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The duties and rights of tenants and landlords under Swiss
and South African law – A comparative analysis

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List of Abbreviations

art	article
BGE	Bundesgerichtsentscheid (Swiss Federal Tribunal Decision)
Cf	conferre (compare)
CPA	Consumer Protection Act 68 of 2008
E.	Erwägung (consideration)
ESTA	Extension of Security of Tenure Act 62 of 1997
et sqq.	et sequentes (and the following)
fn	footnote
GDP	Gross Domestic Product
GN	Government Notice
HEV	Hauseigentümerverband (association of home owners)
LLA	Leases of Land Act 18 of 1969
MG	Entscheid des Mietgerichts (decision of the Court for Landlord and Tenant Law)
mp	Mietrechtspraxis (Swiss legal periodical)
OGer	Entscheid des Obergerichts (decision of the Cantonal Supreme Court)
OR	Bundesgesetz betreffend Ergänzung des Schweizerischen Zivilgesetzbuches (fünfter Teil: Obligationenrecht) (Swiss Code of Obligations)
PIE	Prevention of Illegal Eviction
RHA	Rental Housing Act 50 of 1999
RHT	Rental Housing Tribunal
s	section
SchKG	Bundesgesetz über Schuldbetreibung und Konkurs (Swiss Federal Act on Debt Collection and Bankruptcy)
UN	United Nations
VMWG	Verordnung über die Miete und Pacht von Wohn- und Geschäftsräumen (Swiss Ordinance on the Rental and Letting of Residential and Business Premises)
ZMP	Zürcher Mietrechtspraxis (Swiss legal periodical)
ZPO	Zivilprozessordnung (Swiss Civil Procedure Code)

1 INTRODUCTION

1.1 Background to the thesis

In comparison with other European and international countries, Switzerland has long had a relatively high proportion of tenants, and thus in the public consciousness been considered as the 'land of tenants'. In fact, up until the beginning of this millennium in the Swiss Confederation around 66 per cent of inhabitants were tenants.¹ This is mainly due to the Swiss housing market being historically characterised by low supply and high demand. This has its cause mainly in the steady growth of the population during the post-Second World War period that was strongly influenced by the rise in immigration, the altered housing needs as a result of changes in the working environment, and above all the scarcity of land.² In recent years, however, by virtue of the promotion of construction activity by the communal and cantonal administrative bodies³ as well as very low mortgage rates, the number of homeowners has been significantly increasing at the expense of the number of tenants. Nevertheless, at the end of 2013 around 59 per cent of all Swiss households were still renting.⁴ Thus the rental market is still one of the biggest markets in the Swiss economy.⁵ And precisely for that reason, it is extremely important that the rent legislation is well-balanced, taking into account the interests of the tenant and landlord in the best possible manner.

¹ See data and indicators of the Swiss Federal Statistical Office available at <http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/bewohnertypen/entwicklung.html>, accessed on 3 July 2015.

² See also D Lachat, D Stoll & A Brunner *Mietrecht für die Praxis* 8 ed. (2014) at 3.

³ In Switzerland between the years 2000 and 2010 242'000 new condominiums have been built. See M Heim 'Abschied vom Land der Mieter' (01. Juni 2013) available at <http://www.schweizamsonntag.ch/ressort/wirtschaft/3000/>, accessed on 4 July 2015.

⁴ See data and indicators of the Swiss Federal Statistical Office supra (n1).

⁵ See also JP Thomsen 'Die Revision des Mietrechts – Wieso findet seit 1997 keiner der Vorschläge zur Revision des Mietrechts keine Mehrheit?' (2008) at 3, available at http://www.kpm.unibe.ch/content/ausweiterbildung/executive_mpa/dateien/e13808/e13853/ThomsenJean-Pierre.pdf, accessed on 7 July 2015.

In South Africa, on the other hand, data estimate that around 20 per cent of all households do in rent.⁶ However, this does not mean that nowadays the rental housing market in South Africa does not play as important a role as in Switzerland. Indeed, the case is precisely the opposite. The overall South African rental market has gained increasing significance since the era of apartheid, in which black Africans were only allowed to live in rental housing in the townships⁷ and housing construction for those was brought to a stop⁸ (something which has substantially contributed to the phenomenon of backyard shacks).⁹ In order to resolve the currently dire housing conditions, further aggravated by ongoing urbanisation, the new democratic government has taken major steps to increase home ownership amongst poor people by promoting capital housing subsidies on the one hand, and making available affordable social rental housing units of adequate quality for people with low and moderate incomes on the other.¹⁰ Notwithstanding the above, the private rental sector has also experienced a considerable boost during the post-apartheid period. This can primarily be explained by the economy's growth¹¹ and the stimulation of tourism¹², but

⁶ L Scholtz 'Why is There Not Enough Affordable Rental or Social Housing for the Poor in South Africa's Cities?' (7 May 2014) at 1, available at <http://www.sacsis.org.za/site/article/1996/print>, accessed on 6 July 2015. It is even assumed that the overall rental sector in South Africa in reality accounts for 42 per cent of households. See M Huchzermeyer 'Regulated rental sector can meet the urban housing challenge in Private Sector & Development' Proparco's Magazine (July 2014) at 14, available at http://www.proparco.fr/webdav/shared/PORTAILS/Secteur_privé_developpement/PDF/SPD19/Proparco_SPD_19_UK.pdf, accessed on 6 July 2015.

⁷ See UN-HABITAT report 'Rental Housing - An essential option for the urban poor in developing countries' (2003) at 215, available at <http://www.urbancentre.utoronto.ca/pdfs/elibrary/UNHabitatRentalHousing.pdf>, accessed on 6 July 2015.

⁸ Y Shapurjee, A le Roux & M Coetzee 'Backyard Housing in Gauteng: An analysis of spatial dynamics' (2014) 64 *Town and Regional Planning* 19 at 20.

⁹ See UN-HABITAT op cit (n7) at 215.

¹⁰ See also Scholtz op cit (n6) at 1-2.

¹¹ According to the Statistics South Africa the Gross Domestic Product (hereinafter GDP) in the country averaged roughly 3 per cent from 1995 till 2015. See Trading Economics

also by the enactment of the Rental Housing Act 50 of 1999 (hereinafter RHA) which aimed, inter alia, to promote private rental housing investments.¹³

Therefore, in order to make a considerable contribution towards the social well-being of the population for the rental housing market of both countries, a functioning rent legislation that enables the accessibility to rental housing in general, and guarantees the protection of the tenants without neglecting the legitimate interest of the landlords in particular, is crucial. Indeed, both countries, although having two different legal systems¹⁴, can fall back on rent legislation that has been developed over several decades.

As a part of South African private law in general and contract law in particular, rent law has always been strongly shaped by the principles of common law.¹⁵ However, the ongoing development of legislation has resulted in no field of law in South Africa being solely governed by common-law principles.¹⁶ In particular, the Roman-Dutch law¹⁷, the genesis of common

Portal available at <http://www.tradingeconomics.com/south-africa/gdp-growth>, accessed on 6 July 2015.

¹² The South African tourism contributes over 9 per cent of the country's GDP and supports over 1.4 million jobs. See South African Tourism Strategic Plan 2015-2020 at 2, available at http://www.southafrica.net/uploads/files/Annual%20Reports/78449_STRATEGIC_Plan_03.08.2015.pdf, accessed on 6 July 2015

¹³ UN-HABITAT op cit (n7) at 218.

¹⁴ Whereas the Swiss Confederation belongs to the Civil law legal tradition, having a comprehensive and codified system of rules, the Republic of South Africa is defined as a mixed legal system comprising principles and rules of Roman-Dutch law influenced by the English law and adapted to the local needs through the decisions of the courts.

¹⁵ See also G Bradfield & K Lehmann *Principles of the Law of Sale & Lease* 3ed (2013) 136.

¹⁶ F du Bois 'Sources of law: Common law and precedent' in F du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 65.

¹⁷ For a detailed historical overview of Roman-Dutch law, see du Bois op cit (n16) at 67-76.

law in South Africa, still has a considerable influence on domestic legislation.¹⁸

The first relevant rent legislations have their origin in the period of the First and Second World Wars, and were essentially a reaction to the serious lack of housing caused by them.¹⁹ In fact, the Acts No. 7 of 1920 and No. 33 of 1942, both intended to be temporary war measures, protected tenants against eviction and exorbitant rents.²⁰ Worth mentioning is also the Act No. 26 of 1940, which extended the principles of the rent controls acts to business premises, something of a novelty at the time.²¹ In subsequent years, various other rent amendment acts were enacted.²² In the late 1970s, landlords were considerably limited in the exercising of their rights.²³ Consequently, the landlords, supported by the Apartheid regime, organised a powerful campaign that resulted in a regulation according to which rent control was significantly restricted.²⁴ It followed that nearly all housing located in neighbourhoods populated by white people was released from rent control at the beginning of the 1990s.²⁵ In subsequent years, efforts have been made to reform the rent law²⁶, this also in order to meet the principles set forth in the new Constitution of 1996, according to which, inter alia, everyone has the right to have access to adequate housing.²⁷ As a result, first the RHA²⁸ was enacted and came into force on 1 August 2000.²⁹ This new act

¹⁸ Du Bois op cit (n16) at 66.

¹⁹ REG Rosenow & MA Diemont *THE RENTS ACT IN SOUTH AFRICA* 3ed (1965) 1.

²⁰ Rosenow & Diemont op cit (n19) at 1 and 5.

²¹ Rosenow & Diemont op cit (n19) at 5.

²² For a detailed overview, see Rosenow & Diemont op cit (n19) at 1 et sqq.

²³ SI Mohamed *Tenant and Landlord in South Africa* 2ed (2010) 7-8.

²⁴ For details, see Mohamed op cit (n23) at 8.

²⁵ Ibid.

²⁶ Mohamed op cit (n23) at 8-9.

²⁷ See s 26 (3) Constitution of the Republic South Africa, 1996.

²⁸ The key functions can be found in the chapters 2, 3 and 4, which first force the government to promote the rental housing market in its growth and access, secondly determine the relations between landlords and tenants and thirdly set rules for the establishment of provincial rental housing tribunals. Additionally, the said act also mainly

finally revoked and replaced the laws of rent controls in existence for the last 80 years.³⁰ Secondly, specialised tribunals with a simplified procedure³¹ and services free of charge, known as Rental Housing Tribunal (hereinafter RHT), were established in the various provinces of South Africa.³² These are solely and exclusively competent for complaints of 'unfair practices'³³ lodged by tenants or landlords³⁴ and whose rulings are subject to appeal and enforcement, unless they are final or exceptionally not enforceable.³⁵

In Switzerland, rent law, as one of the various types of regulated contractual relationship governed by the private law, was codified in 1881

lays down procedural and formal conditions that obligatorily must be complied with by the landlords and tenants.

²⁹ After having been amended in 2008, yet only insignificantly, more substantially changes will prospectively be introduced by the Rental Housing Amendment Act of 2014 which to date is not yet effective. In the main, this new act will increase the protection of the tenants especially by introducing the duty of written rental contracts, further by obliging the municipalities to establish Rental Housing Information offices in order to advise tenants and landlords, and, finally, by professionalizing the training of the members of the Rental Housing Tribunals. See SI Mohamed 'Tenant Issues' available at http://www.iol.co.za/dailynews/consumer/tenant-issues-1.1778258#.VWbvWM_tmko, accessed on 28 May 2015.

³⁰ Mohamed op cit (n23) at 9.

³¹ The procedure is mainly divided into three steps, consisting of a conduct of preliminary investigations, a performance of a mediation and a conduct of a hearing combined with a making of a decision. For a more detailed description, see s 13 RHA.

³² An up-to-date list of the current RHTs is available at <http://www.ocr.org.za/content/rhts.pdf>, accessed on 29 May 2015.

³³ Pursuant to s 1 of the 2008 adjusted RHA the term 'unfair practices' means any '*act or omission by a landlord or tenant in contravention of this Act or a practice described as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord*'. Today, specific examples of unfair practices are listed in many provincial regulations, the adoption of which are assigned to provincial authorities. See s 15 (1) (f) RHA.

³⁴ S 13 (1) RHA.

³⁵ For details, see s 13 (13) RHA read together with s 61 et sqq. and 82 et sqq. of the Magistrate's Court Act 32 of 1944.

together with the adoption of the Swiss Code of Obligations (hereinafter OR). Thereafter several reforms amended and supplemented the rent legislation.³⁶

In 1911, with the amendment of the OR regarding the rent law, new provisions of socio-political importance were introduced, such as the right to termination of contract in case of defects harmful to health. During and after the years of the First and Second World War, rent law was characterised by Federal Acts restraining the rent and termination rights of the landlords. In 1972, due to the worsening situation on the rental housing market, the Federal Council imposed measures against abuses in rental matters. Subsequently, the protection of the tenant was additionally reinforced by determining special protection provisions against the termination of rent contracts on premises rented by families. Further, in 1990 the rent law was completely revised. With the revision, a new restructuring of the relevant rent provisions in four sections was implemented. Moreover, the Federal Act against Abuses in the Rental Market was integrated into the OR and renamed Ordinance on the Rental and Letting of Residential and Business Premises (hereinafter VMWG). Between 1990 and 2004, various other reform efforts were made, in particular at breaking the dependence of rent on mortgage interest rates, but without success. Finally, in addition to two minor amendments of the above-mentioned ordinance, the procedural rent provisions in the OR were repealed in the recent past with the ratification of the Swiss Civil Procedure Code (hereinafter ZPO).³⁷

Another key achievement of the socially shaped rent legislation is the introduction of specific conciliation authorities which include both tenant and

³⁶ For a detailed overview, see H Rohrbach 'Die Entwicklung des schweizerischen Mietrechts von 1911 bis zur Gegenwart' (Mai 2014) at 4-21, available at <http://www.bwo.admin.ch/themen/mietrecht/index.html?lang=de&download=NHZLpZeg>, accessed on 7 July 2015.

