DR 19 by plain language practitioner writer and columnist Caryn Gootkin lists problematic styles of writing that lawyers employ including:

- using many words when one would be enough, like 'right, title and interest';
- choosing grand words over simpler ones such as 'notwithstanding the fact that' instead of 'even though';
- using Latin terms instead of simple English equivalents such as '*inter alia*' instead of 'among others';
- beginning or joining sentences with archaic conjunctions like 'wherefore' and 'whereupon';
- writing in the passive rather than the active voice such as 'an application will be brought by the seller' instead of 'the seller will apply'; and
- listing reams of synonyms to amplify a point introduced by 'including, but not limited to...'.

Lawyers also love doublets and triplets, stringing together two or three synonyms to convey what is usually a single legal concept, for example, 'cease and desist', 'due and owing', 'fit and proper' or 'null, void and of no effect'. Much of this redundant language stems from mimicry of the extensive use of alliteration by French, German and Latin legal scholars which serves no purpose in the 21st century. Convention, habit and a large dollop of laziness are probably the main reasons why lawyers still favour archaic language plus, perhaps, a blind reliance on precedent documents handed down through generations.

Some of the phrases found in pleadings and judgments originate from matters decided long ago and far away from South Africa. In the case of *Johannesburg City Council v Bruma Thirty-two (Pty) Ltd* 1984 (4) SA 87 (T) the court described the

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prayer for further and alternative relief as *"redundant and mere verbiage"*, saying that whatever the Court can validly be asked to order on the papers as framed, can still be asked without that phrase which doesn't enlarge in any way *"the terms of the express claim"*.

Standard legal words or phrases might, in limited cases, be the quickest and most succinct way to convey the message but a skilled lawyer should be able to adapt their style of writing to the situation and the intended reader. But the purpose of language is to communicate. Then, simple English must always trump *legalese* whether the writing is aimed at a client, an opponent or intended to be a clear recordal of an agreement, an opinion, or a pleading. Tempting as it might be to show off your vocabulary, your ability to navigate a Thesaurus and to dazzle with your jargon, the message is always more important than the words.

It should be obvious that simple English - with both clarity and brevity – is preferable to the daily confusion wrought by lawyer speak, but there are two challenges to that.

First; change is hard although encouragingly the best-selling Canadian author Robin Sharma counsels that *"Change is hard at first, messy in the middle and gorgeous at the end"*. Second, and even if lawyers are prepared to change and embrace simple English, writing simple English is often harder than writing *legalese*.

Mark Twain famously said: *"I apologise for such a long letter - I didn't have time to write a short one."*

Tim Fletcher and Refiwe Makhema

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Presented by CDH in collaboration with Faculty of Law, University of Pretoria

The online short course is focused on international investment law and standards of protection under investment treaties and agreements.

DATES: Tuesday, 13 October to Thursday, 29 October 2020

TIME: 17h00 to 19h30 Central African Time (CAT)

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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