



## ISSUES RELATING TO COMMERCIAL LEASING

### SOUTH AFRICA Bowman Gilfillan

#### CONTACT INFORMATION

**Bobby Bertrand**  
Bowman Gilfillan  
SA Reserve Bank Building  
60 St Georges Mall  
Cape Town  
27.21.480.7800  
[b.bertrand@bowman.co.za](mailto:b.bertrand@bowman.co.za)  
[www.bowman.co.za](http://www.bowman.co.za)

**1. Describe [National][state][territorial][provincial] or local transfer taxes payable on creation or assignment of a lease.**

Over the years the imposition of stamp duty has been reduced. Stamp duty that was payable on leases of at least five years in duration has been repealed in respect of leases entered into on or after 1 April 2009.

**2. Describe any legal restrictions limiting the maximum term of a lease (including renewals).**

There are no statutory restrictions limiting the maximum term of a lease. However, in terms of our Roman Dutch Common Law, a lease cannot be in perpetuity.

**3. Describe any laws requiring landlords to allow a tenant to renew its lease.**

There are no statutes requiring landlords to allow a tenant to renew a lease. That is normally provided by agreement in the lease.

**4. Describe any restrictions on rent that may be charged for to a tenant.**

There are no statutory restrictions on the amount of rent that may be charged for, to a tenant.

**5. Describe any laws permitting tenants to terminate a lease prior to its stated expiration date.**

There are no statutory provisions permitting tenants to terminate a lease prematurely. The lease can provide such provisions by agreement. If a landlord materially breaches the terms of a lease, the tenant can put the landlord on notice to remedy the breaches failing which the tenant can cancel the lease.

**6. Describe any laws allowing tenants to assign or sublease without landlord's consent.**

Most leases provide that a tenant may not assign or sublease without the landlord's consent. This is not governed by statute. If there is no restriction in a lease, and the tenant sublets, the original tenant remains responsible for the rent vis a vis the landlord. A tenant cannot assign his obligations under a lease without the consent of the landlord.

**7. Describe any laws allowing landlord to restrict assignments or subleases by tenants.**

This is not governed by statute but is normally a provision in the lease.

**8. What is the common form of eviction proceeding? What is the customary length of time for that proceeding?**

Eviction proceedings are actions in the Magistrate's or High Court. The time it takes depends on how much opposition to the action the tenant raises.

**9. Are there any legal restrictions on pledging a leasehold interest as security for a financing?**

A landlord may pledge a short term lease as security for funding by means of a notarial bond. A long term lease (ten years or more) which is registered in the deeds registry and recorded against the title of the leased premises may be pledged by mortgage bond registered over the notarial deed of lease.

**10. Describe any requirements for landlords to hold security deposits in separate accounts and, if such requirements exist, describe if there can be one separate account for all tenant security deposits or whether each security deposit must be held in its own separate security deposit.**

Unlike residential leases, there are no statutory requirements that deposits have to be held in separate accounts for non-residential leases.

**11. Describe any required statutory or other legal disclosures to be made to all tenants.**

Unlike residential leases, there are no statutory provisions requiring specific disclosures to be made to non-residential tenants.

**12. Describe all taxes on rent or other taxes that landlord are required to collect from tenants.**

Most commercial leases are subject to Value Added Tax at 14% which landlords collect from

tenants.

**13. Describe any limitations on the ability of landlords to exercise self-help.**

Landlords are not allowed to exercise self-help. Evictions and attachment of the tenant's movable property have to be authorized by the High or Magistrate's Court and implemented by the Sheriff.

**14. Describe whether remedies such as acceleration of rent must be expressly stated or whether they are implied.**

Such remedies must be specified in the lease agreement and do not apply in terms of statute.

**15. Describe whether there are any expedited remedies for tenant default and, if so, what lease provisions (such as waiver of jury trial, for example) would be required for a landlord to seek expedited remedies.**

There are no statutory expedited remedies for tenant default.

**16. Describe any formal requirements for the execution of a lease.**

There has to be an agreement, oral or in the writing, between the landlord and tenant as regards the parties, premises, period (even if indefinite) and rent payable.

**17. Describe whether a memorandum of lease or other document would need to be recorded for the lease to be enforceable against third parties.**

For a lease of ten years or more it has to be registered by notarial deed against the title deed for it to be enforceable by the tenant against creditors and successors in title of the landlord, see The Formalities in Respect of Leases of Land Act 18 of 1969. A lease of up to ten years does not have to be registered but the tenant has to be in occupation to enforce the lease against third parties. If a lease is registered against property that is already mortgaged, the bondholder's right ranks prior to the tenant's and, if the bondholder organizes a judicial sale in execution, the property could be (but does not have to be) sold free of the lease.

**18. Describe any restrictions on the transfer of ownership of real properties subject to a lease. Does such a transfer affect the tenant's rights or obligations?**

There are no restrictions on the transfer of ownership of leased properties. The new owner steps into the landlord's shoes. The new owner has to honour the lease for the remainder of the period in terms of the common law maxim of "huur gaat voor koop".

If the lease is not registered against the title, the tenant may only enforce the lease against third parties for up to the first ten years of the lease, unless the third party was aware of the lease when they entered into the transaction with the landlord.