



PROPERTIES: DISASTER RECOVERY PLAN

RENTAL INCOME

1. BACKGROUND

On 15 March 2020, the Minister of Corporate Governance and Traditional Affairs, declared a National State of Disaster in terms of section 27(2) of the Disaster Management Act in response to the COVID-19 pandemic.

The state of disaster lapses after 3 months on 15 June 2020, or it may be terminated earlier or extended further by the Minister.

There is no doubt that the collection of rent in the next few months will be challenging. Many businesses and individuals face the prospect of zero or reduced income in the coming months.

2. Compounding non-payment of rent

Compounding the non-payment of rent is a very real scenario for tenants who are in self-quarantine and therefore unable to vacate, and with courts closed to issuing new processes or allocating new hearing dates, ECDC are further prejudiced from enforcing our legal rights.

Importantly, tenants whose income has not been affected by the State of Disaster are expected to continue to pay their rent in the ordinary course of business.

3. ECDC Rental Recovery Pack

3.1 Application

The application for assistance is only applicable to those tenants who have all previously exhibited a trend of paying their rent in full, and who have valid Lease Agreements in place.

These tenants are candidates for the Deposit Utilisation or Rent Deferment Agreements, under the following circumstances (although on a case-by-case basis):

- Tenants whose income has been lost or limited due to retrenchment;
- have been placed on temporary unpaid leave;
- commission earners who are unable to work;
- Commercial / Retailers who provides non-essential services and cannot operate.



3.2 Rental Disaster Recovery Pack

3.2.1 Income Declaration Document

This Declaration Document should be completed by all tenants who would like to apply to the ECDC for their deposit to be used as rent or a deferment of rental.

The purpose of this document is for the tenant to declare the reason for their loss of earnings and to allow ECDC to confirm this with the employer as well as request the necessary supporting documentation.

3.2.2 Deposit Utilisation Document

Ordinarily, a tenant's deposit is held in trust until the lease has ended and the tenant has vacated but these are extraordinary times. The Deposit Utilisation Document is an agreement between ECDC and the tenant that the deposit can be used to pay the rent.

It's important to note that this document includes a repayment plan so that the deposit will be reinstated over instalments for the remaining period of the lease term once the State of Disaster has been lifted.

This option is suitable to tenants who acknowledge liability. Where the tenant defaults on the repayment of the reinstatement of the deposit, ECDC will be in a position to easily take further legal action.

3.2.3 Rental Deferment (Payment Holiday) Document - Residential Tenant

This Rental Deferment Document takes into consideration that the residential tenant's obligation to make full rental payment is suspended for the period of the State of Disaster or a shorter period should the lease be validly cancelled by either party.

Importantly, this option includes a repayment plan for the rental to be reinstated over instalments for the remaining period of the lease term once the State of Disaster has been lifted and also provides ECDC to withdraw from the indulgence under specific circumstances.

This is to be utilised where the tenant acknowledges liability, if the tenant defaults on the repayment of the reinstatement of the rental, ECDC can take further legal action on the basis of this document.

3.2.4 Rental Deferment (Payment Holiday) Document - Commercial Tenant

This Rental Deferment Document takes into consideration that the commercial tenant's obligation to make full rental payment is suspended for an agreed period which could be the



period of the State of Disaster, or some shorter or longer period.

Importantly, the Document provides, as an option, for the tenant to make a minimum monthly payment during the period that its normal payments are suspended. The document also provides for ECDC to withdraw from the indulgence, in specified circumstances.

This document is to be used where the tenant acknowledges liability, should the tenant default on the repayment plan, ECDC can easily take further legal action. Where the tenant is not a natural person, the person signing the agreement binds himself as surety and co-principal debtor in order to secure the repayment of the deferred amounts.

4. Tenants who have already displayed a trend of non-payment

ECDC will continue with its normal collection process e.g. Listing the tenant on a Credit Bureaux, sending Letter of Demand and Lease Cancellation notifications.

Should the tenant fail to vacate after cancellation, ECDC will ensure that the tenant is ready to hand over as soon as the State of Disaster is lifted and the Courts begin to operate as normal.

5. Lease Agreements that has ended or is about to end

Where the tenant is no longer able to vacate due to the need to be quarantined or remain in isolation, an Addendum to the Lease Agreement is included, which extends the existing terms of the lease agreement on a month-to-month basis.

FACILITIES MANAGEMENT

1. Emergency Procurement

It is envisaged that ECDC the following Emergency Situations may arise:

- Water leakages
- Security Services
- Acts of God
- And similar

The above to be read together with the Gazetted Regulations that has been issued.

Our Facilities Management Team will continue operating remotely and appoint service providers as per the ECDC Procurement Policy as applicable to emergency procurement requirements.

