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How safe are commercial landlords: effect of CPA

By Lucinde Rhoodie

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Lease agreements fall within the ambit of the Consumer Protection Act, No 68 of 2008 (Act) as a 'service' which is defined as including the provision of access to or use of premises or other property in terms of a rental.

A landlord operating a rental enterprise will be a 'supplier' or 'service provider' in terms of the Act, if leasing commercial property to third parties is in the ordinary course of its business. The Act applies to all commercial leases entered into with natural persons as well as juristic persons with an annual turnover or asset value of less than R2,000,000.

What does this mean for landlords? The most significant implication of the Act on commercial leases relates to unfair, unreasonable or unjust contract terms and the impact thereof. It is a well-established principle of the law of contract that a party, when it signs a contract, is taken to be bound by the ordinary meaning and effect of the words that appear over its signature.

Because of the provisions of the Act, a landlord can now no longer assume that a court will enforce a lease agreement simply based on the signature principle. Where the courts previously adopted the policy that it will avoid 'rewriting the bargain between parties', the Act now expects the courts to do so to give effect to the Act.

The Act prohibits certain specific contractual provisions and declares others to be unfair, unreasonable or unjust and obliges landlords to bring certain provisions of lease agreements to the tenants' attention.

Unjust contract terms

Sections 48 to 52 of the Act deal with unfair, unreasonable and unjust contract terms. Section 48 and s49 inter alia prohibit suppliers ie. landlords from entering into agreements on terms that are unfair, unreasonable or unjust, including terms that require consumers ie. tenants to waive any rights or assume any obligations; waive any liability of the landlord or which impose as a condition of entering into a transaction terms that are unfair, unreasonable or unjust and prohibits agreements that are excessively one-sided in favour of the landlord.

It also requires a landlord, at the time of entering into any lease agreement, to bring to the notice of the tenant any term of the lease agreement that purports to limit in any way the risk or liability of the landlord or any other person; purports to constitute an assumption of risk or liability by the tenant; purports to impose an obligation on the tenant to indemnify the landlord or any person for any cause; purports to be an acknowledgement of any fact by the tenant; and concerns any activity or facility that is subject to certain specified risks.

The provisions of s48(1) will apply typically to standard clauses found in commercial lease agreements which limit the liability of landlords in respect of damages claims by tenants and indemnify landlords from any claims by third parties. The provisions of s48 and s49 are fairly vague and beg the question: how will courts determine whether a term of a lease agreement falls foul of the provisions of s48 and s49?

Although there is an attempt to define these terms in the Act it remains open to subjective interpretation. Each case will have to be determined on a case-by-case basis and it is likely that the courts will have regard to customary terms used in the trade.

Escaping certain liability

The most likely consequence of the Act will be tenants relying on s48 to s51 to escape certain liability created by the terms of lease agreements, for instance, being joined as a defendant in an action by an individual who sustained injuries in a leased premises, by virtue of an indemnification provided by the tenant in favour of the landlord.

Tenants may also attempt to use the Act to declare null and void those terms which either absolves landlords from damages claims by tenants or limits the quantum of such claims or terms which take away tenants' rights to cancel lease agreements in certain circumstances, if a tenant can show that such terms are unfair, unjust and unreasonable.

If any term falls foul of the provisions of s48 to s51 of the Act, the tenant will be entitled to request the courts to make an order to the effect that the term contravening the Act is void; or that such term is severed from rest of agreement or altered to the extent that it will be unlawful.

So what can landlords do to better protect themselves? The overriding principles remain that of fairness and reasonableness.

Landlords must ensure that when entering into lease agreements any term which may fall within the categories mentioned in s48 to s51 are not drafted on any unreasonable terms and are, prior to and at the time of entering into the agreement explained to the tenant, with the tenant signing a declaration that such terms were brought to its attention, the consequences explained and understood.

Indeed uncertain times ahead for landlords and industry old provisions in lease agreements and there is no doubt that tenants will start to rely more on the provisions of the Act to escape onerous terms imposed by commercial leases.

ABOUT LUCINDE RHOODIE

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