³⁷ Currently, a partial amendment of the rent law is in planning, which mainly enhances the transparency in the event of a re-letting. For details, see Botschaft zur Änderung des Obligationenrechts (Schutz vor missbräuchlichen Mietzinsen) available at <http://www.news.admin.ch/NSBSubscriber/message/attachments/39515.pdf>, accessed on 7 July 2015.

landlord representatives³⁸ and primarily aim to reach a consensual agreement between the arguing renting parties in an informal manner.³⁹ Furthermore, some cantons⁴⁰ even provide a specific court, the so-called Court for Landlord and Tenant Law, which exclusively deals with matters concerning rent law and likewise are equally represented.

1.2 Aim, methodology and structure of the thesis

To what extent the two rental legislations can currently be considered as progressive and practical will be examined with the help of this thesis by performing a comparative analysis of the principal rights and obligations of the landlords and tenants (mainly relating to residential and commercial leases), which are granted and imposed by each jurisdiction.⁴¹ Thereby, in order to gain a better understanding of these rights and obligations, not only is a minimum amount of knowledge about the essence of contracts between landlord and tenant required, but if necessary certain procedural aspects in connection therewith need to be considered. Accordingly, before looking concretely at the specific rights and duties of the renting parties in both countries alongside the determination of the applicable law, a brief introduction to the nature and formation of the contract between the landlord and tenant of each jurisdiction will be provided. With regard to the granted rights, particular attention will also be paid to the several solutions which are available to one contracting party in case of non-performance of the contractual and legal obligations by the other party. Finally, an assessment will be made on whether (and if so, which rules of) the Swiss rent legislation can serve as a role model or basis for an improvement and further development of the South African rent legislation, and vice versa, by pointing out their similarities and differences, and strengths and weaknesses.

³⁸ See art 200 ZPO.

³⁹ See art 201 ZPO.

⁴⁰ These are the cantons of Zurich, Geneva, Waadt, Freiburg and Jura.

⁴¹ It must be kept in mind that a rent contract, like others contract governed by the private law, may grant additional rights or impose further obligations to the parties. These, however, are only treated by this thesis if needed.

As mentioned earlier, the Swiss rent law is of great importance because it affects various interests which may often lead to goal conflicts and political disputes. Therefore, to some extent it is surprising that, to date, the Swiss rent law has been subjected to little in-depth comparison with the rent law of other legal systems. In particular, it appears that an in-depth comparative analysis with a rent law of a different legal system, especially a mixed legal system (as the South African system examined in this thesis), where civil law elements strongly interact with common-law principles, is lacking. Hence, by comparing the rent laws of the two countries, this analysis shall incidentally also help to gain a better comparative understanding of the two legal systems in question.

For the sake of clarity, here it may also be briefly noted that the structure of the two countries has a very low influence on the present comparative analysis. In Switzerland the rent law is mainly a federal matter. Thus in terms of rights and obligations of the tenants and landlords, the 26 cantons have barely any legislative power. They may only introduce an additional obligation to the landlord in connection with the conclusion of the rent contract if certain conditions are met (see 3.3.2). The situation is similar in South Africa, where the provincial departments are, *inter alia*, entitled to release regulations relating to unfair practices (see above footnote 33). The existing regulations, however, do not differ substantially from each other, since for the most part they are a summary of the parties' rights and duties under common law.⁴²

This comparative analysis is mainly based upon the study of the information collected in the relevant national acts, codes or regulations, the current most important legal books and journals, academic articles and leading case law, all being regularly acknowledged and referenced. For reasons of readability and simplicity this thesis uses the male form of words with respect to the parties of the contract between the landlord and tenant.

⁴² See also Bradfield & Lehmann *op cit* (n15) at 172.

However, the female form is always intended. Moreover, for the sake of clarity and ease of comparison, in this work the landlords' and tenants' rights and obligations of the two legislations are treated separately, especially as they might not be always congruent from a legal perspective. Finally, in what follows, the term 'rent law' will be used to indicate the law governing the rental matters; the terms 'rent contract' and 'lease' to indicate the contract between the landlord and tenant; the term 'rent' to indicate the compensation to be paid by the tenant for the use of the rented premises; and the term 'property' to indicate the immovable property, since this work is only concerned with the landlords' and tenants' rights and obligations relating to immovable properties. Lastly, the term 'let' is used as a synonym for the verb 'rent' and the terms 'premises' and 'housing' as a synonym for the word 'property'.

The thesis is divided into five main chapters: Following this introduction (the first chapter), the second chapter will present the South African rights and duties of tenants and landlords. The third chapter will then outline the same rights and duties in Switzerland. By analysing the rights and obligations in question the fourth chapter will provide an assessment accompanied by some recommendations, while the fifth and final chapter will end with a few concluding remarks. In the second and third chapters, the obligations of the renting parties will be discussed before their rights, with the latter further divided into substantive rights and remedies (both with subchapters as required).

2 LEGAL SITUATION IN SOUTH AFRICA

2.1 Relevant sources of rent law

Today, in matters relating to the rent law other statutes alongside the RHA should be taken into account:⁴³

One of these is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter PIE). Another can be found in the Extension of Security of Tenure Act 62 of 1997 (hereinafter ESTA). In terms of the above-named statutes, it is particularly worth mentioning that (as with the RHA) the application of both acts is limited to leases for residential use, while they are rather more concerned with the legal entities of owner and occupier than landlord and tenant.⁴⁴

An important role in the context of leases may likewise be played by the Consumer Protection Act of 2008 (hereinafter CPA) which, unlike the other acts, applies to residential and commercial leases, provided that the parties involved in a renting arrangement fulfil the qualifications of supplier and consumer as well as the lease occurring in the ordinary course of the landlord's business.⁴⁵ Besides, the National Credit Amendment Act 19 of 2014 or the Formalities in Respect of Leases of Land Act 18 of 1969 (hereinafter LLA) may also be of significance.

In spite of these numerous statutes that require consideration within the scope of the rent law, the common-law principles nevertheless remain the primary source of the regulation of relationship between landlords and tenants. Namely, this is in the sense that the commercial leases are

⁴³ See Bradfield & Lehmann op cit (n15) at 137.

⁴⁴ Ibid.

⁴⁵ S 1 read together with s 5 (1) CPA.

exclusively governed by common law, while the residential leases are subjected to the common law altered by the rules of the relevant acts.⁴⁶

2.2 Definition, nature and formal requirements of the rent contract

Relating to the properties let, a rent contract is generally defined as an agreement between one party, usually known as 'landlord', and another party, the so-called 'tenant', with the former allowing the latter the temporary use and enjoyment of the property in return for the payment of a rental sum.⁴⁷ Since both parties are liable to perform, the rent contract is classified as a reciprocal agreement.⁴⁸

In order for the rent contract to come into effect, consensus of both parties on its essential features is required, meaning which property is to be let, the temporary use and enjoyment of it, and the rent to pay in return.⁴⁹ Consequently, if the parties disagree on one of these three elements, no rent contract will be concluded.

It is further important to note that while the property (which must be identified or at least identifiable) can be rented in its entirety or in part⁵⁰, the right of use and enjoyment does not offer an authorisation of consumption in its substance, not even partially.⁵¹

Equally noteworthy is that in terms of duration, being not a necessary component of the contract, the lease may first be limited in time, secondly unlimited, or thirdly at the will of the landlord or tenant or both.⁵² An exception

⁴⁶ Bradfield & Lehmann op cit (n15) at 136.

⁴⁷ See *SA Pulp and Paper Industries (Sappi) v CIR* 1955 (1) SA 8 (T) at 11.

⁴⁸ WE Cooper *Landlord and Tenant* 2ed (1994) 2-3.

⁴⁹ AJ Kerr *The Law of Sale and Lease* 3ed (2004) 245-246.

⁵⁰ Kerr op cit (n49) at 249-250.

⁵¹ See *SA Pulp and Paper Industries (Sappi) v CIR* supra (n47) at 12A-B.

⁵² For details, especially for the question whether or not a lease may be concluded 'in perpetuity', see G Wille *Landlord and Tenant in South Africa* 5ed (1956) 44-55.

to this common-law principle is made when the parties of the lease fall within the scope of the CPT.⁵³ Finally, it is the general opinion of the courts⁵⁴ and most scholars⁵⁵ that the rent can be paid either in money or exceptionally in a share of produce where agricultural land has been rented.

The basic rule for the formation and validity of a rent contract is that no formalities are required.⁵⁶ Thus, a lease can generally also be concluded orally or implicitly between the parties. There are, however, some exceptions to the validity of the informal rent contract (see 2.6.1.1). Moreover, the tenant and landlord may of course provide the written form as a formal requirement.⁵⁷

2.3 The obligations of the landlord

2.3.1 Delivery of the property

In order that the tenant may use and enjoy the property let by the landlord, the latter first has the duty to deliver the property to the tenant.⁵⁸ Expressed differently, the tenant gains physical control over the premises.⁵⁹ Thus, where the lease involves premises, the delivery takes place through the delivery of the keys, and normally comprises other facilities and accessories needed for the use and enjoyment of the property.⁶⁰

⁵³ Subject to s 4 (1), (2) (a) and (4) CPT read together with s 5 (1) (a) of the Consumer Protection Regulations, No 34180 of 1 April 2011, fixed-term leases between a consumer (not being a juristic person) and a supplier may not exceed a duration of 24 months, unless a longer period is clearly agreed with the consumer and the supplier can show a verifiable financial benefit to the former.

⁵⁴ See, for example, *Jordaan No v Verwey* 2002 (1) SA 643 (E) at 645.

⁵⁵ See, for example, Wille op cit (n52) at 35 and Bradfield & Lehmann op cit (n15) at 140.

⁵⁶ Cooper op cit (n48) at 69.

⁵⁷ Cooper op cit (n48) at 75.

⁵⁸ Wille op cit (n52) at 129.

⁵⁹ Ibid.

⁶⁰ *Wireless & General (Pvt) Ltd v Arjay Investments (Pvt)* 1971 (4) SA 174 (R) at 176F-177A.

Furthermore, the property let not only has to comply with the description in the rent contract⁶¹, but (according to the precedents) it is to be initially delivered '*in a condition reasonably fit for the purpose for which it has been let*'.⁶² In the *Mpange* case⁶³ the court held that this duty is not fulfilled when a tenant is exposed to any unnecessary risk of harm to life and the premises in question do not ensure safe occupation due to its dirty and unrepaired condition.

For residential leases, the property let must be acceptable for living conditions, which simply means that it has to be suitable for human habitation.⁶⁴ The landlord shall deliver the property on the agreed date.⁶⁵ In the absence of such an agreement, the delivery has to take place immediately after conclusion of the contract or on a date determined by an existing local custom.⁶⁶

2.3.2 Maintenance of the property

The right of a beneficial use of the property let belonging to the tenant⁶⁷ basically requires the landlord to maintain the rented premises in a fit condition during the lease.⁶⁸ For this purpose, all important parts of the property, such as doors, windows or roof and other items that are specifically let, must be repaired or replaced by the landlord in the event of damage during the lease.⁶⁹

Naturally, repair or replacement requires that first the landlord should have knowledge of the defective premises (which is why he is regularly

⁶¹ Kerr op cit (n49) at 294.

⁶² *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A) at 150H.

⁶³ *Mpange v Sithole* 2007 (6) SA 578 (W) at 587.

⁶⁴ See s 13 (4) RHA.

⁶⁵ Kerr op cit (n49) at 295.

⁶⁶ Ibid.

⁶⁷ See *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd* 1999 1 SA 796 (W) at 801H.

⁶⁸ See *Nisenbaum and Nisenbaum v Express Buildings* 1953 (1) SA 246 (W) at 249.

⁶⁹ Cooper op cit (n48) at 99.

reliant on a corresponding notice of the tenant). Secondly, the landlord has the right to unrestricted access to the housing⁷⁰ and, if necessary, even to ask the tenant to vacate the premises.⁷¹ In this last case, the landlord is normally obliged to continue with the lease⁷² and to give a reasonable notice to the tenant for the vacation of the premises before commencing repairs.⁷³ The tenant may also claim the contract termination only exceptionally.⁷⁴ However, for the deprivation of the use and enjoyment of the housing he is at least relieved from paying the rent, unless before his moving in he already knew of the needed repairs related with temporarily discomfort or the repairs are done within a short span of time, respectively, causing only little trouble.⁷⁵

Furthermore, in the context of the obligation to maintain the premises in proper conditions it is worthwhile mentioning that the landlord does not have to undertake measures which improve the property.⁷⁶ Moreover, the liability belongs to the tenant, and thus the landlord's duty to repair or replace does not apply, in case of minor repairs or where damages are caused by him, whether he does so intentionally or negligently, or by other persons⁷⁷ for whom he is responsible.⁷⁸ Incidentally, by derogation of the landlord's common law duty of maintenance, the parties may also determine in an express contract clause that the tenant is responsible for repairs and replacement of damage to the property occurring during the lease period.⁷⁹

⁷⁰ Ibid.

⁷¹ Wille op cit (n52) at 155-156.

⁷² See exemplarily *Murphy v Sullivan* 1934 CPD 387 at 389.

⁷³ Cooper op cit (n48) at 124.

⁷⁴ See *Shapiro v Yutar* 1930 CPD 92 at 95.

⁷⁵ Wille op cit (n52) at 156.

⁷⁶ Wille op cit (n52) at 152.