A delegation of Authority has been provided to our Facility Manager in charge to issue permits to the necessary service providers as and when required.

A Standard Operating Procedure has been put in place to ensure that:



- work is performed accordingly to COVID19 regulations;
- Work is performed up to acceptable standards

DISPOSAL OF PROPERTIES

This process will be halted due as Estate Agents do not form part of essential services and the Legal Documentation is required to be signed in person with attending witnesses.

INFRASTRUCTURE MANAGEMENT

Currently, all projects are either at pre-tender or post-construction stage.

No projects require a person or company to be physically on site.

Work to continue as normal as per the ECDC Standard Operating Procedures taking the remote locations of staff into consideration.



PROPERTIES: DISASTER RECOVERY PLAN - CONSIDERATIONS

Question #1: What happens to tenants who need to move on the 1st of April?

Nobody is moving during a nationwide lockdown. It would be contradictory to the Disaster Management Act and therefore illegal to do so.

Only essential services on the list published by the Government may operate for 21 days from 23:59 on Thursday, 26 March. This list does not include estate agents or moving companies.

Question #2: How do I handle In-coming and Out-going inspections?

According to the Rental Housing Act, out-going inspections must be performed within 3 days of the tenant vacating the premises. As you are not allowed to leave your house, it will be impossible to perform an out-going inspection. Similarly, as nobody will be able to move out and with nobody moving in, there will be no need for an in-coming inspection to be performed during lockdown.

Question #3: What happens to an Eviction Order now?

An Eviction Order that was granted before the lockdown can't currently be enforced as Sheriffs will in all likelihood not be working as well as our attorney that handled the matter.

It is extremely important that tenants who have not paid their rent are placed on terms and that the necessary Letter of Demand has been sent so that ECDC can act immediately after the lockdown has been lifted.

Question #4: Can the tenant cancel their lease agreement in the usual way?

The tenant still has the right to cancel the lease agreement by giving 20 business days' notice. The landlord's right to charge an early cancellation penalty remains in force and should the landlord suffer damages as they are not able to find a replacement tenant due to the lockdown, the landlord would still be able to charge loss of rental as part of these damages.

It is unclear in law at the moment as to whether the days during the lockdown can be counted as business days. Until there is a directive which will come from the Judge President, we have to treat business days as business days in which case, the tenant would be entitled to cancel the lease but not be entitled to vacate until after the lockdown.

Question #5: I have a vacant property, can I charge my new tenant rent from the 1st of April even though they can't move in?



We find ourselves in extraneous circumstances. Where the tenant is not physically able to move in during a national lockdown, the landlord would have no claim against the tenant for rent due during the lockdown. The situation is as a result of a force that is outside of either the tenant or the landlord's control.

Question #6: Does my tenant have to pay rent?

There is a falsified document said to have been issued by the Department of Health doing the rounds on social media. It claims that 'Health Minister Zweli Mkhize has barred landlords from collecting rent money from their tenants for the next 90 days'. This is fake news which has been verified as such in [an article by News 24](#) with comment received from the Department of Health spokesperson, Lwazi Manzi.

Tenants are still bound by their rental agreement. Should a tenant have difficulty in paying their rent due to the COVID-19 pandemic, ECDC will apply the Properties Disaster Recovery Plan and negotiate the best possible out-come.

Question #7: Are employees entitled to a paid salary during lockdown?

No obligation on employers

There is no obligation on employers to pay salaries to employees who cannot perform their normal work functions by reason of the lockdown. Many employers do not have the deep pockets and strong balance sheets to heed President Ramaphosa's call for employers "to take care of their workers during this period" by continuing paying salaries during the lockdown.

Agreed paid leave

Employers who are unwilling or unable to pay salaries to employees who cannot work during the lockdown have a number of options open to them to attempt to ensure that employees do not suffer unduly. The first option is that they can reach an agreement with the employees that they take paid leave for whole or part of the period from 26 March to 16 April.

Naturally, any paid leave taken by employees during this period will be deducted from the employee's annual leave allocation, reducing the leave available to employees to be taken on a voluntary basis.

UIF claims for unpaid leave

It is open to employees who are forced take unpaid leave to claim short term



Unemployment Insurance Fund benefits and where a business employing more than 50 employees is forced to cease operations, the Department of Labour will send a special team to the business to help process the UIF claims. The President has also promised assistance to pay employees' salaries through a Temporary Employee Relief Scheme.

Nevertheless, the Department of Labour and other government agencies are likely to be over-stretched by the calls on its resources as a result of the lockdown and the impact of COVID-19. The processing of UIF claims will inevitably take much longer than usual. Likewise, the funds to assist small businesses and employees affected by COVID-19 derived from the funds donated by the Rupert and Oppenheimer families and allocated by the Department of Small Business Development are likely to take too long to reach many businesses when relief funding is most needed.

