MICHAEL MATTHEWS
& ASSOCIATES • ATTORNEYS

WITH COMPLIMENTS

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Suite D1
Westlake Square
1 Westlake Drive
TOKAI
7945

Tel: 021 702 3070
Fax: 021 702 3080
Email: georgia@legalonline.co.za
Website: www.michaelmatthewssa.com

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February 2020

Does an Expired Lease Automatically Continue Month-to-Month? At What Rental?

"Close your eyes - Landlord knocking On the back door" (Jack Kerouac; Northport Haiku)

Your residential fixed-term lease expires but for whatever reason you don't sign a new one. Nor does the lease say anything about what will happen on expiry. Is there still any form of valid lease in place and if so what terms and conditions apply? What rent is payable?

To avoid confusion over the answers to those questions, the Rental Housing Act ("the RHA" - which, as its name suggests, applies only to residential leases) says that you are deemed "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."

Your fixed-term lease is now a "month-to-month" lease. Nothing changes except that the lease is no longer for a specific period but rather continues indefinitely unless and until a month's written notice is given by either party.

Critically, the rent remains unchanged, unless…

The case of the verbal rental increase

- A tenant rented a residential property for a year at a rental of R30,000 p.m. The written lease was extended for another year at a rental of R32,400 p.m. When that expired, there was no written extension, but verbally the tenant agreed to pay an increased rental of R34,500 p.m. and in fact paid that amount for another nine months.

- When the landlord then gave notice to vacate to the tenant he declined, only moving out four months later. The landlord sued him for various amounts, including damages for "holding-over". The concept with "holding-over" is that where a tenant remains unlawfully in the property and thereby prevents the landlord from re-letting the property, the landlord can recover his losses from the tenant in the form of damages.

- The tenant fought back, and one of the defences he raised (the one relevant to this article) was that the orally-agreed increase in rental to R34,500 p.m. was invalid. In terms of the RHA, he argued, the rental remained at the R32,400 p.m. applicable at the date of expiry.

- Not so, held the High Court (this being an appeal from a Magistrate's Court ruling). The subsequent oral agreement to change the rental was valid – all the RHA says is that the terms and conditions of the lease (including the agreed rental) are deemed to be unchanged, which is "rebuttable". In other words if you can show that different terms and conditions were agreed upon, verbally or in writing, they will be valid.

- The end result – the tenant must pay damages in the full amount of R69,000 (2 months at R34,500 p.m.) plus interest and costs.

The bottom line, and what your lease should say about expiry

Of course your lease may have been a month-to-month lease from the start – we are talking in this article only about the concept of fixed-term leases expiring and automatically becoming month-to-month. It is in such a case that the upshot of this new High Court decision is that the answer to the question "What rental must the tenant pay under a month-to-month lease?" is that the rental remains unchanged unless - as in this case - the evidence shows clearly that a new rental was agreed upon.

That of course opens the door to uncertainty and dispute, and to avoid that make sure that your fixed-term lease **provides clearly in writing exactly what will happen when it expires**. Some leases for example provide that they will continue automatically on a month-to-month basis, but incorporating any changes to rental or other terms notified in writing by the landlord to the tenant. Without such a clause you could be in the same position as these parties, battling your way through the courts and hoping that a magistrate or judge (probably both in the end result) will uphold your interpretation of whatever you think was verbally agreed.

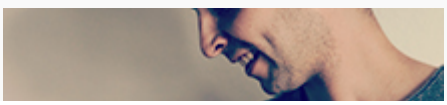
Avoid verbal leases!

As a final note, remember that verbal leases (in fact verbal contracts of any sort), and/or verbal amendments to them, are a recipe for misunderstanding, duplicity and dispute.

So although our law accepts the validity of verbal leases (written leases will be compulsory only when the latest amendments to the RHA finally come into force), in practice you should always insist on everything being in writing and signed by both parties, with a clause providing that no amendments will be valid and binding unless likewise reduced to writing and signed.

Employees: Your New Rights to Paternity and Parental Leave

"People who say they sleep like a baby usually don't have one" (Psychologist Leo J Burke)



It has taken over a year of confusion and delay around when new changes will be implemented, but finally your extended rights to parental leave and to an Unemployment Insurance Fund (UIF) claim have fully commenced.

Here's an update/refresher -

- New mothers are still entitled to 4 consecutive months' maternity leave.
- New "parents" (which would include fathers and same-sex partners) are entitled to 10 consecutive days' "parental leave".
- An adoptive parent of a child under 2 years old is entitled to 10 consecutive weeks' adoption leave. Where there are two adoptive parents, the other is entitled to only the 10 consecutive days' "parental leave" (the two adoptive parents should decide between them who gets 10 weeks and who gets 10 days).
- Commissioning parents in a surrogacy agreement have the same entitlements as adoptive parents.
- The law does not force your employer to give you *paid* leave – the above entitlements are for *unpaid* leave only. So unless your employment contract entitles you to paid leave you are limited to claiming from the UIF (assuming you are a qualifying contributor). That will give you 66% of your salary subject to a standard earnings cap.

And a note for employers: if you haven't already done so, take advice now on reviewing your maternity and parental leave policies.

Can You Sue a Bad Investment Advisor? It depends...

"I always advise people never to give advice" (P. G. Wodehouse)

If you want to send shivers down the spine of any investor, mention "Steinhoff", or "Sharemax", or any one of the many other spectacular corporate collapses that have plagued both local and overseas investors in recent times.

Quite apart from the high-profile failures it's been a hard few years for investors generally, and if your nest egg has taken a painful tumble recently you may well wonder whether you can sue your financial advisor for giving you bad advice.