⁷⁷ In terms of residential leases s 4 (5) RHA lays down that visitors of the tenant are included.

⁷⁸ Wille op cit (n52) at 153.

⁷⁹ For details, see Cooper op cit (n48) at 112-118.

2.3.3 Warranty of undisturbed use and quiet enjoyment of the property

The landlord is committed to granting the tenant an undisturbed use and quiet enjoyment of the premises let.⁸⁰ To this end, first he is obliged to refrain from any actions which could disturb or hinder the convenient use and enjoyment⁸¹ of the property. This for instance includes entry and access to the rented premises without the consent of the tenant⁸² or the exclusion of the latter from the property let or the deprivation of him from the use thereof by locking the door and taking possession of the keys⁸³ or by cutting off the electricity, even in case of non-payment of the rent.⁸⁴ Secondly, the landlord has to ensure that any other person who claims to have a superior right relating to the rented property does not interfere with the tenant's use and enjoyment of it, which also includes the guarantee of not being evicted from the rented premises.⁸⁵ From this it follows that if the interference comes from a person without claiming any title, the landlord is not bound to any kind of guarantee.⁸⁶

2.3.4 Payment of fees and taxes

Unless the rent agreement stipulates otherwise and subject to binding provisions laid down by act, the landlord is liable for the payment of the governmentally imposed tax and rates relating to the property, while the tenant covers the fees that are enforced upon the proceeds from the property.⁸⁷ From the payment obligation of the landlord, it follows that the tenant cannot be sued by the competent authorities in the event that the

⁸⁰ Bradfield & Lehmann op cit (n15) at 150.

⁸¹ Ibid.

⁸² See *Soffiantini v Mould* 1956 (4) 150 (E) at 153E-F.

⁸³ See *Nino Bonino v De Lange* 1906 TS 120 at 122-123.

⁸⁴ See *City of Cape Town v Strumpher* 2012 (4) SA 207 (SCA) at 2014-B; *Anva Properties CC v End Street Entertainment Enterprises CC* unreported case no 22109/2014 (14 April 2015) at 5.

⁸⁵ Kerr op cit (n49) at 345.

⁸⁶ Kerr op cit (n49) at 347.

⁸⁷ Cooper op cit (n48) at 132.

former fails to pay the imposed tax debt.⁸⁸ The same applies where the charge is not settled by the tenant himself, although bound by contract.⁸⁹ Here, however, the landlord certainly may ask the tenant for a refund if he is obliged to pay.⁹⁰ He may also terminate with immediate effect the lease, provided that the default of payment of the tenant can concretely be considered as a serious breach that entitles to a contractual termination with immediate effect.⁹¹

2.4 The obligations of the tenant

2.4.1 Payment of the rent

From the bilateral nature of the rent contract, it follows that for the use and enjoyment of the premises let the tenant is primarily obliged to pay a rent to the landlord.⁹² The parties may not only stipulate which means of payment shall be used for the settlement of the rent due, but also the time and place of the payment.⁹³ In the absence of such an agreement, the payment of the rent is to be performed in South African currency⁹⁴ and in arrears.⁹⁵ Additionally, when the place of payment has not been agreed upon, the tenant may, to put it in simple terms, choose any convenient place to lawfully perform his payment obligation in order to make sure that the landlord obtains the rent on time.⁹⁶ A payment of the rent by means of set-off is also conceivable.⁹⁷

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Cooper op cit (n48) at 133.

⁹¹ Ibid.

⁹² For residential leases, see s 4 (a) and (b) RHA.

⁹³ For details, especially for the possible variations of time and place of payment that may be stipulate, see Cooper op cit (n48) at 154-156.

⁹⁴ See *Esterhuysen v Selection Cartage* 1965 (1) SA 360 (W) at 361.

⁹⁵ For details, see Kerr op cit (n49) at 359-361.

⁹⁶ See exemplarily *Venter v Venter* 1949 (1) SA 768 (A) at 778.

⁹⁷ For details, see Wille op cit (n52) at 175-176.

Finally, in return for the payment of the rent the tenant may ask for a receipt, which is a piece of evidence of payment of the amount stated therein.⁹⁸

2.4.2 Proper use and appropriate care of the premises

In general, the tenant may use the premises only for the purpose stipulated in the rent contract or, lacking such a clause, for the purpose for which it was utilised in the past or which it is intended to naturally be used.⁹⁹ Nevertheless, the tenant is basically not obliged to use and keep using the property let, unless an explicit agreement to the contrary forces him to do so.¹⁰⁰ However, where the premises let are effectively used, which normally is the case, the tenant is obliged to use them not only in conformity with their purpose, but also in a proper manner¹⁰¹ or, to be more accurate, according to a standard of care which a head of household would use in his own property.¹⁰²

Moreover, if the tenant lives in a tenement where other tenants occupy other flats, the right of using the premises let is limited to such an extent that the ordinary use and enjoyment of the premises inhabited by the other tenants is not impaired, but still ensured.¹⁰³

Further, a tenant wishing to alter the rented property needs the consent of the landlord, except when the changes are merely superficial or a clause in the rent contract gives the tenant the corresponding right.¹⁰⁴ The tenant's diligence due on the use of the property let, however, does not normally comprise an obligation of maintenance and repair, as this belongs to the landlord's field of duty (see 2.3.2).

⁹⁸ Wille op cit (n52) at 176.

⁹⁹ Cooper op cit (n48) at 207.

¹⁰⁰ *Foodtown Inc v Florenca* 1974 (1) SA 635 (A) at 639G.

¹⁰¹ Cooper op cit (n48) at 208.

¹⁰² *Manley von Nierek (Pty) Ltd v Assegai Safaris and Film Productions (Pty) Ltd* 1977 2 SA 416 (A) at 423B-C.

¹⁰³ Cooper op cit (n48) at 208.

¹⁰⁴ Wille op cit (n52) at 235.

2.4.3 Restoration and restitution of the property

With the termination of the lease, not only the tenant's right to use and enjoy the premises let ceases, but he is also faced with the obligation to return the property to the landlord by vacating it, removing all personal items, and returning all the keys belonging to the premises.¹⁰⁵ Consequently, if at the end of the lease the tenant abandons the rented premises, but leaves some of his goods therein or does not deliver all keys to the landlord, the premises may be considered as not yet restored.¹⁰⁶

Additionally, the tenant is under the duty to return the premises let in the same condition in which they were obtained, unless otherwise agreed and excluding a worsening of the status resulting from reasonable wear and tear.¹⁰⁷

2.5 The rights of the landlord

2.5.1 Substantive rights

2.5.1.1 Rights of access

Alongside the right to access the property in order to perform necessary repairs, the landlord is also entitled to occasionally inspect the premises subject to the condition that he announced the inspection to the tenant in advance.¹⁰⁸ Besides, the landlord also has a right to show the premises to potential tenants when the present lease is expiring.¹⁰⁹

2.5.1.2 Termination of the lease

Concerning the termination of the lease under common law, the landlord may terminate periodic leases by giving reasonable notice, whereby

¹⁰⁵ Kerr op cit (n49) at 214.

¹⁰⁶ See, for example, *Bourbon Leftley v Turner* 1963 2 SA 104 (C) at 107C-D.

¹⁰⁷ Kerr op cit (n49) at 414-415. For residential leases, see s 5 (d) (i) RHA.

¹⁰⁸ Kerr op cit (n49) at 297. For residential leases, see s 4 (2) RHA.

¹⁰⁹ Kerr op cit (n49) at 297.

the reason of termination is in principle of no significance.¹¹⁰ Exceptionally, however, it is relevant for residential leases, as the landlord basically may only terminate a lease for reasons that do not constitute unfair practices.¹¹¹ Therefore, unlike for commercial leases, the termination of residential leases requires in addition to the observance of a notice of period that the termination does not violate the principle of unfair practice. Finally, the landlord may exceptionally terminate with immediate effect the rent contract, if the tenant commits a major breach of contract (see 2.5.2.1 and 2.5.2.2).¹¹²

2.5.1.3 Deposit

In terms of residential leases, the landlord has the right to ask the tenant to pay a deposit before moving into the premises.¹¹³ In this case the landlord is committed to placing the deposit on an interest-bearing account with a financial institution and, on request, providing the tenant during the lease with written proof of the interest accrued.¹¹⁴ However, conversely, on the expiration of the lease the landlord is permitted to use the deposit and interest towards the payment of all amounts for which the tenant is liable for the present lease, including the appropriate cost of repairing damage to the housing during the rent period and the cost of replacing lost keys.¹¹⁵ Where no amount is due, the landlord shall refund the deposit and the interest to the tenant within seven days from the expiry of the lease.¹¹⁶

2.5.1.4 Insolvency of the tenant

If during the course of the lease the tenant becomes insolvent, the lease still continues, provided that the insolvency administrator communicates to the landlord the desire to continue with the lease.¹¹⁷ This

¹¹⁰ Bradfield & Lehmann op cit (n15) at 186.

¹¹¹ See s 4 (5) (c) RHA. For the meaning of the term 'unfair practices' see above fn 33.

¹¹² Leading scholars such as Kerr, Bradfield and Lehmann often use the term 'cancellation' to indicate the termination with immediate effect of the rent contract. See Bradfield & Lehmann op cit (n15) at 186 and Kerr op cit (n49) at 361-362.

¹¹³ S 5 (3) (c) RHA.

¹¹⁴ S 5 (3) (d) RHA.

¹¹⁵ S 5 (3) (g) RHA.

¹¹⁶ S 5 (3) (i) RHA.

¹¹⁷ See s 37 (1) and (2) of the Insolvency Act 24 of 1936.

means that it does not lie within the power of the landlord to decide whether or not the lease should go on. The landlord, however, is at least entitled to claim compensation for the loss suffered against the insolvent assets in the event that the trustee decides to terminate the lease.¹¹⁸

2.5.2 Remedies in case of non-fulfilment of the obligations by the tenant

2.5.2.1 Rent payment

Should the tenant not pay the rent or be in default with the rent due, the landlord is entitled to claim the rent and the interest for the period of default.¹¹⁹

A termination with immediate effect of the rent contract by the landlord is only possible if for the parties the time of payment is matter of major importance.¹²⁰ This can regularly be assumed where the rent contract includes a forfeiture clause which entitles the landlord to terminate with immediate effect the lease in the event of non-payment of the rent by the tenant.¹²¹ Therefore, in the absence of such a clause the landlord is normally not entitled to terminate with immediate effect the rent contract because the tenant merely fails to pay the rent due.¹²² Furthermore, despite the presence of such a termination clause in the rent contract, the judicial practice considers a termination with immediate effect as unlawful if the landlord continuously accepts a delayed rent payment without any complaint and the rent contract does not contain provisions which require from the landlord a waiver in written form of its acquired contract rights or which specify that any form of easing of the contractual rules can be interpreted as a forfeiture of the landlord's right.¹²³

¹¹⁸ S 37 (1) of the Insolvency Act 24 of 1936.

¹¹⁹ Kerr op cit (n49) at 361.

¹²⁰ Kerr op cit (n49) at 362.

¹²¹ Ibid.

¹²² Wille op cit (n52) at 184.

Where the landlord is entitled to terminate with immediate effect the rent contract he may additionally claim the unpaid rent accrued up to the time of termination and/or ask for damages for the amount by which the tenant has unjustly benefited in case the latter should unlawfully occupy the premises after the termination.¹²⁴

To secure the outstanding rent, the landlord may pledge the movable goods that are brought on the premises¹²⁵ as well as the related proceeds or alternatively ask for a court order that prohibits the tenant from removing them.¹²⁶ According to the prevalent opinion of the current scholars, the landlord's tacit pledge offers only protection for the rent due and not for the fulfilment of other obligations of the tenant.¹²⁷ Moreover, whereas all the movable goods of the tenant situated in the premises let is subject to the pledge, the items of a sub-tenant (see 2.6.1.3) only fall therein if the latter owes rent to the former.¹²⁸ Goods owned by other third persons are only affected if such persons fail to give notice to the landlord of their property although able to do so first; secondly the landlord does not realise that the goods do not belong to the tenant and thirdly the goods in question have been brought into the premises with the knowledge and consent of the third persons as well as with their intention that they stay there for the tenant's use for an indefinite time.¹²⁹ However, it must be emphasised that the third party's additional liability only applies in case of insufficient value of the pledged goods belonging to the tenant.¹³⁰ Further it is worth mentioning that the pledge of the tenant's goods not only places the landlord in a favourable position in case of debt proceedings¹³¹, but if the tenant becomes insolvent the landlord also enjoys preferential treatment with regard to all items

¹²³ See, for example, *Myerson v Osmond Ltd* 1950 1 SA 714 at 721-722.

¹²⁴ Bradfield & Lehmann op cit (n15) at 158.

¹²⁵ See s 31 and 32 of the Magistrates' Courts Act 32 of 1944.

¹²⁶ Bradfield & Lehmann op cit (n15) at 160-161.

¹²⁷ For an illustrative overview of the assenting opinions, see Cooper op cit (n48) at 180.

¹²⁸ Kerr op cit (n49) at 393.

¹²⁹ See *Bloemfontein Municipality v Jacksons* 1929 AD 266 at 271.

¹³⁰ Cooper op cit (n48) at 191.

