7 common mistakes to avoid when cancelling a lease agreement

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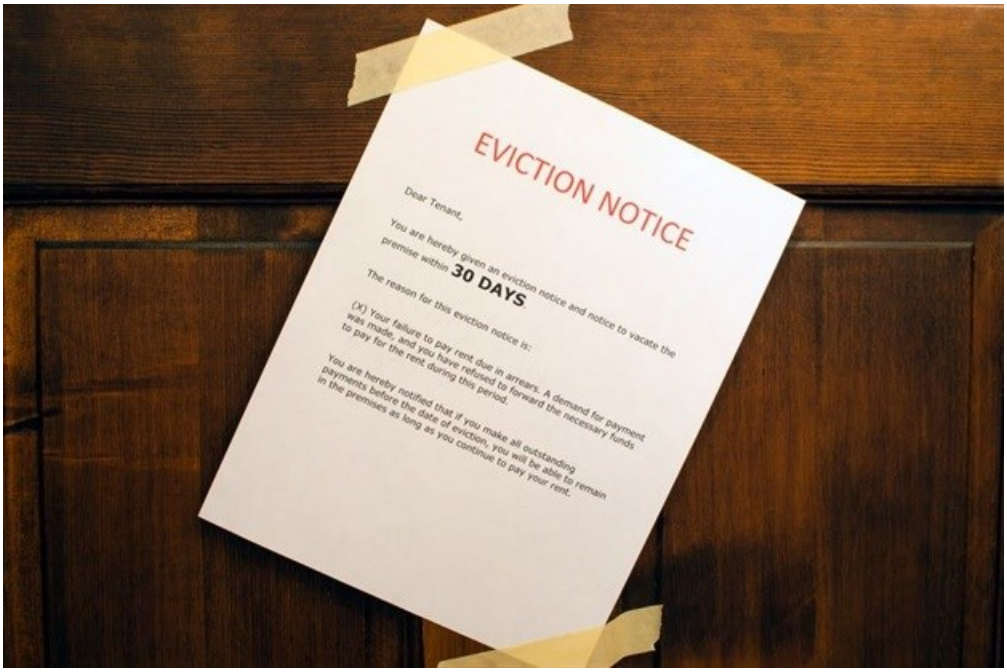
This article deals with the seven most common mistakes made in cancelling an occupant's right to reside on the property.



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Cancelling the occupant's right

The Constitution provides that no one may be evicted from their home without a court order authorizing the eviction of the occupant. This effectively means that without an eviction order, any attempt to dispossess a person, even a squatter, from your property, would be unlawful. In order to obtain an eviction order, the owner needs to prove that the occupant has no right to reside on the property. In rendering the tenant's occupation unlawful, any and all lease agreements in place need to be properly cancelled in accordance with the terms of the lease agreement and relevant legislation. In the event that the lease agreement is not properly cancelled, the eviction will not be granted.

The following are common mistakes made in the cancellation of the lease agreement, which often result in the invalidation/appeal of, or a delay in, obtaining the eviction order:

1. **Indulgences**

Imagine that it has been weeks or even months and the tenant has not paid the rent. The landlord continues to follow up with the tenant regarding payment and the demands for payment are mostly met with excuses and empty promises that the payment will be made “next week”. Compassion and hope drives the landlord to give the tenant more time to pay. Yet as time passes, nothing comes of the promises. During this time, the debt keeps escalating, municipal accounts come pouring in and mortgage bond payments are due. A bad situation has become worse and the need for urgent intervention is paramount.

However, the eviction process is not the speediest of remedies and it takes time, which is now lost because of all the various indulgences provided to the tenant. Rather, we suggest that the landlord acts by the 7th day of the rental being due and unpaid, by sending out a formal letter of demand (in writing) immediately upon the need therefore arising. If the lease does not contain a clause that prohibits the tenant from using a history of indulgences to compel the landlord to provide further indulgences in future, the landlord might find her/himself in a pickle when trying to compel payment in any period shorter than those previously permitted.

2. **Does the Consumer Protection Act (“CPA”) apply to the lease agreement?**

In demanding payment and eventually cancelling the lease agreement, no matter what the lease agreement says, one needs to firstly ascertain whether Section 14 of the CPA applies to the lease agreement. No matter what the lease agreement says, legislation like the CPA will trump any clause if it is not in line with that legislation.

Section 14 of the CPA will need to be followed in order to cancel a lease agreement in the following circumstances:

a. Both landlord and tenant are not juristic persons. The CPA defines a “juristic persons” as a company, close corporation, trust or partnership; and

b. The fixed term of the lease agreement is still in operation.

In cases where the lease agreement is subject to Section 14 of the CPA, the landlord has to provide the tenant with a letter of demand, allowing the tenant 20 business days in which to effect payment of the rental. If the tenant fails to remedy his breach, the landlord may cancel the lease agreement on or after the 21st business day by sending a cancellation letter. In the event that one of the parties (either landlord or tenant) to the lease agreement is a juristic person, one must rely at the breach clause in the lease agreement.

