

Covid-19 regulations for retail landlords

By William Fullard

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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.



Image source: www.pixabay.com

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.



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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.

The TPN Rental Recovery Pack was created specifically for this purpose, to foster negotiation and agreement between landlords and tenants in a time that is unprecedented. It is available at no cost and can be downloaded on the [TPN Shop](#).

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