¹³¹ See s 61 et sqq. Magistrates' Courts Act 32 of 1944.

belonging to the tenant which are subject to the pledge (albeit restricted to the rent due until the pledge date of sequestration and to various fixed amounts each depending on the modality of rent payment).¹³²

2.5.2.2 Use and care of the premises

If the tenant uses the rented property in disrespect of the intended purpose or improperly by, for example, causing damage or altering the premises without the consent of the landlord, then the latter may obtain a court order by which the former is restrained from the asserted breach.¹³³

A termination with immediate effect of the rent contract, however, is only justified if the misuse is classified as serious, which does not count if, for instance, the tenant uses the premises improperly only on a single occasion¹³⁴ or the repair costs for the damage caused are low.¹³⁵

Finally, in relation to the right to additionally assert claims for damages, a distinction needs to be drawn between the situations where a termination with immediate effect of the rent contract due to a minor breach is not justified and thus the lease may carry on, and where the termination with immediate effect is justified. Whereas in the latter case the landlord is regularly entitled to claim compensation for the loss suffered, in the former event he is normally precluded, as otherwise he would unlawfully be indemnified twice since the tenant is already compelled to restore the premises upon the termination of the lease.¹³⁶

2.5.2.3 Restoration and restitution of the property

By restoring the premises let in a faulty condition, the tenant commits a breach of contract and therefore entitles the landlord to claim for a repair order or, under certain circumstances in lieu of this specific performance, the

¹³² See s 85 of the Insolvency Act 24 of 1936.

¹³³ Cooper op cit (n48) at 215.

¹³⁴ *Burns v D & G* 1949 (4) SA 135 (T) at 140.

¹³⁵ *Spies v Lombard* 1950 (3) SA 469 (A).

¹³⁶ Cooper op cit (n48) at 216.

corresponding sum of money or the difference between the value the property has in the conditions in which it has been returned and the one it would have had if returned after proper restoration.¹³⁷

If the tenant does not vacate the property on the termination of the lease, not only a breach of contract occurs (and the landlord thus has the right to request the eviction of the tenant¹³⁸) but he also commits a criminal offense by continuing to unlawfully occupy it.¹³⁹

The same applies should a sub-tenant (see 2.6.1.3) still inhabit the rented premises although the rent contract with the main tenant has been terminated, as the rights of a sub-tenant do not go beyond those of the main tenant.¹⁴⁰

In any case the landlord must always proceed by means of judicial proceedings and not on his own initiative¹⁴¹ even if a clause of the rent contract entitles him to evict the tenant by himself.¹⁴² Should the landlord nonetheless act on his own, the tenant has the right to reclaim the use and enjoyment of the premises.¹⁴³

Finally, in case of unlawful holding over, the tenant is also liable for damages incurred by the landlord. This may consist of the value of the use and enjoyment of the property for the period between the ending of the lease and the actual vacation and disbursement, as well as loss of profit.¹⁴⁴

¹³⁷ See *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) at 9D, 13G and 16A-B.

¹³⁸ Kerr op cit (n49) at 416.

¹³⁹ Bradfield & Lehmann op cit (n15) at 165.

¹⁴⁰ Wille op cit (n52) at 263.

¹⁴¹ For residential leases see also s 5 (d) (ii) RHA.

¹⁴² See s 26 (3) Constitution of the Republic South Africa, 1996.

¹⁴³ Bradfield & Lehmann op cit (n15) at 165.

¹⁴⁴ Kerr op cit (n49) at 417-418.

Regarding judicial eviction proceedings, a distinction needs to be made between three situations:

Where after the termination of the rent contract a residential tenant refuses to vacate the premises situated on rural land and the income does not exceed the amount of R 5'000¹⁴⁵, the ESTA is applicable.¹⁴⁶

In case of application of the ESTA, an order for eviction against the tenant will be granted provided that the termination of the tenant's right to reside (based on a lawful ground) is just and equitable, and the tenant, the municipal administration and the provincial office of Land Affairs have received from the landlord after the termination of the lease a communication with two calendar months' notice stating the intention to obtain an order for eviction.¹⁴⁷

To establish whether or not the termination is just and equitable, the court generally has to take into consideration relevant factors such as the fairness of the provisions of the rent contract, the behaviour of the parties (including the termination of the lease) and the interests of the parties (including the comparative hardship to the landlord and the tenant concerned).¹⁴⁸ Furthermore, an eviction of tenants who acquired the right of residence on or before 4 February 1997 is only possible if in the context of the termination the tenant's behaviour in general has been reprehensible and the disruption of the lease is entirely attributable to him. Alternatively, in case none of these circumstances apply, eviction is only possible if a suitable alternative housing is available for the tenant (otherwise in this latter case a suspension of the eviction for a period of nine months will be imposed).¹⁴⁹ On the contrary, for residences established after 4 February 1997 and for fixed-

¹⁴⁵ S 1 (1) (x) (c) ESTA read together with s 2 (1) ESTA Regulations GN R1632 GG 19587 of 18 December 1998.

¹⁴⁶ See preamble of ESTA and further s 2 read together with s 3 and 8 ESTA.

¹⁴⁷ S 9 (2) (d) ESTA.

¹⁴⁸ S 8 (1) (a), (b), (c), (d) and (e) ESTA.

¹⁴⁹ See s 10 ESTA.

term leases an eviction will be granted if it is considered to be just and equitable by assessing the rental duration, the fairness of the provisions of the rent contract, the availability of a suitable alternative accommodation, the reason determining the requested eviction and the balance of interest of the various persons involved.¹⁵⁰

Should a residential tenant occupy a property situated within urban areas, the PIE is applied¹⁵¹, no matter if the occupation was unlawful from the beginning or only on the termination of the lease by refusing to vacate the property.¹⁵²

If the PIE is applied, the court must give written notice to the tenant concerned and the local municipality at least 14 days before the hearing concerning the eviction.¹⁵³ Furthermore, if the duration of the lease has been of less than six months, an order for eviction will only be granted if it is regarded as just and equitable considering all relevant circumstances determined by the court, including, inter alia, the rights and needs of children and the elderly.¹⁵⁴ Where the duration of the lease has exceeded six months, the fact that housing has been or can reasonably be made available for the relocation of the tenant by the local administration, another governmental body or a land owner must additionally be considered for the granting of an eviction order as a basic principle.¹⁵⁵ Put simply, a demand for eviction will be approved if it is considered to be just, and the termination of the lease is regarded as lawful (but unlike under the regime of ESTA not necessarily fair).¹⁵⁶

¹⁵⁰ See s 11 ESTA.

¹⁵¹ Bradfield & Lehmann op cit (n15) at 168.

¹⁵² *Bekker v Jika* 2003 (1) SA 113 (SCA).

¹⁵³ See s 4 (2) PIE.

¹⁵⁴ See s 4 (6) PIE

¹⁵⁵ See s 4 (7) PIE.

¹⁵⁶ Bradfield & Lehmann op cit (n15) at 170.

Nevertheless, the fairness of the termination may play a crucial role in the context of eviction proceedings. In fact, if during the eviction trial a tenant in his defence asserts that the termination of the lease according to the RHA constitutes an unfair practice the Constitutional Court is of the opinion that the issue must be referred to the RHT and the eviction proceedings be suspended until the decision of the specialised tribunal.¹⁵⁷ Furthermore, although there is still a legal uncertainty concerning the question of whether or not a termination of the lease that impinges against the principle of fairness constitutes an unlawful termination, the presence of an unfair practice is in any case an essential factor to be considered by the court in the granting or refusing of the eviction order.¹⁵⁸

If the court ultimately comes to the conclusion that the granting of an eviction is justified, it determines a just and equitable date on which the tenant must vacate the premises and an enforcement date in the event that the tenant has not abandoned the property by the fixed date.¹⁵⁹

The third and last situation relates to commercial leases for which the residual common law rules governing the eviction have to be taken into consideration.¹⁶⁰ The consequence is that in this case, only the ownership of the landlord and the unlawful occupation of the tenant are of importance for the examination of the eviction application.¹⁶¹ Therefore, the courts do not have a margin of discretion in judging the request to evict the tenant, but they are forced to issue the order of eviction.¹⁶²

¹⁵⁷ *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) at 62 and 67.

¹⁵⁸ Bradfield & Lehmann op cit (n15) at 174.

¹⁵⁹ See s 4 (8) PIE.

¹⁶⁰ Bradfield & Lehmann op cit (n15) at 166.

¹⁶¹ See *Brisley v Drotsky* 2002 (4) 1 (SCA).

¹⁶² Bradfield & Lehmann op cit (n15) at 166.

2.6 The rights of the tenant

2.6.1 Substantive rights

2.6.1.1 Right to a written contract and challenge to rent

Unlike commercial leases, the tenant of a residential lease may demand the landlord to reduce the lease in writing.¹⁶³ In this case the tenant has an enforceable right for all payments made to be furnished with written receipts by the landlord.¹⁶⁴ Moreover, by claiming an unfair practice, the tenant may ask the RHT to set aside exploitative rent and replace it with one that is regarded as just and equitable.¹⁶⁵

2.6.1.2 Termination, alienation and insolvency

Concerning the termination of the lease, the tenant is entitled to terminate periodic leases by giving a reasonable period of notice, whereby the reason of termination is of no significance under the regime of common law as well as the RHA.¹⁶⁶ Where a fixed-term lease falls under the CPA, the tenant is even entitled to terminate the rent contract by giving 20 business days' notice.¹⁶⁷ After all, the tenant may exceptionally elect to terminate with immediate effect the lease where the landlord commits a major breach of contract (see 2.6.2).¹⁶⁸

Apart from the rights recognised by the RHA and CPA, tenants additionally enjoy protection in case of alienation of the property let by the landlord or owner, which generally means that a buyer is bound by the rent contract and hence may not evict a tenant from the rented premises.¹⁶⁹ With reference to leases with a duration of ten years or longer, the right of the tenant prevails against any successor or creditor either for the full term of the

¹⁶³ S 5 (2) and (3) (a) RHA.

¹⁶⁴ S 5 (3) (a) RHA.

¹⁶⁵ S 13 (1) read together with s 13 (4) (c) (iii) and 13 (5) RHA.

¹⁶⁶ Bradfield & Lehmann op cit (n15) at 186-187.

¹⁶⁷ See s 14 (2) (b) (bb) CPA.

¹⁶⁸ See also Bradfield & Lehmann op cit (n15) at 186.

¹⁶⁹ Cooper op cit (n48) at 275.

lease (provided the registration of the lease has taken place or the latter two knew of the lease at the time they entered the transaction), or for a restricted time of ten years where the tenant is in occupation but registration is lacking.¹⁷⁰ Relating to leases with a duration of less than ten years, in line with the accepted and applied '*huur gaat voor koop*'¹⁷¹ rule, the tenant is protected for the whole period of the lease as well, either if he already is in occupation at the time of the transfer of rights to the purchaser or the latter has knowledge of the lease when he acquires the property rights.¹⁷² Moreover, the tenant is unconditionally protected for the entire period of the lease in case of intestate succession or donation of the landlord.¹⁷³ Finally, an insolvency of the landlord does not terminate a lease, unless the property let must be sold free of the lease to discharge a mortgage on it.¹⁷⁴

2.6.1.3 Subletting

The tenant is generally entitled to sublet the rented premises. To be more accurate, while for the subletting of urban property the tenant does not need the consent of the landlord, provided that the latter is not in a position to fairly reject the person of the sub-tenant, for the subletting of rural property the prior written approval of the landlord is necessary.¹⁷⁵ Besides, it is also conceivable that the rent contract may provide a full prohibition of subletting without the consent of the landlord.¹⁷⁶ Moreover, subject to an agreement to the contrary, the tenant of an urban property (but not of a rural property) also has the right to transfer his rights to a third party, without requiring the approval of the landlord.¹⁷⁷ On the contrary, however, the tenant is generally reliant on the consent of the landlord if he wants to cede his duties.¹⁷⁸

¹⁷⁰ See s 1 (2) LLA.

¹⁷¹ This maxim simply means that the hire precedes the sale. See Cooper op cit (n48) at 274 fn 7.

¹⁷² Bradfield & Lehmann op cit (n15) at 182.

¹⁷³ For details, see Cooper op cit (n48) at 281-284.

¹⁷⁴ For details, see Kerr op cit (n49) at 496-500.

¹⁷⁵ Bradfield & Lehmann op cit (n15) at 175.

¹⁷⁶ Ibid.

¹⁷⁷ Kerr op cit (n49) at 452.

¹⁷⁸ For details, see Cooper op cit (n48) at 261-263.

2.6.1.4 Improvements

Before returning the property to the landlord, a tenant of residential property is permitted to remove useful and luxurious improvements he made during the course of the lease, provided that they can be separated without deteriorating and damaging the property.¹⁷⁹ If the useful improvements for whatever reason have not been removed, and necessary ameliorations are forbidden to be removed, the tenant may demand a compensation which, broadly speaking, consists of the increase of the market value of the property or the actual expenses incurred.¹⁸⁰ Furthermore, the tenant may retain the possession of the property until payment of the compensation is made.¹⁸¹ In respect of the lease of rural properties, the legal situation is different: tenant rights are restricted, particularly since here, unlike the lease of urban properties, some provisions of a particular Dutch Law, the so called Placaten of 26 September 1658, still continue to be applied.¹⁸² Here, for instance, the tenant has no right of retention and may ask compensation for improvements that are attachments only and for which the landlord has given his approval.¹⁸³

2.6.2 Remedies in case of non-compliance by the landlord

2.6.2.1 Delivery of the rented premises

In case of non-delivery by the landlord, it is judicial practice¹⁸⁴ to grant an order to deliver the property for the benefit of the tenant, provided that for the landlord it is still objectively possible to deliver it.¹⁸⁵ Therefore, where conversely, for the landlord it is impossible to deliver the housing, the tenant should be entitled to terminate with immediate effect the rent contract and

¹⁷⁹ Kerr op cit (n49) at 466.

¹⁸⁰ Ibid.

¹⁸¹ Bradfield & Lehmann op cit (n15) at 193.

¹⁸² See *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 (6) SA 605 (SCA).

