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.