The short answer, as several recent cases have highlighted, is "It depends…".

Case 1: A R2.5m claim succeeds

- A widow, still reeling from her husband's death and unversed in financial products, invested R2m in Sharemax on the advice of her trusted financial advisor, an authorised Financial Services Provider (FSP).
- She made it clear that she needed a safe, low risk investment and "that she

- She made it clear that she needed a safe, low risk investment and that she could not risk losing even two cents as the money was earmarked for her son's upbringing".

- The advisor did not explain any other investment products and emphasized that "it was so good that he did not even want to introduce other financial instruments and/or investments to her."

- Sharemax of course collapsed, and the investor duly sued the advisor for her R2m plus interest - a total of almost R2.5m by the time this case found its way through the High Court and an appeal to the Supreme Court of Appeal (SCA).

- The advisor was found liable on the basis of having been negligent "and even dishonest" and to have "failed to exercise the degree of skill, care and diligence which one is entitled to expect from a FSP".

Case 2: An R11m claim fails

- A UK couple temporarily in South African sought a local financial advisor's advice on how best to invest some "spare cash".

- They ended up putting GBP 565,000 and R700,000 (about R11m in all) into investment products offered by UK based investment companies. The companies failed and the investments were rendered worthless.

- The investors successfully sued the advisor in the High Court for R11m in damages, but on appeal to the SCA their claim was dismissed.

- The investors, said the Court, had failed on the evidence to "identify what a reasonably skilled financial service provider would know about products in the market place; what due diligence they would have done before making a presentation to a prospective client and what sources of information they would have consulted." **They had failed to prove that any negligence on the advisor's part in "making a presentation without adequate knowledge of the proposed investments, resulted in advice materially different from that which a reasonably competent advisor would have given.**" (Emphasis supplied).

- End result - the investors lose their R11m and face a (doubtless substantial) legal bill.

Case 3: A R5m claim fails

To the High Court now for some insight into the range of factors that a court is likely to take into account in deciding liability –

- This was another Sharemax investment, this time for R5m.

- The difference was that this investor was found to have been an astute and wealthy businessman who managed his own share portfolio and went into the investment understanding the risks and "with his eyes open" after taking independent advice.

- Claim dismissed.

The bottom line, and some advice for investors

Let's start off with this thought - **unless you are fully qualified to make your own investment decisions, seeking help from a financial advisor is a no-brainer. A trained and certified professional advisor brings elements of insight, knowledge and objectivity that you can never match on your own**.

Just be sure that your chosen advisor is the right advisor for you and is both competent

and trustworthy. As a first step check for FSCA (Financial Sector Conduct Authority) authorisation (and a list of products the advisor is approved to provide) **here**.

If worst comes to worst and you feel that your advisor has let you down and should refund you, the bottom line (in a nutshell) is that to successfully sue you will have to prove that you suffered loss in consequence of following your advisor's **negligent** advice.

The million dollar question (literally perhaps) is of course - how do you establish that necessary element of negligence? Whilst it will never be easy, and whilst each case will be treated on its own merits, the SCA (in the R11m case above) usefully held that an advisor's legal duties are mirrored in the FAIS (Financial Advisory and Intermediary Services) Act and its Codes of Conduct. So perhaps start off by proving a breach of the General Code of Conduct's provision that "**an authorised financial service provider 'must at all times render financial services honestly, fairly, with due skill, care diligence and in the interests of clients and the integrity of the financial services industry**'."

There's also the FAIS Ombud option

You may not need to go to court to recover your losses, in that the "FAIS Ombud" (Ombudsman for Financial Services Providers) has the power to resolve complaints against FSPs. It can award "fair compensation for the financial prejudice or damage suffered" up to its jurisdictional limit of R800,000. In at least two Sharemax complaints, compensation orders have been issued, but many more have been dismissed.

Ask your lawyer which route is best for you.

And last but not least, some advice for financial advisors

Make sure that all your documentation protects you from liability as much as possible, that you have insurance cover in place in case you are sued (in the R2.5m case mentioned above, the insurers were ordered to indemnify the advisor against the claim), and that you comply strictly with FAIS and its Codes.

Report Your Traffic Accident with an Online Reporting Service

Traffic accidents, your fault or not, are traumatic affairs. Even minor dings come with their hassles – panel beaters, tow trucks, shock and recriminations, reams of paperwork, having to get a Crash Report Number for the insurers...

That last bit has always been a major added stress factor, requiring a trip to the local police station (unlikely to be a happy experience) and yet more paperwork.

No longer - life just got a little bit easier with the new online reporting service from NaTIS (the National Traffic Information System) on its website **here**. The submission of the report is legally binding and only applies to "minor damage crashes", not in cases of injury or death. Note the time limit – "All crashes must be reported within 24 hours or the next working day. (Non-Working days Saturday, Sunday and Public Holidays)."

Get your lawyer's help urgently if it's anything but a minor accident!

Your Website of the Month: Become a Client Whisperer

"It takes seven times more money, effort and time to get a new client than it does to keep an existing one"

We've all heard of "dog whisperers", "cat whisperers", "horse whisperers", even "elephant whisperers" – but "client whisperers"? Is that even a thing?

It is, and with your clients being the lifeblood of your business, retaining them is fundamental to its profitability and success. For a take on how to do that - to your mutual benefit - read "The Client Whisperer" on the CleanFax **website**.

The article specifically addresses carpet cleaning businesses but the principles it espouses, and the advice it gives, are universal. They apply to every type of business you can think of.

So protect your client base – become a client whisperer!