¹⁸³ Bradfield & Lehmann op cit (n15) at 194.

¹⁸⁴ See, for example, *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378.

¹⁸⁵ See also Cooper op cit (n48) at 87.

additionally claim compensation for any damages and the return of the deposit paid.¹⁸⁶

Regarding the late delivery of the property let by the landlord, there is a lack of clarity whether or not the tenant may terminate with immediate effect the rent contract. Some scholars seem to allow the termination of the lease only where the delay is of long duration, but without defining when this criterion is met.¹⁸⁷ They referred to the apparently only existing legal case instead, where the termination of a business rent contract by the tenant due to a ten days late delivery of the premises was considered to be lawful.¹⁸⁸ Therefore, it is uncertain whether or not this rule applies with regard to residential leases as well. Rather, it has to be assumed that in the event of a late delivery by the landlord, the tenant is generally exempted from the payment of the rent during the delay and additionally entitled to claim compensation for any damages.

In relation to the delivery of defective premises and the maintenance duty of the landlord during the lease period, previously the South African courts, by generally arguing that the enforcement would be complicated, were more than reluctant to grant an order against the landlord to carry out the necessary repairs or replacements in the exercise of their discretion.¹⁸⁹ They rather urged the tenants to carry out the repairs and replacements themselves and afterwards ask the landlord for reimbursement of the incurred costs instead.¹⁹⁰ This point of view has not only been sharply criticised with convincing arguments by leading scholars such as Cooper¹⁹¹, Bradfield and Lehmann¹⁹², but also the jurisprudence has over time moved to

¹⁸⁶ See also Bradfield & Lehmann op cit (n15) at 147-148.

¹⁸⁷ See, for example, Cooper op cit (n48) at 88 (with further references).

¹⁸⁸ See *Levy v Rose* (1903) 20 SC 189.

¹⁸⁹ Cooper op cit (n48) at 89.

¹⁹⁰ See, for example, *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* supra (n62) at 150H-151H.

¹⁹¹ See Cooper op cit (n48) at 89.

¹⁹² See Bradfield & Lehmann op cit (n15) at 146.

a position more favourable to the granting of specific performances where the landlord has failed to maintain the premises in a proper condition.¹⁹³ Furthermore, according to the precedents, the tenant is entitled to terminate with immediate effect the rent contract in two cases: either where at the delivery the premises are defective to such an extent that an acceptance by the tenant is unreasonable, or where during the lease period the condition seriously deteriorated or became unfit for habitation, and thus practically useless due to lack of repairs or the landlord not performing the repairs within an appropriate time.¹⁹⁴ Consequently, should the premises despite the defects remain safely habitable, the tenant is bound to the continuation of the rent contract, but may at least demand a reduction of the rent in proportion to the decrease in the use and enjoyment of the property, in so far as he is not only faced with a temporary or insignificant inconvenience.¹⁹⁵

Finally, although this is not unanimously accepted by the South African legal doctrine, it is widely recognised as well as adopted and applied as a principle from the courts¹⁹⁶ that if the tenant has suffered additional damages due to the wrongful conduct of the landlord or the delivery of defective premises or the failure to maintain them, he may claim compensation subject to the condition that (a) the landlord either has known or ought to have known of the defect and (b), having knowledge of the defect, he has not carried out the required work or repairs have been unsuccessful.¹⁹⁷

¹⁹³ In *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* supra (n137) at 5 the Appellate Division stated unequivocally that the limitation of granting specific performance would not be consonant with the South African law. This point of view was confirmed in *Mpange v Sithole* supra (n63) at 589 and 592 where the court, inter alia, pointed out that the alternative solution suggested by the courts would not be applicable to persons with poor financial means and the refuse of granting an order containing a specific performance would virtually infringe the constitutional rights of the tenants.

¹⁹⁴ See, for example, *Shapiro v Yutar* supra (n74) at 95-96.

¹⁹⁵ Kerr op cit (n49) at 315-316.

¹⁹⁶ See, for example, *Hunter v Cumnor Investments* 1952 (1) SA 735 (C) 735 at 741-742.

¹⁹⁷ Wille, Bradfield and Lehmann, by referring to the authority of the Digest, agree to the mentioned principle. On the contrary, Cooper and Kerr advocate a reconsideration of the

2.6.2.2 Maintenance duty

In the event of the landlord's failure to maintain the property to the required standard, or in an adequately fit condition for the purpose for which it has been let, the tenant may choose from various solutions which, depending on the situation, are specific performance, termination of the rent contract, compensation for damages and reduction of the rent. As these solutions have already been extensively discussed in the context of the delivery of defective premises, the reader is referred to the corresponding chapter (see 2.6.2.1).

2.6.2.3 Use and enjoyment

Should the tenant be unlawfully deprived of the premises by the landlord, he may usually initiate an action to reclaim the use and enjoyment thereof or alternatively terminate with immediate effect the rent contract, if the breach is serious enough, and in both cases additionally claim compensation for any loss suffered as well as a rent reduction for the period of deprivation.¹⁹⁸ Where the use and enjoyment of the tenant is disturbed by the landlord, the former may normally obtain a court order against the latter and additionally claim compensation for any damages.¹⁹⁹ Moreover, if the tenant is disturbed in his use and enjoyment or even evicted from the premises by a third party with a superior title, the landlord must compensate the tenant for the incurred damages.²⁰⁰ However, according to the rule on mitigation of loss, the tenant is under the duty to inform the landlord about the eviction procedure, in order to enable the latter to assist him therein and thus avoid or at least diminish his liability.²⁰¹ If the tenant fails to do so, the liability of the landlord is excluded, unless resisting to the eviction is pointless.²⁰²

principle. See Wille op cit (n52) at 161-162, Bradfield & Lehmann op cit (n15) at 147-148, Cooper op cit (n48) at 108-110 and Kerr op cit (n49) at 316-339.

¹⁹⁸ Cooper op cit (n48) at 122-123.

¹⁹⁹ Ibid.

²⁰⁰ Kerr op cit (n49) at 345.

²⁰¹ Kerr op cit (n49) at 346-347.

²⁰² Ibid.

3 LEGAL SITUATION IN SWITZERLAND

3.1 Relevant sources of rent law

For Swiss rent law, the most important regulations are to be found in articles 253 to 274g of the OR and the articles of the VMWG. Some of these provisions are mandatory, meaning that both renting parties are not allowed to reach an agreement contradicting them.²⁰³ In addition, with regard to rent procedural matters the provisions of ZPO require consideration.

In addition to the relevant specific rent provisions, other provisions or laws are also of importance in the context of the rent. These include for instance the general rules of the OR, some provisions of the Swiss Civil Code as well as the regulations of the Federal Act on Debt Enforcement and Bankruptcy (hereinafter SchkG).

3.2 Definition, nature and formal requirements of the rent contract

Leases are contracts in which a landlord grants a tenant the use of an object in exchange for rent.²⁰⁴ Thus, the following characteristic elements for a lease can be identified. The first essential element is the granting of the object for use during a period of time. Relating to the properties, this means that the parties are both required to agree on the property to be rented, which at least should be determinable.²⁰⁵

Also noteworthy is that the qualification of the rented property, depending on the intention of the parties, is important, as the rent provisions,

²⁰³ For a detailed overview of the mandatory and non-mandatory provisions, see Lachat et al op cit (n2) at 43.

²⁰⁴ See art 253 OR.

²⁰⁵ Lachat et al op cit (n2) at 28.

inter alia, in terms of termination of the lease lay down different notice periods and formal requirements.²⁰⁶

Further, the lease may only be contracted during a period of time, which can be definite or, alternatively, indefinite until termination by notice given by one of the parties.²⁰⁷ As a result, the return of the property at the end of the lease is also a key feature of the rent contract.²⁰⁸

Finally, the payment of a rent, being a compensation for the use and the maintenance of the property let²⁰⁹, is an essential element of the rent contract too, whereby, further to the jurisprudence of the Swiss Federal Court, the amount of the rent must be ascertainable, otherwise the contract does not constitute a rental agreement.²¹⁰

The rent contract is classified as a bilateral agreement, as both parties are liable to perform.²¹¹ In order for the rent contract to come into effect, consensus of the parties on the above essential features is required.²¹² From this it follows that generally no rent contract will be concluded in case of disagreement over one of the required elements.

The lease can be concluded orally or implicitly by the parties.²¹³ Therefore, no written agreement is required, unless the contrary has been expressly stipulated.

²⁰⁶ R Bisang, P Burkhalter & R Futterlieb et al *Das schweizerische Mietrecht Kommentar* 3ed (2008) note 2 to art 253.

²⁰⁷ See BGE 113 II 209.

²⁰⁸ Lachat et al op cit (n2) at 29.

²⁰⁹ P Higi *Die Miete. Zürcher Kommentar zum schweizerischen Zivilgesetzbuch, Teilband V2b, Erste Lieferung, Art. 253-256 OR, Zweite Lieferung, Art. 266-268b OR, Dritte Lieferung, Art. 269-270e OR und Vierte Lieferung, Art. 271-274g OR* (1994-1998) note 2 to art 253 OR.

²¹⁰ See BGE 119 II 347.

²¹¹ Bisang et al op cit (n206) note 1 to preliminary words of art 253-274g.

²¹² Art 1 (1) OR read together with art 2 (1) OR.

²¹³ See the wording of art 253 OR.

3.3 The obligations of the landlord

3.3.1 Delivery of the property

The landlord is obliged to make the property available on the agreed date in a condition fit for its designated use.²¹⁴ This date generally corresponds to the beginning of the lease.²¹⁵ The landlord complies with this obligation if he keeps the premises let at the disposal of the tenant on the agreed time.²¹⁶ If the parties to the rent contract fail to agree upon a delivery date, the delivery then is required to take place immediately after conclusion of the rent contract.²¹⁷

Normally the delivery takes place through the handover of the keys.²¹⁸ With the delivery the tenant becomes the user of the rented property, but without acquiring any property rights.²¹⁹ In other words, the tenant becomes the holder of the right to exclusive use the premises let.²²⁰ As a result, he may prohibit any person to access the rented premises.²²¹ This applies to the landlord, too, as long as there are no mandatory or justified reasons to enter.²²²

In terms of the owed condition of the rented property it is of importance that the premises let should be fit for their intended use (in the sense that, for example, a flat is habitable or an office room suitable to work in).²²³ The use

²¹⁴ See art 256 (1) OR.

²¹⁵ Higi op cit (n209) note 44 to art 256 OR.

²¹⁶ Higi op cit (209) note 45 to art 256 OR.

²¹⁷ See art 75 OR.

²¹⁸ Bisang et al op cit (n206) note 10 to art 256.

²¹⁹ R Weber 'Kommentar zu Art. 253-274g OR' in H Honsell, NP Vogt & W Wiegand (eds) *Basler Kommentar Obligationenrecht I Art. 1-529 OR* 5ed (2011) note 9 to art 253 OR.

²²⁰ Lachat et al op cit (n2) at 714.

²²¹ Ibid.

²²² Ibid.

²²³ P Zihlmann *Das Mietrecht* 2ed (1995) at 49.

of the rented property is normally determined by the parties, otherwise reference is made to the normal use.²²⁴

3.3.2 Notification of the initial rent and presentation of return report

In case of housing shortage, the cantons may oblige the landlords of residential properties to communicate to the tenants on a form approved by the canton both the initial rent and the rent from the previous lease when contracting a new lease.²²⁵ To date, this specific duty has been introduced only in few cantons.²²⁶

In the remaining cantons, the landlord is required to inform the new tenant about the amount of rent paid by the previous tenant only upon request of the new tenant.²²⁷ However, the landlord is not obliged to deliver a copy of the previous rent contract.²²⁸ Further, it is also sufficient to communicate it orally.²²⁹ Finally, the tenant is denied this right if it is made after the expiry of the contestation period for the initial rent (see 3.6.1.1).²³⁰

In addition, if a report was drawn up on the return of the property at the end of the previous lease, the landlord is (again on request) obliged to make this document available for verification by the new tenant when the rented premises are delivered to him.²³¹ This rule should enable the tenant to draw up a list of faults at the beginning of the lease.²³² Therefore, the request is not limited in time, as the delivery of the return report can be demanded

²²⁴ Cf OGer Kanton Zürich vom 24.9.1997 (published in *Zürcher Mietrechtspraxis* 2/1997, 12).

²²⁵ See art 270 (2) OR.

²²⁶ These are the cantons of Waadt, Genf, Neuenburg, Freiburg, Zug, Nidwalden and Zurich.

²²⁷ Art 256 (2) OR.

²²⁸ Bisang et al op cit (n206) note 19 to art 256a.

²²⁹ Higi op cit (n209) note 37 to art 256a-256b OR.

²³⁰ See Lachat et al op cit (n2) at 134-135.

²³¹ Art 256a (1) OR.

²³² Zihlmann op cit (n223) at 51.

during the whole time of the lease.²³³ However, although it might be of great interest for the landlord, he is not obliged to create a return report at all.²³⁴ Hence, where no return report was created, the mentioned rule is of no importance.²³⁵

3.3.3 Maintenance of the property

In addition to the delivery duty, the landlord is also obliged to maintain the property let in a condition fit for its intended use.²³⁶ Or put differently, the landlord shall ensure that the rented property has the agreed quality during the whole time of the lease.²³⁷ Therefore, irrespective of who is at fault, the landlord is obliged to repair or replace all defects occurring during the course of the lease, which are not of a minor nature²³⁸ and also not caused by the tenant or persons for whom he is liable.²³⁹

The elimination of the damages implies that the landlord is aware of them. Thus, first the tenant is under a duty to inform the landlord about any defects.²⁴⁰ Failure to notify renders the tenant liable for any loss or damages incurred by the landlord as a result.²⁴¹ Secondly, the tenant on the one hand allows the landlord to inspect the rented property to the extent required for the maintenance, and on the other hand grants access as well as tolerates work intended to repair the damage.²⁴² In other words, the tenant should only tolerate repair work necessary to prevent a worsening of the condition of the

²³³ A Thanei 'Pflichten der Mietparteien betreffend die Übergabe der Mietsache bei Vertragsbeginn – und Ende' (1992) 2 *mp* 57 at 58.