Question #7: Accessibility of Properties/Infrastructure staff?

All critical staff are contactable via cellphone and remotely per Laptop via 3g etc.

Question #8: Block Exemption for Retail Property

On 24 March 2020, the Minister of Trade, Industry and Competition published certain regulations entitled [COVID-19 Block Exemption for the Retail Property Sector 2020](#) against the background of the declaration of a National State of Disaster on 15 March 2020 in response to the COVID-19 pandemic.

Quick take

The regulations - which are limited in their application to certain selected retail environments - seek to exempt certain categories of collective agreements between landlords; tenants; and landlords and their tenants; from the application of sections 4 and 5 of the Competition Act, as a response to the national disaster.

The categories of agreements contemplated by the regulations include payment holidays, rental discounts and limitations on evictions. The retail environments covered by the regulations are limited to clothing, footwear and home textiles; personal care (grooming); and restaurants.

The regulations have clearly been drafted in haste. They are not clear, require interpretation, and they may not in fact amount to a blanket exemption, even within the limited scope of their application.

Sections 4 and 5 of the Competition Act

Section 4 of the Competition Act prohibits agreements or decisions between competitors that directly or indirectly involves fixing a purchase or selling price or any other trading condition. Depending on the circumstances, a trading condition may include an



agreement on discounts, or on payment terms.

Section 5 of the Competition Act prohibits an agreement between a firm and its suppliers, or between a firm and its customers (read “tenants”), that has the effect of substantially preventing or lessening competition in a market.

Conditions for Exemption: Categories of Tenants

The exemption is limited to agreements (or practices) in respect of the following categories of tenant retailers: clothing (which includes clothing, uniforms, sportswear, protective gear and workwear); footwear; home textiles (which includes sheets, pillows, towels, table cloths, carpets and blankets); personal care grooming services (which includes hairdressers and health and beauty salons); and restaurants (businesses that prepare and serve food and beverages).

Conditions for the Exemption: Categories of Agreements

The exemption is limited to agreements (or practices) in respect of: payment holidays and/or rental discounts; limitations on the eviction of tenants; and (cryptically) the suspension or variation of clauses in lease agreements that restrict the tenants from undertaking reasonable measures to ensure their viability during the national disaster. The types of agreements contemplated here would include, for example, an agreement between the landlords of two or more retail malls to grant all of their tenants a payment holiday for a certain period, or not to evict them for a certain period, or an agreement between a group of tenants in a mall and their landlord to negotiate a blanket rental discount for a certain period.

Exemptions must extend to all

To qualify for the exemption, such agreements must be extended to all such retail tenants, including small, independent tenants (in this context, “independent” probably refers to a retailer which is not part of a chain), if those tenants are South African. So, for example, an agreement between the landlords of two or more malls, and several clothing chains, a payment holiday would have to be extended to the independent clothing boutiques in those malls (if they were South African). This appears to be an attempt to ensure that all tenants are treated evenly, irrespective of their size.

A further requirement is that such agreements must be entered into *with the sole purpose of ensuring the survival of the tenants of the retail properties*.

Conditions for the Exemption: Involvement of the DTIC

Probably the most puzzling aspect of the regulations is that it is said that any agreement must be “undertaken” at the request of, and in co-ordination with, the Department of Trade, Industry and Competition, if it is to be exempt. This is counter-intuitive and may



be a drafting error. Nevertheless, it is there.

Communications Concerning Rentals Prohibited

The regulations specifically exclude any communications or agreements in respect of prices (read “rentals”), unless the Department of Trade, Industry and Competition has specifically authorised it. It may, for example, be necessary for landlords to share information concerning rentals in order to determine an appropriate rental holiday period or discount for their tenants. The agreement of such rentals is nevertheless prohibited, unless the Department has previously approved it.

Paper Trail

Landlords and tenants who participate in any such exempted agreements or practices must keep minutes of all meetings held and such agreements or practices must be recorded in writing.

Conclusion

Until such time as there is clarity, possibly in the form of amended regulations, landlords and tenants who wish to collectively negotiate agreements of the type contemplated by the regulations would be well advised to involve the Department of Trade, Industry and Competition before those negotiations commence.

There is also a school of thought, based on certain statements within the regulations that any such agreements (or practices) might have to be limited to the period of the national disaster. We consider that to be unlikely, but it is worth bearing in mind. That may be another good reason for involving the DTIC.

The take-out for parties seeking to conclude such collective agreements in retail categories not covered by the regulations is that they should be wary of doing so, since the authorities appear to be of the opinion that such agreements have the potential to fall foul of the Competition Act. The conclusion of similar such agreements between individual landlords and individual tenants, would ordinarily not raise significant competition law concerns, and appear to fall outside the ambit of these regulations.