

DEEMING PROVISION IN S 5(5) OF THE RENTAL HOUSING ACT WHEN A LEASE EXPIRES AND THE TENANT STAYS ON: CAN IT BE REBUTTED?

Sharma v Hirschowitz and Others (A3064/18) [2019] ZAGPJHC 434 (4 November 2019)

In order to assist in the resolution of disputes, the Rental Housing Act has certain deemed provisions, impliedly forming part of the agreement between the landlord and tenant. This judgment dealt with the provision stating that if, on the expiration of the lease, the tenant remains in the premises with the express or tacit consent of the landlord, the parties are deemed to have entered into a periodic lease generally on the same terms as before, unless there was a written lease agreement with terms to the contrary. Can a tenant argue that an oral rental increase in the periodic lease period was therefore invalid?

The Judgment can be viewed [here](#).

FACTS

Sharma leased a residential property from Mr and Mrs Hirschowitz for the period 1 March 2012 to 27 February 2013 in terms of a written lease agreement. The rental amount was R30,000 per month.

On expiry of this lease agreement, a written renewal lease was concluded for the period 1 March 2013 to 27 February 2014. The terms were identical to the initial lease, save that the monthly rental increased to R32,400.

On expiry of the renewal lease agreement, no further written lease agreement was concluded. However, the parties orally agreed on a rental of R34,500 per month and Sharma paid this amount for the period 1 March 2014 to 31 October 2014.

The Hirschowitzes gave notice to Sharma to vacate the property with effect from 31 October 2014. Sharma however failed to vacate the property and continued to make rental payments for the months of November and December 2014.

Then, at the end of February 2015, Sharma vacated the property, having made no payment for the months of January and February 2015.

The Hirschowitzes issued summons in the Magistrates' Court for the confirmation of the cancellation of the lease agreement and other charges. Sharma defended the action and counterclaimed for payment of R40,000 together with interest, being his rental deposit plus the accrued interest.

The Magistrates' Court granted judgment in favour of the Hirschowitzes and Sharma appealed to the High Court.

HELD

Damages for Holding Over

- Sharma was found by the Magistrates' Court to have held over the property for the period November 2014 to 26 February 2015 (i.e. for the period after the cancellation of the oral lease).
- A claim for holding over is founded on a breach of the contractual obligation to give vacant possession on termination, as required by the relevant clause in the lease agreement or as an incidence of the common law.

Its underlying basis is that of damages suffered by reason of the lessee's continued occupation despite lawful cancellation. A claim requires damages to be determined by reference to the amount which the landlord could obtain if he had been able to re-let but for this continued occupation of the property by the erstwhile tenant.

- The amount claimable is not rental but damages which according to settled law is the market rental value of the premises. In the present matter, the amount of R34,500 per month would be an accurate assessment of the rental value, as this was the agreed amount at the time of holding over.

Set-off of the deposit and interest

- It was common cause that Sharma had paid a rental deposit of R40,000 at the commencement of the lease. This amount had accrued interest and the total amount was R48,164 as at the time of the proceedings.
- Set-off comes into operation when two parties are mutually indebted to each other and both debts are liquidated and fully due. The one debt extinguishes the other to the extent of the debt, as effectually as if payment had been made.
- In the present matter, set-off was pleaded by Sharma. After finding that the Hirschowitzes did not prove that the deposit had to be applied to damages, the Magistrate ought to have applied set-off against the unpaid rental amount found to be owing by Sharma. The amount of R48,164 in respect of the rental deposit and interest therefore ought to be set-off against the amount owing by Sharma to the Hirschowitzes.

Section 5(5) of the Rental Housing Act 50 of 1999 (the Act)

- During the period 1 March 2014 to 31 October 2014, there was only an oral agreement in place. However, by virtue of the application of section 5(5) of the Act, Sharma argued that the parties' agreement on this amount ran contrary to section 5(5) of the Act because the increased rental agreed to, an increase of R2,100 per month, was not provided for in a further written agreement and this additional amount had to be set-off against any amount found to be owing by Sharma.

- Section 5(5) of the Act reads:

"(5) If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month's written notice must be given of the intention by either party to terminate the lease." (our emphasis).

- The words "shall be deemed" are often used in legislation to predicate that a certain subject-matter, e.g. a person, thing, situation or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction.
- In the present matter, the long title of the Act reflects two overall objectives: general principles governing conflict resolution in the rental housing sector; and providing for the facilitation of sound relations between tenants and landlords and for this purpose to lay down general requirements relating to leases.
- It was clear that the legislature did not intend to preclude the conclusion of further oral lease agreements after the expiration of the lease agreement or to prohibit increased rentals after expiry of initial leases.
- The mischief the legislature intended addressing in section 5(5) is the resolution of disputes which quite often arise in oral or tacit lease agreements about the nature of the terms of the renewed lease. Absent a written

- agreement, the renewed lease is deemed to be the same as the previous one. This is a perfectly sensible statutory provision designed to provide a rule of thumb to resolve commonly encountered disputes.
- The interpretation contended for by Sharma would: (i) nullify the actual oral agreement simply because it was oral, despite both parties having accepted that it was concluded and implemented; (ii) nullify section 5(1) of the Act which provides that a lease need not be in writing.
- The proper construction to be given to the word 'deemed' in this subsection is that it provides *prima facie* proof in the absence of a written agreement. Section 5(5) of the Act contemplates a situation where the parties' relationship is not being governed by a written agreement and is therefore a provision to facilitate proof of matters which might otherwise be difficult to prove in a court of law.
- Section 5(5) only applies in the absence of a written lease agreement. It serves as an evidentiary tool and countervailing evidence is thus permissible. As it was common cause that the oral agreement was concluded and implemented it followed that the deeming provision has been rebutted and therefore the rental due under the oral agreement was an enforceable obligation.

CONCLUSION

The appeal was upheld.