²³⁴ Thanei op cit (n233) at 59.

²³⁵ Ibid.

²³⁶ Art 256 (1) OR.

²³⁷ Bisang et al op cit (n206) note 2 to preliminary words of art 258-259i.

²³⁸ See art 259 OR.

²³⁹ See also Lachat et al op cit (n2) at 164.

²⁴⁰ Art 257g (1) OR.

²⁴¹ Art 257g (2) OR.

²⁴² Art 257h (1) and (2) OR.

property.²⁴³ From his side, the landlord is committed to timely inform the tenant of work and inspections and shall take all due account of the tenant's interests when such works and inspections are carried out.²⁴⁴ The announcement should include the beginning date and the estimated duration of the work and the name of the company performing the work.²⁴⁵ Further, the term of notice depends on the volume and urgency of the work.²⁴⁶ As a general rule, the more extensive the repairs are, the longer the term of notice shall be.²⁴⁷

Finally, the parties may not derogate to the detriment of the tenant in a clause of the rent contract the landlord's duty to maintain the premises let or repair the damage occurred therein.²⁴⁸

3.3.4 Declaration of termination and return of the property

Concerning the termination of a residential or commercial lease, the landlord is mandatorily obliged to use a form approved by the canton in which the property let is presented and which instructs the tenant on how to proceed in case he wishes to challenge the termination or apply for the extension of the lease (see 3.6.1.4).²⁴⁹

Additionally, if the termination of the lease relates to a rented property that serves as a family residence, the notice of termination by means of cantonal form must be served separately to the tenant and to his spouse²⁵⁰ even if the latter is not a contracting party.²⁵¹ The notice of termination is considered void if it does not comply with these formal requirements.²⁵²

²⁴³ Higi op cit (n209) note 15 to art 257h OR.

²⁴⁴ Art 257h (3) OR.

²⁴⁵ Lachat et al op cit (n2) at 156.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Art 256 (2) OR.

²⁴⁹ Art 266o OR.

²⁵⁰ The same applies to registered same-sex partnership.

²⁵¹ Art 266n OR.

²⁵² Art 266o OR.

Hence, the landlord is well-advised to oblige the tenant by a contract clause to inform him about every change of his marital status as any provisions of rent law do lay down such an obligation.²⁵³

On the contrary, the reasons for giving notice must be stated only upon request of the tenant.²⁵⁴ Consequently, a termination of lease is also formally valid if there is a lack of reasoning.

Finally, when the property let is returned, the landlord is committed to inspect its conditions and immediately inform the tenant of any defects for which he is liable.²⁵⁵ A notification of defects within two to three working days after the return is generally deemed to be timely.²⁵⁶ Should the landlord fail to do so, he forfeits his claims for compensation of the visible defects.²⁵⁷ In terms of the defects that are not detectable upon the routine inspection, the landlord must inform the tenant immediately after their discovery.²⁵⁸ Moreover, the notification of defects must be precise and detailed, which basically means that it must be formulated in a comprehensible manner and contain a list of the defects as well as include the statement that the tenant will be held liable for these.²⁵⁹ In practice, although it is not obligatory, the return of the property let regularly takes place in the presence of the tenant, with a common written return report being compiled. This report, however, represents only a notification of defects if it is signed by both parties and it is clear which defects the tenant will be liable for.²⁶⁰

²⁵³ See also Bisang et al op cit (n206) note 13 to art 266I-266o.

²⁵⁴ See art 271 (2) OR.

²⁵⁵ Art 267 (1) OR.

²⁵⁶ Cf MG Zürich vom 14.10.1991 (published in *ZMP* 1/1992, 7).

²⁵⁷ See art 267a (2) OR.

²⁵⁸ See art 267a (3) OR.

²⁵⁹ Cf MG Zürich supra (n256).

²⁶⁰ Higi op cit (n209) note 20 to art 267a OR.

3.3.5 Payment of charges and taxes

It is the duty of the landlord to bear all taxes and charges in connection with the rented property.²⁶¹ These costs are mainly related to the ownership of the rented property and not to its use, which is why they cannot be charged to the tenant.²⁶² In particular, such costs include capital costs, premium of building insurance, basic fee for rubbish collection as well as contributions towards connection to the sewer system and water supply.²⁶³ According to the opinion of the majority of the scholars this rule is compulsory.²⁶⁴ Therefore, an agreement which obliges the tenant to pay these costs would be void.

3.4 The obligations of the tenant

3.4.1 Payment of the rent and accessory charges

Considered as the main obligation, the tenant owes the landlord a rent for the use of the rented property²⁶⁵, as well as a compensation for the actual expenses made by the landlord for services connected with the use of the property²⁶⁶, subject to the condition that this has been specifically agreed upon between the parties.²⁶⁷

It is common practice that the tenants settle their rent debt, including the accessory charges, by means of a monetary payment.²⁶⁸ Although it is permitted to pay cash, nowadays most of the rent payments are made by bank transfer or postal order.²⁶⁹

²⁶¹ See art 256b OR.

²⁶² This can be concluded by means of an 'argumentum e contrario' of the art 257a (1) OR.

²⁶³ Lachat et al op cit (n2) at 237-238.

²⁶⁴ For an illustrative overview of the assenting opinions, see Lachat et al op cit (n2) at 238.

²⁶⁵ Art 257 OR.

²⁶⁶ According to art 257b (1) OR these includes, among others, heating, hot water and other operating costs.

²⁶⁷ Art 257a (2) OR.

²⁶⁸ Lachat et al op cit (n2) at 214.

²⁶⁹ Ibid.

Further, the rent and, where applicable, the accessory charges must be paid at the end of each month and on expiry of the lease at the latest, unless otherwise agreed by the parties or required by local usage.²⁷⁰ Indeed, today most rent contracts stipulate a monthly advanced payment. This generally means that the landlord must be able to have free disposal over the rent by the first day of the month, with the effect that the tenant comes into arrears without any reminder and thus, additionally owes a default interest in the amount of 5 per cent where the payment is not made by the due date.²⁷¹ Therefore, in case of payment by bank transfer or postal order, the tenant has to issue payment instruction in a timely manner so that the payment can timely reach the landlord.²⁷² If the payment, instead, is to be made in cash, the tenant must bring the money to the landlord's domicile.²⁷³ Lastly, a payment of the rent by means of set-off is also possible.²⁷⁴

3.4.2 Duty of care

There is not an obligation to make use of the rented premises as such.²⁷⁵ If the tenant, however, uses the property let he is obliged to use it in accordance with the rent contract and with all due care.²⁷⁶ The imposed duty of care requires that the rented property should be used carefully, since the landlord does not bear any loss of the property value.²⁷⁷ This generally means that the tenant must avoid unnecessary damage and carry out the required cleaning as well as sufficiently and regularly ventilate the premises.²⁷⁸ Besides, he also has to ensure the good reputation of the

²⁷⁰ Art 257c OR.

²⁷¹ Art 102 (2) read together with art 104 (1) OR.

²⁷² See BGE 119 II 232 E.2.

²⁷³ See art 74 (2) item 1 OR.

²⁷⁴ See art 120 to 126 OR and art 265 OR.

²⁷⁵ Higi op cit (n209) note 21 to art 257f OR.

²⁷⁶ See art 257f (1) OR.

²⁷⁷ W Sprenger *Entstehung, Auslegung und Auflösung des Mietvertrages für Immobilien* (unpublished Ph.D. thesis, University of Zurich, 1972) 80.

²⁷⁸ Bisang et al op cit (n206) note 19/20 to art 257.

property let and keep it in safe custody to prevent, inter alia, burglary.²⁷⁹ As part of regular maintenance the tenant is, at his own expenses, further committed to eliminate defects which can be dealt with by minor repairs.²⁸⁰ In general, 'minor repairs' are considered as work that can be carried out by the tenant without greater personal and financial effort.²⁸¹ Today, it is a widespread view that a single repair up to an amount of CHF 150 is considered as minor.²⁸²

Secondly, the tenant must show due consideration for all residents of the building and neighbours.²⁸³ In other words, he must refrain from any excess detrimental to the fellow tenants and neighbours.²⁸⁴ It mainly concerns the need for rest and privacy of others, but also the observance of the house rules when using common rooms such as stairway, laundry and cellar.²⁸⁵

3.4.3 Tolerances

Together with the duties of notification and tolerance, which must be fulfilled by the tenant in connection with the landlord's elimination of defects, the former is also obliged to grant access to the latter to the extent required for a sale or re-letting of the property.²⁸⁶ But here, too, the landlord shall timely inform the tenant of future inspections of the premises and take all due account of the latter's interests when they are carried out.²⁸⁷ Inspections for the purpose of re-letting need only be accepted by the tenant when the termination of the lease has been declared or the contract is near to the end in case of a fixed-term lease.²⁸⁸ Furthermore, the tenant can demand from

²⁷⁹ Higi op cit (n209) note 18 to art 257f OR.

²⁸⁰ See art 259 OR.

²⁸¹ Bisang et al op cit (n206) note 13 to art 259.

²⁸² See T Oberle *Nebenkosten-Heizkosten* 3ed (2007) at 31-32 (with further references).

²⁸³ Art 257f (2) OR.

²⁸⁴ Higi op cit (n209) note 34 to art 257f OR.

²⁸⁵ Bisang et al op cit (n206) note 26 to art 257f.

²⁸⁶ See art 257h (2) OR.

²⁸⁷ Art 257h (3) OR.

²⁸⁸ Bisang et al op cit (n206) note 20 to art 257h.

the landlord that different prospective buyers or tenants are invited to the inspection not individually, but as far as possible together, in order to keep disturbance to a minimum.²⁸⁹

3.4.4 Return of the property

At the end of the lease, the tenant is under the duty to return the property in a condition that is in accordance with its contractually designated use.²⁹⁰ From this rule it principally follows that he must thoroughly clean the premises and carry out minor repairs²⁹¹ even if they are the consequence of normal, contractual use of the rented property.²⁹² Conversely, major repair work need only to be carried out by the tenant if they are a result of careless use, or use contrary to the terms of the contract.²⁹³ The cleaning and repair work must be completed by the termination of the lease at the latest, since the tenant has no claim for the setting of a period of grace.²⁹⁴ The property is returned by transferring back exclusive possession which typically takes place with the removal of the movables and the restitution of all keys on the occasion of the joint inspection.²⁹⁵ The return of the property should normally take place during regular business hours on the last day of the lease²⁹⁶, but in various cantons a local practice has been established, pursuant to which the premises have to be returned only in the morning of the day after termination.²⁹⁷

²⁸⁹ Ibid.

²⁹⁰ Art 267 (1) OR.

²⁹¹ These may include, for instance, the correct closing of plug holes in the walls. See Bisang et al op cit (n206) note 11 to art 267-267a.

²⁹² Lachat et al op cit (n2) at 675.

²⁹³ Weber op cit (n219) note 4 to art 267 OR.

²⁹⁴ Higi op cit (n209) note 60 to art 267 OR.

²⁹⁵ See BGE 119 II 36 E. 3b.

²⁹⁶ See art 79 OR.

²⁹⁷ For an overview of the affected cantons, see Bisang et al op cit (n206) note 5 to art 267-267a.

3.5 The rights of the landlord

3.5.1 Substantive rights

3.5.1.1 Deposit

For residential and commercial leases, the landlord may demand a security in form of cash or negotiable securities in the contract. However, he is then obliged to deposit it in an interest-bearing bank savings or deposit account in the tenant's name.²⁹⁸ This means that the tenant's security may not form a part of the landlord's assets. Thus, where the security is delivered personally to the landlord, the latter is obliged to deposit it within a few days in a bank.²⁹⁹ Should the landlord nonetheless deposit the security unlawfully, he may not only render himself liable to criminal prosecution due to misappropriation³⁰⁰, but the tenant is also entitled to enforce his claim to deposit the security in a bank by way of action or demand return of the security or have it set-off against the rent.³⁰¹

Furthermore, in residential leases the landlord is not entitled to ask for more than three months' rent by way of security³⁰², whilst in commercial leases no limit for the amount of the security exists.³⁰³ The security, however, provides protection for all claims of the landlord against the tenant deriving from the lease³⁰⁴, and is given preferential treatment in favour of the landlord in case of the tenant's insolvency.³⁰⁵

Finally, the bank is allowed to release such security only with the consent of both parties, in compliance with a final payment order or a legally

²⁹⁸ See art 257e (1) OR.

²⁹⁹ Lachat et al op cit (n2) at 264.

³⁰⁰ See BGE 101 IV 213.

³⁰¹ Higi op cit (n209) note 30 to art 257e OR.

³⁰² Art 257e (2) OR.

³⁰³ Bisang et al op cit (n206) note 19 to art 257e.

³⁰⁴ Zihlmann op cit (n223) at 64.