3. **The Breach Clause**

In the event that Section 14 of the CPA does not apply, the landlord needs to rely on the breach clause of the lease agreement to ascertain how the lease agreement is to be cancelled. This would be the case where one of the parties is a juristic person or when the fixed term of the lease period has expired. For example, the breach clause in the lease agreement may state that the landlord is obliged to provide the tenant with a letter of demand demanding payment within only 7 days before cancelling the lease agreement.

In the event that the fixed term of the lease agreement has lapsed, the Rental Housing Act (RHA) will apply. The Rental Housing Unfair Practice Regulations states that in order to deprive a tenant of possession of the property (and obtain an eviction order), the landlord is obliged to provide the tenant with 7 days’ notice in which to remedy the specific breach of the lease agreement. However, this notice can be dispensed with if the tenant is in breach in regard to rental payments specifically and remains in breach for a period of 7 days as from the due date. This requirement is often misinterpreted as the “7-day grace” period.

4. **Counting the days**

Although it is considered a simple exercise to count the days between when the letter of demand was dispatched and when the cancellation letter may be sent, the ramifications of sending the cancellation out too early can be severe.

In counting the days, the rule of first—day-in and last-day-out is to be followed. In counting business days, often for example, public holidays are overlooked and if the lease agreement is cancelled even a day early, this may mean that the landlord has repudiated the lease agreement and it could lead to a damages claim from the tenant against the landlord if the repudiation is accepted.

5. **Delivery of the Letter of Demand**

The *domicilium citandi et executandi* (chosen address) clause of the lease agreement will set out how and where any notices, including any letters of demand and cancellation letters, must be sent. If these notices are not delivered correctly they may be deemed to be invalid and the occupant can always deny ever receiving them or be found by a court not to have received proper notice while the eviction application is underway.

Older lease agreements sometimes require the notices to be sent by post or registered mail and if so required, even as antiquated as it may seem, they need to be sent by such methods.

“Demands” for payments made by text, Whatsapp messages, and email can be considered valid if you can prove that the tenant has or should reasonably have received the notice. However, we would also suggest that notices should be dispatched as specifically agreed to in the lease agreement as well.

When in doubt, the authors suggest the notices be hand delivered to the property and dispatched by email as well. For hand delivery, the letter merely needs to be slipped under the door or attached to the gate, not actually handed to the occupant personally, in order to be considered proper service of the notice. However, if no one has signed for it, it is best to make a service affidavit immediately after delivery, to keep for purposes of proof in court in case you need it later.

6. **The content of the letter of demand and cancellation letter**

The wording of the letters is extremely important. For example, if the content of the letter of demand is vague and does not address any consequences that may follow it may be considered to be insufficient. The letter of demand needs to specify the exact amount due, the amount of time allotted in which the tenant is to effect payment as well as clearly indicate that for example upon non-payment, the lease agreement may be cancelled, the tenant may be blacklisted, and/or the tenant may be sued for arrears and/or damages. Threatening with the broad phrase “legal action” is not sufficient for purposes of cancelling the lease agreement. The letter of demand also needs to be addressed to each and every lessee (as in cases of co-lessees, they are jointly and severally liable for the payments due under the lease agreement).

The cancellation letter on the other hand specifically needs to confirm that the lease agreement is cancelled and demand that the occupants vacate the property. You may also indicate that in the event that the occupant fails to vacate the property, eviction proceedings may commence. There is a myth that a landlord needs to provide the tenant with more time in which to vacate the property after the cancellation but in actual fact a landlord may demand the immediate vacating of the property. It is within the court’s discretion upon the granting of the eviction to provide the tenant with more time in which to vacate the property. Usually, in our experience, the occupants are afforded about a month in which to vacate the property. Again, it should be remembered that the cancellation letter also needs to be addressed to all the lessees listed on the lease agreement.

7. **Further correspondence after cancellation**

As soon as the lease agreement is cancelled, the landlord should immediately seek legal representation. Waiting to see whether the occupant vacates of this own volition will merely delay any proceedings and may even grant the

occupant further entitlements for instance, in terms of the PIE Act (Prevention of Illegal Eviction from and Unlawful Occupation of Land Act), in which event that the occupant has been in unlawful occupation of the property for more than six months, the municipality may be called on to file a report on the availability of alternative accommodation. This report will inevitably delay any eviction proceedings pending.

All correspondence (even sending rental invoices) should immediately cease and any communication should only be handled by the attorney. This is imperative as any correspondence (including possible settlement negotiations) can be seriously detrimental the eviction application no matter how seemingly insignificant. For example, by the landlord sending invoices and demanding “rental” after cancellation, the landlord may tacitly reinstate the lease agreement after the cancellation. At that point, the process may have to start from the beginning again.

Conclusion

This area of law is fraught with technicality and it is always best to consult an expert on these issues because the consequences of the delay that might occur if one makes critical errors, are dire.

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