



To pay or not to pay?

(In the context of COVID-19)



Introduction

To pay or not to pay? has become an imperative question asked by retail tenants in the context of rental amounts due pursuant to lease agreements concluded between retail tenants and retail landlords. The question is raised in the wake of an extension of the lockdown period to the end of April as announced on 9 April 2020 by the President of South Africa, Cyril Ramaphosa.

The extension of the lockdown period means that retail tenants who do not provide goods and services which have been categorised as essential, would not have been allowed to operate their businesses from the end of March until the end of April. The halting of business operations by retail tenants means that there is no income which is generated from the sale of the goods and services as a result of the lockdown restrictions, however, from a contractual perspective, retail tenants may be expected to continue remitting rental amounts as agreed to in lease agreements.

Rental amount

Typically, the rental amount in commercial lease agreements involving retail tenants is determined by the greater of X amount (which is usually the price per square metre of the total leased premises) or a fixed percentage of the total monthly turnover of a retail tenant. The failure by a retail tenant to remit the agreed rental amount would constitute a material breach and trigger default provisions which may entitle a retail landlord to claim specific performance or damages. This means that regardless of whether a retail tenant is in operation or not, would not be a factor to be considered by a retail landlord if a strict and purely contractual approach were to be followed.

COVID-19, however, presents an unprecedented dynamic which may require a lenient and pragmatic approach to be adopted in the treatment of rental amounts which are due to retail landlords, but due to the lockdown circumstance, retail tenants may not be in a financial position to comply fully with their obligations in lease agreements.

Proposals on the table

There are numerous proposals on the table which are being negotiated. Initially some retail tenants had decided not to pay any rental amount due to retail landlords on the basis that their business operations have been halted as a result of the restrictions imposed by the lockdown and its subsequent extension. However, it is reported by IOL that some of those retail tenants have reconsidered their positions pursuant to ongoing sector negotiations and are now proposing to remit a certain percentage of the rental amount, instead of non-payment.

Retail tenants and retail landlords are further reported by IOL to be locked in discussions with the view of reaching an amicable resolution to the treatment of rental amounts due to retail landlords (<https://www.iol.co.za/business-report/companies/pepkor-woolies-truworths-mr-price-tfg-offer-r220-million-to-landlords-during-lockdown-46655204> accessed 14 April 2020). The resolution may be a deviation from the agreed terms in lease agreements due to the unprecedented circumstance of COVID-19.

Competition Act exemption

On 24 March 2020, the Minister of Trade, Industry and Competition, Ebrahim Patel, promulgated the COVID-19 Block Exemption for the Retail Property Sector, 2020 (the "Regulations") in response to the declaration of COVID-19 as a national disaster. The Regulations provide exemption to retail tenants and retail landlords from the application of sections 4 and 5 of the Competition Act, 89 of 1998, in order to minimise the financial impact of COVID-19 on retail tenants in clothing, footwear, home textile, personal care services and restaurant industries.

The scope of the Regulations is currently limited to agreements and practices between retail tenants and retail landlords in the context of payment holidays and/or rental discounts, limitations on evictions and the suspension or adjustment of certain clauses in lease agreements which would impede retail tenants from implementing reasonable measures aimed at ensuring the survival of business operations during the national disaster. However, should retail tenants and retail landlords identify additional agreements or practices which may foster the efficacy of the Regulations, a request may be made to the Minister in terms of Regulation 6 to expand the scope of the exemption.

Conclusion

The global community is in uncharted territory which might necessitate a temporary deviation from the agreed terms of lease agreements which regulate the rights and obligations of retail tenants and retail landlords. A lenient and pragmatic approach in resolving the impasse between retail tenants and retail landlords may be preferred, under these circumstances, as opposed to a strict and purely contractual approach.

Contact



Thato Mashishi
Legal Consultant
KPMG Legal Services
Email: thato.mashishi@kpmg.co.za
Mobile: +27 (0)66 010 0167