³⁰⁵ See BGE 61 III 77.

binding decision of the court.³⁰⁶ However, on expiry of one year following the end of the lease, on request of the tenant the bank is obliged to return the security to him, if during that period the landlord has not brought a claim against the tenant.³⁰⁷

3.5.1.2 Renovations and modifications

The landlord is authorised to renovate or modify the property as far as it is acceptable for the tenant and the lease has not been terminated.³⁰⁸ It follows from this that the landlord basically does not need the approval of the tenant for the realisation of the renovation. On the contrary, he may realise the restructuring without the consent of the tenant as long as the above two prerequisites are met.³⁰⁹ Whether or not the renovation or modification is acceptable for the tenant depends on the consideration of the party's interest, whereby various objective criteria such as the type and extent as well as the utility and effect of the renovation must be considered.³¹⁰ In carrying out renovation work, the landlord must pay due consideration to the tenant's interests.³¹¹ Furthermore, the latter may claim a reduction of the rent and compensation for damage suffered. On the contrary, the landlord, subject to certain conditions, may increase the rent (see 3.5.1.5).

3.5.1.3 Termination

Where the parties have agreed on a lease of indefinite duration, the landlord is basically entitled to ordinarily terminate the residential premises by giving three months' notice, and a commercial property by giving six months' notice, both expiring on a date fixed by local usage³¹² or, in the absence of such usage, at the end of a three-month period of the lease.³¹³ These are

³⁰⁶ Art 257e (2) OR.

³⁰⁷ Ibid.

³⁰⁸ Art 260 (1) OR.

³⁰⁹ See also Bisang et al op cit (n206) note 18 to art 260-260a.

³¹⁰ For details, see Bisang et al op cit (n206) note 24/26 to art 260-260a.

³¹¹ Art 260a (2) OR.

³¹² The prevailing dates fixed by local usage within the most cantons are the end of March and the end of September.

³¹³ Art 266c and 266d OR.

minimum periods of notice. Thus, while the parties remain free to agree on any desired termination date, they may only stipulate a longer notice period.³¹⁴

3.5.1.4 Insolvency of the tenant

If the tenant becomes insolvent after having taken possession of the rented premises, the landlord is entitled to demand security for the future rent payments from the tenant and the insolvency administrators, whereby to the latter an appropriate time limit of around 14 days³¹⁵ must be granted.³¹⁶ In the case of a fixed-term lease, the security must cover the whole rent up to the termination, and where the lease is unlimited until the next possible termination date (see 3.5.1.3).³¹⁷ Should the landlord not receive the security within the time limit, he may terminate with immediate effect the rent contract.³¹⁸

3.5.1.5 Rent increase

Where an unlimited lease has been concluded, the landlord is basically entitled to increase the rent during the lease either if he provides additional services that, to put it simply, enhance the value of the property let³¹⁹ or if since the initial rent or the last rent adjustment an increase in the costs and living expenses has occurred.³²⁰ Referring to this, in practice it applies that every increase to the extent of 0.25 per cent of the reference interest rate, deriving from the average interest rate for the domestic mortgage claims and published by the Federal Department of Economic Affairs four times per year³²¹, represents a basis for the increase of the rent.³²² The tenant,

³¹⁴ See art 266a (1) OR.

³¹⁵ Lachat et al op cit (n2) at 572.

³¹⁶ Art 266h (1) OR.

³¹⁷ Weber op cit (n219) note 7 to art 266h OR.

³¹⁸ Art 266h (2) OR.

³¹⁹ See art 269a OR read together with art 14 VMWG.

³²⁰ See art 269a OR read together with art 12 and 16 VMWG.

³²¹ See art 12a VMWG.

³²² Art 13 (1) VMWG.

however, may raise objections (for instance, that with the new rent an excessive income for the landlord would result).³²³

As a formal matter, the landlord may at any time increase the rent with effect from the next termination date, but he is obliged to give notice of and reasons for the rent increase at least ten days before the beginning of the notice period for termination. The landlord is required to use a form approved by the canton; otherwise the rent increase will be void.³²⁴ These ten days are considered to be a kind of period of reflection, during which the tenant can decide whether he wishes to terminate the lease in the event he does not wish to accept or challenge the rent increase (see 3.6.1.1).³²⁵

3.5.2 Remedies in case of default of the duties by the tenant

3.5.2.1 Rent payment

Should the tenant fail to pay the rent and accessory charges or is in arrears with them, the landlord is entitled to claim the rent for the period of arrears. However, he will preferably initiate debt collection proceedings as by means of a written rent contract he can easily remove a filed objection by the tenant and continue with the pledging of goods and their liquidation.³²⁶ Consequently, only where the landlord does not dispose of a written rent contract he first will lodge a claim for the rent and after obtaining the judicial decision initiate debt collection proceedings.

Moreover, concerning residential and commercial leases, the landlord may set a time limit of 30 days for the payment in arrears, and notify the tenant that in the event of non-payment within the imposed time limit the landlord will terminate the lease subject to at least 30 days' notice ending on the last day of a calendar month.³²⁷ This demand of payment combined with a threat of extraordinary termination must be in writing and sent to the

³²³ For details, see Lachat et al op cit (n2) at 439.

³²⁴ Art 269d (1) and (2) OR.

³²⁵ See BGE 107 II 189 E. 2.

³²⁶ See also Lachat et al op cit (n2) at 225-226.

spouse of the tenant separately, no matter if he is not a contracting party.³²⁸ The time limit for the payment starts the day after the receipt of the letter.³²⁹ If the tenant does not accept the letter, the time limit for the payment starts after the expiry of the seven-day time limit for the postal collection at the latest.³³⁰ After expiry of the time limit for the payment, the landlord is advised not wait too long with the notice of termination, otherwise a tacit waiver might be assumed.³³¹ If the landlord, on the contrary, gives the notice of termination before the expiry of the time limit for the payment, it will be ineffective.³³²

In conclusion, relating to commercial leases, as security for the rent for the past year and the current six-month period, the landlord has the right to retain movables located on the leased premises and either used as fixtures or required for the use of the premises.³³³ The landlord's special lien also extends to items brought into the premises by a sub-tenant (see 3.6.1.3) in so far as the latter has not paid his rent.³³⁴ On the contrary, the right of lien does not extend to movables of third parties which the landlord knew or should have known that they do not belong to the tenant, or are stolen, lost or otherwise mislaid objects.³³⁵

The landlord's lien starts with the recording of the movables of the tenant by the competent debt collection office and will be continued with a debt collection by realising pledged property which places the former in a privileged position.³³⁶ The same applies if the tenant becomes insolvent.³³⁷ Despite the recording the tenant may still use the retained movables, but is

³²⁷ Art 257d OR.

³²⁸ See art 266n OR.

³²⁹ Lachat et al op cit (n2) at 543.

³³⁰ See BGE 119 II 147 E. 3.

³³¹ Bisang et al op cit (n206) note 34 to art 257d.

³³² See BGE 121 II 156.

³³³ Art 268 (1) OR.

³³⁴ Art 268 (2) OR.

³³⁵ Art 268a (1) OR.

³³⁶ For details, see Lachat et al op cit (n2) at 229-232.

³³⁷ See art 219 (1) SchKG.

no longer authorised to dispose over them.³³⁸ Should the tenant nevertheless intend to remove the objects located in the premises, the landlord may, with the assistance of the competent authority, retain such objects as are blocked to secure his claim. Where items have been removed secretly or by force, they can be brought back to the premises with the assistance of the police.³³⁹

3.5.2.2 Duty of care

Should the tenant breach his duty of care relating to residential and commercial leases, the landlord is entitled to extraordinarily terminate the rent contract with a 30 days' notice period at the end of the month. Such right can be exercised if, despite a previous written warning from the landlord, the tenant continues to act in breach of the mentioned duty and that the continuation of the lease becomes not acceptable for the landlord, or other persons who live in the tenement too.³⁴⁰ In this regard, all relevant circumstances such as the kind and duration of interference must be considered.³⁴¹ The written warning is to be sent by the landlord to the tenant soon after having taken note of the breach of duty to care and precisely describe it, but not necessarily contain a threat of termination.³⁴² However, a written warning is superfluous where the tenant intentionally causes serious damage to the property, as in this case the landlord has the right to terminate with immediate effect the residential and commercial leases.³⁴³ This also applies should the tenant cause harm to the landlord or neighbours by attacking them.³⁴⁴

3.5.2.3 Return of the property

Should the tenant not vacate the premises on the termination of the lease, the landlord may have the tenant judicially evicted by the competent

³³⁸ Bisang et al op cit (n206) note 20 to art 268-268b.

³³⁹ Art 268b OR.

³⁴⁰ Art 257f (3) OR.

³⁴¹ See Lachat et al op cit (n2) at 551-552.

³⁴² Higi op cit (n209) note 52 to art 257f OR.

³⁴³ Art 257f (4) OR.

³⁴⁴ Weber op cit (n219) note 7 to art 257f OR.

authorities.³⁴⁵ Since the domiciliary rights of the tenant do not end with the termination of the lease, but only when he definitely moves out, despite the unlawful occupation the tenant does not commit a criminal offense.³⁴⁶ Therefore, conversely, the landlord cannot take possession of the property himself by force (for instance by replacing the door locks), as he would otherwise render himself liable to criminal prosecution due to unlawful entry.³⁴⁷ However, the tenant is in breach of contract, and thus liable to pay the damages suffered by the landlord.³⁴⁸ The compensation normally corresponds to the rent owed for the period during which the tenant unlawfully occupies the premises.³⁴⁹ Furthermore, if the landlord delays too long with the claim for eviction, it might be assumed that he tacitly agrees to the continuation of the lease.³⁵⁰

For the judicial eviction of the tenant, the landlord can make use of the ordinary proceedings by introducing the request before the conciliation authority³⁵¹ and subsequently, in case of non-agreement, before the competent Court for Landlord and Tenant Law, or, alternatively, through summary proceedings.³⁵² These proceedings have the advantage that no prior conciliation procedure is required.³⁵³ Conversely, however, the judge of summary proceedings only approves the claim for eviction where the facts are undisputed or immediately provable and the legal situation is clear.³⁵⁴ Hence, eviction requests are mostly only approved by the judges in the summary proceedings if the notice of termination is not void and has not been challenged by the tenant or in case of extraordinary termination due to

³⁴⁵ Bisang et al op cit (n206) note 14/15 to art 267-267a.

³⁴⁶ See BGE 112 IV 31 E. 3C.

³⁴⁷ Lachat et al op cit (n2) at 715.

³⁴⁸ See BGE 131 III 257 E. 2.

³⁴⁹ Lachat et al op cit (n2) at 690.

³⁵⁰ See BGE 119 II 147 E. 5.

³⁵¹ See art 197 et sqq. ZPO.

³⁵² See art 248 et sqq. ZPO.

³⁵³ See art 198 (a) read together with art 257 (1) ZPO.

³⁵⁴ Art 257 (1) ZPO.

default in payment.³⁵⁵ In simple terms, if the validity of the notice of termination is not immediately provable, the judge of summary proceedings will not consider the case and consequently charge the procedural costs to the landlord.

Should, for whatever reason, the tenant already have challenged the termination of the lease at the conciliation authority, the landlord is not precluded from bringing an action for eviction before the judge in summary proceedings. In this case, the conciliation authority will suspend its proceedings until the judge in summary proceedings has passed his judgement.

If an eviction order has finally been issued, it is normally combined with a very short period of grace, within which the tenant must vacate the property. If he fails to do so, the appropriate authority in the municipality in question will enforce the eviction, with the help of the police if necessary.³⁵⁶

3.6 The rights of the tenant

3.6.1 Substantive rights

3.6.1.1 Challenge to rent

Within 30 days of taking possession of the property, the tenant has the right to challenge the initial rent of residential or commercial leases as legally unfair before the conciliation authority and request from the mentioned authority an order to reduce the rent, provided that he felt compelled to conclude the lease agreement on account of personal or family hardship, or by reason of the conditions prevailing on the local market for residential and commercial premises, or the rent required by the landlord has significantly been increased with respect to the previous rent for the same property.³⁵⁷

³⁵⁵ See also M Fricker ‘Die Mietausweisung nach der neuen Zivilprozessordnung’ (2011) 11 *Wohnwirtschaft HEV Aargau* 14 at 14.

³⁵⁶ See also Lachat et al op cit (n2) at 689.

³⁵⁷ See art 270 (1) OR.

Concerning familiar or personal distress, the tenant must find himself in a situation of coercion in the sense that his personal or the rent market situation virtually forced him to conclude the challenged rent contract and another solution would appear highly unreasonable.³⁵⁸ To put it more simply, the tenant must offer serious grounds that result from his plight.³⁵⁹

Regarding the conditions prevailing on the local market for residential and commercial premises, the tenant must prove that he was not able to find an alternative solution, although he intensively searched for suitable properties over a longer period of time.³⁶⁰

Further, the rent is in general considered as significantly increased if it exceeds the previous rent by more than 10 per cent.³⁶¹

Lastly, the initial rent is considered as unfair if, inter alia, it permits the landlord to get an excessive income or it falls outside the range of rents usages in the locality.³⁶²

During the lease, the tenant may challenge the rent as unfair and request its reduction as of the next termination date, provided that he has good reason to assume that the return got by the landlord from the rented property is excessive (in particular due to a reduction in costs).³⁶³

In practice, it applies that every reduction to the extent of 0.25 per cent of the reference interest rate (see 3.5.1.5) represents a basis for the reduction of the rent.³⁶⁴ The landlord, however, may raise several objections

³⁵⁸ Cf OGer Kanton Zürich vom 4.9.1992 (published in *ZMP* 1/1993, 33).

³⁵⁹ Bisang et al op cit (n206) note 8 to art 270.

³⁶⁰ Bisang et al op cit (n206) note 12 to art 270.

³⁶¹ Weber op cit (n219) note 5 to art 270 OR (with further references).

³⁶² See art 269 and 269a OR.

³⁶³ See art 270a (1) OR.

