

It is easy to avoid problems with lease agreements

HANLIE VISSER

DEPOSITS have long been one of the major bugbears of the private rental market for tenants and landlords alike.

Tenants fear losing their deposits due to unscrupulous behaviour of landlords whilst landlords and agents fear that tenants may damage properties beyond the value of their deposit or withhold the last month's rent in anticipation of forfeiting the deposit.

Most of the problems with lease agreements and deposits occur in private rental agreements where rental agents are not involved. Most agencies nowadays have to have a trust account into which the deposit is paid and they have to take responsibility for it. Not the case when a person rents from a pri-

ivate individual and pays the deposit into his bank account. Many new tenants assume that laws govern the conditions of tenancy and leasing agreements. Not so. When it comes to your new living arrangement and your rights as a tenant, in many cases, your lease is the law. So take the time to review it carefully. If something in the lease strikes you as unfair, don't be afraid to speak up. And don't accept verbal assurances - demand to get it in writing. Make sure that all assumptions, agreements, and assurances are mutually approved, in the lease and make sure you and your landlord are on the same page, particularly regarding:

- Who is responsible for caring for the yard? Keep in mind that if you're the one responsible, you may have to invest in lawn tools - like a lawnmower.

- Who is responsible for maintaining large appliances? If the house comes with appliances like a washer, dryer, refrigerator, or oven, don't assume that these appliances will necessarily fall under the landlord's responsibility. Ensure that the lease is clear on who will fix or replace these appliances should they break.

The best time to start thinking about getting your deposit back is before you even move in! Plan strategically to protect your deposit by doing a thorough walk-through and recording any pre-existing damage. The best time to do your inspection is just before you move in, while the rooms are still empty. Create a written record by commenting as specifically as possible on the current condition of the house. If there is any existing damage, note the exact type and where it is locat-

ed. It's also a good idea to take a camera with you and take pictures. Create a visual record to back up your written list, taking detailed snapshots of all aspects of the house and property. Of course, this record won't prevent you from getting charged should you do any damage to the unit, but it can help protect you from being blamed for pre-existing damage.

The deposit is not there to be used for the last month's rent. The purpose of a deposit is to safeguard the landlord against damages to the property and by failing to pay the rent and instructing the landlord to use the deposit instead, the tenant is denying the landlord the opportunity to repair the damages caused by the tenants to the property at their costs.

The landlord is left out of pocket in that he will have no alternative but to pay for the repairs himself.

'Be clued up about property in divorce'

MARRIAGE has a limited lifespan. Sooner or later every marriage is bound to be terminated - either by a court order or by one of the spouses dying.

The allocation of immovable property is one of the crucial factors in divorce proceedings and depends on what property regime - determined by contract or, in the absence of one, by law - the couple adopted when they got married.

If you are married in community of property, the property will be registered in favour of the joint estate and so too the mortgage bond.

One option is that the property accrues to the separate estates of both parties in half undivided shares to be held in free co-ownership



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• This column does not constitute legal advice •



This would mean each retains ownership of one half of the property on an individual basis and not as spouses married to each other.

Another option is that one party transfers his half share to the other. In this case, the

party that keeps the property must apply for a new bond in his or her name alone and equal to the outstanding amount of the existing bond.

If married out of community of property the spouses will most likely own the immovable property in half undivided shares. Upon divorce, they can either sell the property or one party may transfer his half-share to the other.

The same principle as in the example above, would apply to the bond.

Common divorce settlements involve selling the immovable property by private treaty, with the nett proceeds of the sale divided between the parties and an agreement to address

the interim arrangements pending the sale. It is difficult to say in the current poor state of our economy whether to insert a time period within which the property should be sold. Normally a six-month period is allowed, failing which the property would be sold by auction.

Settlements involve selling the property

The Transfer Duty Act was amended in 2006 to provide for an exemption from transfer duty in respect of transfers between divorced spouses.

According to this exemption if the settlement agreement states that one spouse would acquire the other spouse's half share in the immovable property, no transfer duty is payable on the transaction.

'If your marriage fails, try mediation'

YOUR marriage is on the rocks and a divorce is unavoidable. Historically all divorces were litigated which meant that a legal process was followed and if a settlement was not reached, the court had to decide how the assets (and children) should be divided. There is now an alternative process that can be followed in a divorce dispute - mediation.

Mediation is a voluntary and confidential process in which a mediator assists parties in identifying the issues to be settled and helps reach a resolution.

The role of the mediator is to encourage discussion and greater understanding; and to provide the couple with information on legal and parenting issues to enable them to make informed decisions. The couple is guided



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through the complex process of divorce and the mediator helps them make decisions regarding the division of their assets, custody, visitation and maintenance. A Parenting Plan which offer a framework for divorced parents

to help them stay close to their children after separation, is mediated.

