

Tenants cannot withhold their rent

Lea Jacobs • May 13, 2018

Tenants often resort to withholding their rental payment if they feel their landlord is not maintaining the property. This can backfire, so it is best to follow the rule of the law to resolve the issue. This is how it should be handled.

If everyone played by the rules then tenants would pay their rent on time every month and landlords would keep the properties that they lease out in pristine condition.

Withholding payments

There are many reasons why tenants default on rental payments. One reason often encountered by lawyers is that the tenant believes that their landlord is not keeping up his side of the bargain by not maintaining the property in the agreed condition or a condition fit for which the property was let.

Often this defence is proffered by the tenant as an excuse when, in reality, the tenant is simply unable to honour his monthly rental commitment. For this reason, matters in which a tenant's right to withhold a portion of his rental and in which the landlords duty to maintain property feature, are seen all too often in our courts.

The basic premise

The starting point is that, in terms of our common law, the landlord is required to maintain the property in a standard as agreed upon by both parties or in a standard fit for which the property was let. This may be altered by the parties but, in order to do so, they will have to ensure that their altered agreement is clearly recorded or is easily capable of being proved.

We asked Marlon Shevelew from Marlon Shevelew and Associates Incorporated, a specialist rental law attorney, to clarify the rights of tenants and landlords in instances where the landlord has a duty to maintain the property and is not complying with his obligation to do so.

What the tenant can do when the landlord is not maintaining the property

A tenant faced with this scenario has a number of remedies at his disposal. Namely:

1. Cancel the lease

Assuming that the breach of the obligation by the landlord is sufficiently material as to warrant same, the tenant may decide that he is no longer interested in renting the property and may cancel the agreement and claim damages suffered (it would be advisable to seek a declaratory order from the courts confirming the cancellation, where the cancellation or reason therefore is, or is likely to be, the subject of a dispute between the parties).

2. Continue with the lease

Should the tenant wish to continue with the contract he may demand that the landlord perform in terms of his obligation to maintain the property, failing which, he may:

Claim any damages, actually suffered by the tenant and which would have been reasonably foreseeable, from the landlord, by way of an action instituted in the appropriate court (put simply, the tenant sues the landlord for losses suffered by him as a result of his failure to maintain the property); or

Approach the appropriate court for an order compelling the landlord to comply with his obligations (known in the legal fraternity as an order of “specific performance”); or

If he is confident that the landlord is in breach of his obligations and that the maintenance is necessary and reasonable, attend to the work himself and deduct the reasonable amount expended on the maintenance from his rental; or

Approach the court for an order to the effect that his right of occupation is being diminished and that as a result thereof need only pay an amount of the rental that he shows to be a fair rental given the reduced occupation or use of the premises.

The main point of contention - withholding payment

It is the last point that seems to be the most misunderstood and contentious. It is important to note that the tenant cannot simply decide that he feels he is entitled to withhold a portion of the rental amount and unilaterally decide what amount to deduct. The court has to grant an order to that effect first.

The reason for this is twofold. Firstly, he has a binding contractual obligation to pay the agreed rental and his failure to do so would mean that he is in breach of the lease agreement. And secondly, the courts do not simply allow individuals to unilaterally decide that they are suffering damages, as a result of a breach, for which the landlord must be liable, and unilaterally decide what amount to attribute to these damages.

How are damages defined?

The above sort of damage suffered is generally known as “unliquidated” as it is not easily ascertainable, and is often subject to a number of subjective factors, whereas the damages that may be incurred by the tenant who wishes to simply effect the repairs himself by hiring a contractor may be considered to be “liquid” as they are capable of being ascertained relatively easily.

A good example of an unliquidated damages claim would be that where a room in a house let by the tenant is not maintained by the landlord and falls into a state of disrepair to the point in which the tenant can no longer make use of this room. If this were to happen to you as a tenant, what amount would you say would be fair to deduct from the rental as compensation for your loss of the room? It is likely that the answer to that may vary as many times as it is posed and if a tenant could unilaterally make that decision without an order from the courts, the tenant and landlord relationships would indeed be treacherous.

That said, Marlon says it is also important to bear in mind that Legislature passed the Consumer Protection Act No. 68 of 2008 (CPA), which has to some extent amended certain aspects of the common law and has in some circumstances crystallised other aspects. These changes affect both the tenant and landlord and they should in turn be aware of its provisions.

Notes on the relevant sections of the CPA

Section 48 of the CPA effectively provides that a landlord must not enter into a contract with a tenant that is unfair. Regulation 44(3)(b) (“the Regulation”) states that a term of any contract will be presumed to be unfair when it excludes or restricts the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement, including the right of the consumer to set off a debt owed to the supplier against any claim which the consumer may have against the supplier. Sections 54 and 55 as read with the definition section of the CPA may be relevant to the extent that they effectively

provide that a landlord must hand over the property in the state that was agreed upon or reasonably expected and must maintain the property to that standard throughout the duration of the lease agreement, fair wear and tear excluded (this is of course simply an enactment of the common law).

How do you decide if a rental contract is fair?

The Regulation makes clear that any provision in a contract will be presumed to be unfair when it excludes or restricts the legal rights or remedies of the consumer against the supplier in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement.

The Regulation lists an example of such an unfair provision, namely, a provision that limits or restricts the consumer's right to set off a debt owed to the supplier against any liquid claim which the consumer may have against the supplier. "At first glance, it would seem that any provision in a lease agreement that purports to restrict the right of the consumer to set off any amount from the rental would be deemed to be an unfair clause," says Marlon. "The wording ... 'any claim which the consumer may have against the supplier' must however be read in the context of the preceding paragraph, which makes clear that the consumer may only apply such a set off where he has a legal right or remedy to do so."

What the CPA says about holding back rent

The CPA does not provide any legal right to set off any amounts from the rental where the landlord fails to maintain the property. At most, the CPA allows a tenant to require the landlord to remedy any defect in the property or to refund a reasonable portion of the price paid, in other words to discount the rent.

The reference to the refunding of money, as opposed to unilateral set-off, is important as it is in line with the common law that one cannot simply set-off an illiquid debt.

The position is of course different where the tenant seeks to place the property in the state it should be in and in doing so incurs reasonable, necessary and easily ascertainable damages, which may in turn be set off against the rental. As stated above, this will need to be preceded by a demand on the landlord calling upon him to place the property in the state agreed upon and after which he fails or refuses to do so. This amount may be set off because it is a liquid claim that the tenant will have against the landlord and which is capable of being set off against the rental.

Insofar as a clause in a lease may seek to limit or restrict the tenant from setting off any liquid amount from the rental that he would legally ordinarily be entitled to, but for the contract in question, such a clause will, in terms of the Regulation, be presumed to be unfair in terms of section 48 of the CPA.

Conclusion

The effect of the presumption is quite simply that where there is any dispute about the clause. Even where a lease agreement does not expressly prohibit the withholding of any portion of the rental, the tenant cannot unilaterally deduct an amount from his rental, which he thinks is fair, without first having taken steps through the courts to liquidate his "damages" claim or set off.