Mediation as to litigation, has a number of benefits. It costs less and the costs can be shared. If spouses were to appoint attorneys to represent them in the divorce, they would each be paying a fee which in the end, will be much more than the costs for the mediation.

It also takes less time and saves the parties a drawn out litigation with much delays.

Furthermore, it is definitely easier on the children. The worst aspect of a divorce for children is the conflict between parents. A better relationship between divorcing parents will ensure the children experience less trauma.

The parties control the mediation process and because of this, the agreements made in

mediation typically work better than those made by the courts.

A colleague and I recently had the privilege to mediate a divorce of a couple who was really determined to make it work. Midway in the process, the husband stumbled on a brilliant idea namely the credit card system where a credit account is opened and all expenses of the children are paid from this account. At the end of each month, each party contributes a *pro rata* share to the amount owed. This is but one example of the good that can come from approaching divorce in a mature manner.

Mediation is not a final process in that, should the parties not be able to reach a settlement, they can still go to court. In most of the cases however, a settlement will be successfully negotiated.

'Don't take wedding contract lightly'

MANY couples choose to get married in the SA's good-weather months. For all these couples, an important decision will be which proprietary system - getting married in or out of community of property - to choose.

If you don't draw up an antenuptial agreement in SA then your marriage automatically defaults to in community of property, and the state assumes all assets and liabilities will be shared. This may sound lovely and more in line with the spirit of marriage, but look at the implications. If one goes into debt, creditors have claim to all of both parties' assets. There is no financial independence as with certain transactions, such as the sale of shares, the consent of the other party must



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be obtained. If one partner should die, the estate of both the deceased and surviving partner will be wound up because it is a joint estate - not great for the surviving partner who will find themselves in legal limbo for

a while.

An antenuptial contract (ANC) is drawn up when you are married out of community of property and it governs what will happen to all assets and liabilities on death or divorce.

You need to consider this carefully and without the emotions of being swept up in your prospective wedding.

Consider situations

An attorney will be able to guide you through the process, but you need to consider situations such as if the wife decides to stay at home and the husband retains control of the finances and assets; if one person becomes insolvent; are you prepared to share assets accumulated before your marriage;

what happens if you divorce?

An important point to remember is that an Ante Nuptial Contract must be signed before the marriage is concluded and must be signed in the presence of a notary and two competent witnesses.

Costs vary

The notary will then register the contract in the local registry of deeds. The costs of Ante Nuptial Contracts vary considerably. Most attorneys calculate their costs on a "time-spent" basis and a fair cost for an Ante Nuptial Contract should include at least two hours of your attorney's time. Be careful for clumsy wording which can be a cause of great dispute later on.

'Contracts apply to same-sex marriages'

THE first lesbian divorce in SA was finalised in the Cape High Court recently. The marriage lasted less than a year.

According to Dutch government statistics, the divorce rate of gay and lesbian couples in the Netherlands, where same-sex marriage has been legal since 2001, is nearly identical to that of heterosexual couples.

In the light of this, it is important to note the proprietary consequences of a homosexual divorce.

In 2006 the constitutional court ruled it was unconstitutional to deny gay couples the same legal benefits as spouses of opposite gender, and gave parliament one year to rectify the legislation. As a result of this, the Civil Union Act came into effect at the end of 2006.



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Few members of the public realised that over the past few years, even without the protection of the Civil Union Act, the legislation has been broadened to define a spouse as the partner in a relationship not concluded within

the Marriage Act, either of the same or the opposite sex, for purposes of the Estate Duty Act, the Maintenance of Surviving Spouses Act and the Intestate Succession Act.

The Civil Unions Act in no way replaces the Marriage Act.

Rather it affords couples engaging in a civil union the same rights that a heterosexual couple would enjoy in a legal marriage. Just as a heterosexual couple would be married either in community of property or out of community of property (including or excluding the accrual system) so the same principle applies to civil unions.

A same-sex couple needs to discuss the conditions of their union as the principles of an ante-nuptial contract, or absence thereof, apply to them as well. This is of vital impor-

tance for same-sex couples married by civil union who are seeking to purchase property, especially in view of the circular of the Registrar of Deeds which states that the fundamentals remain the same as they would for any other married couple.

In theory, the same rules would also apply to couples united in terms of the act who sought to terminate their union by divorce. The basis for seeking a divorce is the same in that it must be proved that the marriage relationship has broken down irretrievably and that there is no prospect that it can be restored.

The same principles regarding division of the estate will apply to same-sex marriages and the maintenance obligation of one party towards the other remains unchanged.