³⁶⁴ Art 13 (1) VMWG.

or set them off as general cost increases incurred or inflation adjustment.³⁶⁵ Furthermore, if the tenant wishes to have the rent reduced, he must present his request in advance to the landlord in writing, who then has 30 days to respond. Only when the landlord does not accept the request or does not answer within the timeline, the tenant may apply to the conciliation authority.³⁶⁶

3.6.1.2 Renovations and modifications

The tenant is entitled to renovate or modify the premises let, provided that the landlord gives his written consent.³⁶⁷ This also means that the landlord may refuse the tenant's renovation request, even without giving any reasons.³⁶⁸ However, should the landlord agree to the tenant's wish to renovate the rented premises himself, the tenant is not obliged to restore the property to its previous condition at the end of the lease, unless it has been agreed in writing between them.³⁶⁹ Moreover, where at the end of the lease the property let has appreciated significantly in value as a result of renovations or modifications to which the landlord consented, the tenant may claim appropriate compensation for such appreciation.³⁷⁰ An added value is confirmed if in the subsequent lease the landlord can ask for a higher rent and thus obtain an additional profit.³⁷¹ Should the tenant carry out a renovation without the consent of the landlord, he commits a breach of contract, which under certain circumstances may result in a termination of the lease.³⁷²

³⁶⁵ See art 13 and 16 VMWG.

³⁶⁶ Art 270a OR.

³⁶⁷ Art 260a (1) OR.

³⁶⁸ Weber op cit (n219) note 3 to art 260a OR.

³⁶⁹ Art 260a (2) OR.

³⁷⁰ Art 260a (3) OR.

³⁷¹ Bisang et al op cit (n206) note 80 to art 260-260a.

³⁷² See Lachat et al op cit (n2) at 697-698.

3.6.1.3 Subletting and transfer

The right of the tenant to sublet the rented premises also depends on the landlord's consent.³⁷³ However, the landlord may refuse his approval if one of the following conditions is met. First, the tenant refuses to inform the landlord of the terms of the subletting.³⁷⁴ Secondly, the terms and conditions of the subletting are unfair in comparison with those of the principal lease.³⁷⁵ In this regard, it generally applies that the subletting is unfair if the rent of the subletting considerably exceeds the rent of the principal lease, without this difference being justifiable by services of the main tenant.³⁷⁶ However, a certain margin in favour of the main tenant is permitted such as for the risk of liability in respect of the landlord or the passing on of administration costs.³⁷⁷ Thirdly, the landlord may refuse consent, if the subletting determines major disadvantages for the landlord³⁷⁸ which may be assumed if the intended use of the premises let is substantially changed.³⁷⁹

The landlord's approval must be obtained by the tenant before the conclusion of a sublease. There is no time limit within which the landlord is obliged to give his answer, but it surely depends on the complexity of the sublease.³⁸⁰

Lastly, if the tenant sublets the property without asking in advance for the approval of the landlord, he risks termination of the lease.³⁸¹ Conversely, should the landlord unjustly refuse consent, the tenant may sue him for the grant of approval.³⁸²

³⁷³ See art 262 (1) OR.

³⁷⁴ Art 262 (2) (a) OR.

³⁷⁵ Art 262 (2) (b) OR.

³⁷⁶ Higi op cit (n209) note 43 to art 262 OR.

³⁷⁷ Lachat et al op cit (n2) at 468.

³⁷⁸ Art 262 (2) (a) to (c) OR.

³⁷⁹ Weber op cit (n219) note 8 to art 262 OR.

³⁸⁰ Lachat et al op cit (n2) at 470.

³⁸¹ For details, see Lachat et al op cit (n2) at 472-473.

³⁸² Lachat et al op cit (n2) at 473.

Relating to commercial premises, the tenant is furthermore entitled to transfer his rent contract to a third party with the landlord's written approval, whereby the latter may withhold it only in the event of good cause.³⁸³ Such a cause already exists if there is a risk that the situation of the landlord will deteriorate.³⁸⁴ Once the landlord has given consent, the third party is subrogated to the rights and obligations of the tenant under the rent contract, and the latter is in so far released from his obligations towards the landlord as he remains liable to the third party until such time as the lease ends, or may be terminated under the contract or by law, but in any event for no more than two years.³⁸⁵

3.6.1.4 Termination, sale and insolvency

The tenant is entitled to terminate the residential and commercial lease under exactly the same conditions as the landlord (see 3.5.1.3). Should the tenant, however, terminate the lease without observing the notice period or the deadline for termination, his obligations towards the landlord shall remain unchanged unless he proposes a new tenant who, on the one hand, is acceptable to the landlord, and on the other is solvent and willing to take over the rental agreement under exactly the same terms and conditions.³⁸⁶ The acceptability is measured only on the basis of objective standards, and the new tenant is principally considered as solvent if his net income is three times the amount of the rent.³⁸⁷ The landlord naturally remains entitled to refuse the presented new tenant, but in this case the tenant is released from his contractual duties.³⁸⁸ Conversely, as long as a tenant is not able to present a new tenant with the required prerequisites, he must continue to pay the rent until such time as the lease may be terminated under the conditions of the rent contract or by law.³⁸⁹ The landlord, however, has a duty to mitigate damages.³⁹⁰

³⁸³ Art 263 (1) and (2) OR.

³⁸⁴ Bisang et al op cit (n206) note 16 et sqq. to art 263.

³⁸⁵ Art 263 (3) and (4) OR.

³⁸⁶ Art 264 (1) OR.

³⁸⁷ See BGE 119 II 36 E. 3d.

³⁸⁸ Bisang et al op cit (n206) note 8 to art 264.

³⁸⁹ Art 264 (2) OR.

In case of termination of residential and commercial leases by the landlord, the tenant is entitled to challenge it where it contravenes the principle of good faith.³⁹¹ The right to challenge is mandatory, and thus the tenant may not waive this right in advance by means of a clause in the rent contract.³⁹² Moreover, if he wants to challenge the termination, he must bring the matter before the conciliation authority within 30 days of receiving the notice of termination.³⁹³ Should the tenant miss the deadline, he forfeits the right to challenge the termination.³⁹⁴ Where the rented premises serves as a family residence, the tenant's spouse is likewise entitled to challenge the termination, even if he or she is not a contracting party.³⁹⁵ After all, in case the termination shall be considered invalid, not only the lease continues to run just as before, but it also results in a three-year vesting period, during which the landlord principally may not ordinarily terminate the lease.³⁹⁶

Along with the right to challenge the termination, the tenant may also request the extension of a fixed-term or unlimited lease subject to the condition that the termination of the lease would cause a degree of hardship for him or his family that cannot be justified by the interests of the landlord.³⁹⁷ Hence, in the absence of hardship reasons on the side of the tenant, an extension will be denied. Conversely, in the event of their existence they must be confronted with the interests of the landlord. This weighing ultimately leads to the duration of the extension of their existence.³⁹⁸

³⁹⁰ See art 264 (3) OR.

³⁹¹ Art 271 OR. For a non-exhaustive enumeration of notice open to challenge, see art 271a OR.

³⁹² Lachat et al op cit (n2) at 597.

³⁹³ Art 273 (1) OR.

³⁹⁴ See BGE 121 III 156 E. 1c.

³⁹⁵ Art 273a (1) OR.

³⁹⁶ See art 273a (1) (e) item 1 OR.

³⁹⁷ Art 272 (1) OR.

³⁹⁸ See Bisang et al op cit (n206) note 15 to art 272.

When weighing the respective interests of the tenant and landlord, particular attention must be given to the circumstances in which the lease was contracted, along with the terms of the lease, the duration of the lease, the personal, family and financial circumstances of both parties as well as their conduct. Also important is any need the landlord might have to use the premises for himself and his family members and the urgency of such need, and ultimately the conditions prevailing on the local market for residential and commercial premises.³⁹⁹

A lease may be extended for a maximum of four years in the case of residential premises and six years for commercial premises, unless otherwise expressly agreed by the renting parties.⁴⁰⁰ During the period of extension, the tenant is entitled to terminate the lease with a shorter period of notice, provided that the decision or agreement on extension does not stipulate otherwise.⁴⁰¹

The request of extension must be submitted to the conciliation authority within 30 days of receiving the notice of termination where the lease is open-ended, or not later than 60 days before expiry of the lease where it is of limited duration (otherwise the tenant is not anymore entitled to it).⁴⁰² Where the rented premises serve as a family residence, the tenant's spouse is likewise entitled to request an extension, even if he or she is not a contracting party.⁴⁰³

Finally, an extension is excluded where, inter alia, the lease has been terminated due to the tenant's default in payment or his breach of duty of care, or because the landlord has offered to the former equivalent residential or commercial premises.⁴⁰⁴

³⁹⁹ Art 272a (2) OR.

⁴⁰⁰ See art 272b OR.

⁴⁰¹ For details, see art 272d OR.

⁴⁰² Art 273a (2) OR.

⁴⁰³ Art 273a (1) OR.

⁴⁰⁴ See art 272a OR.

Should the landlord during the lease sell the property let or be dispossessed of it in debt collection or bankruptcy proceedings, even though the lease passes to the acquirer together with the ownership, the tenant is not totally protected, since the new owner has the right to serve notice to terminate a residential or commercial lease as of the next legally admissible termination date if he claims an urgent need of such premises for himself or his close relatives.⁴⁰⁵ In this case, the tenant is entitled to claim compensation for the damages incurred against the previous landlord, provided that the new owner terminates the lease sooner than it is permitted under the existing rent contract.⁴⁰⁶

3.6.2 Remedies in case of non-compliance by the landlord

3.6.2.1 Delivery

If the landlord does not deliver the let property on time, the tenant is in principle entitled to the specific performance in addition to suing for damages due to the delay or, alternatively, either to waive the subsequent performance and claim damages for non-performance or withdraw from the rent contract altogether and claim damages for the lapse of the contract, unless the landlord can prove that he is not at fault.⁴⁰⁷ The right to demand or renounce to the fulfilment of the rent contract is independent of the landlord's fault.⁴⁰⁸ Furthermore, where the tenant chose to withdraw from the rent contract he is exempted from payment of the rent⁴⁰⁹, while with the choice of the first two remedies he basically remains obliged to pay.

Before choosing one of these remedies, the tenant is normally required to set an appropriate time limit for subsequent performance.⁴¹⁰ Only where

⁴⁰⁵ See art 261 (1) and (2) OR.

⁴⁰⁶ Art 261 (3) OR.

⁴⁰⁷ Art 258 (1) read together with art 107 (2) and art 109 (2) OR.

⁴⁰⁸ Bisang et al op cit (n206) note 26 to art 258.

⁴⁰⁹ See art 109 (1) OR.

⁴¹⁰ Art 107 (1) OR.

the rent contract clearly shows the intention of the parties that the performance has to take place at or before a precise point in time, or where it is evident that the landlord is not able to put the rented premises at the disposal within the grace period (which for instance is the case when the previous tenant refuses to vacate the premises), the setting of an extension of time is not needed.⁴¹¹ After the extension of time, the tenant has to decide immediately between the three remedies. Otherwise it is assumed that he adheres to the rent contract.⁴¹²

Finally, if the delivery is no longer possible (since for example the premises have already been rented to another person or the property has been destroyed without the landlord being responsible for it), the tenant is only entitled to claim back the rent paid in advance and demand compensation for damages, provided that the landlord is hold liable for them.⁴¹³

3.6.2.2 Notification of the initial rent

In the event that despite the existence of a cantonal duty the landlord does not use the form or provides any untrue information therein, the tenant may ask the court to define an appropriate rent in the light of the circumstances of the individual case and considering all relevant factors such as profit and local or regional usage.⁴¹⁴ The rent contract, however, remains binding in its other parts.⁴¹⁵ It is unclear up to when the tenant, who fails to challenge the initial rent (see 3.6.1.1), may refer to the non-use of the mandatory cantonal form. The majority of scholars assume that the tenant is basically at any time entitled to appeal to the partial invalidity of the rent contract, provided that the limitation period for the recovery of the rent paid in excess has not expired.⁴¹⁶

⁴¹¹ See art 108 item 1 and 3 OR.

⁴¹² See BGE 116 II 436 E. 3a.

⁴¹³ For details, see Lachat et al op cit (n2) at 124-125.

⁴¹⁴ See BGE 119 II 341 E. 4-7.

⁴¹⁵ See BGE 124 III 62 E. 2a/2b.

⁴¹⁶ For details, see Higi op cit (n209) note 119 to art 270 OR.

3.6.2.3 Maintenance of the property

If the landlord delivers the property let with defects rendering it wholly or partly unfit for its designated use, in other words with serious defects, the tenant may withdraw from the rent contract and claim compensation for damages incurred.⁴¹⁷ However, the tenant may instead resort simultaneously to several solutions which are available for defects that arise in rented premises during the lease, for which the tenant is neither responsible nor obliged to resolve at his own expense.⁴¹⁸

In the first place, the tenant is entitled to demand the removal of the defect.⁴¹⁹ As soon as the landlord knows of the defects, he is obliged to repair them within an appropriate period of time.⁴²⁰ If the landlord does not perform the needed repairs either fully or partially, the tenant may either arrange for the defect to be resolved at the landlord's expenses if the defect renders the property let less fit for its designated use, albeit not substantially⁴²¹, or terminate with immediate effect the rent contract where the defect is so serious that it renders the property let unfit or significantly less fit for its designated use.⁴²² Should the tenant, however, despite the serious defect decide not to terminate the lease, he is not allowed to arrange the repair himself, but instead has to enforce the claim of repair by way of action.⁴²³ In the end, the tenant does not have the right to rectification of the defect if the landlord provides full compensation for the defective property let within a reasonable time.⁴²⁴

Secondly, the tenant may require the landlord to reduce the rent proportionately from the time when the landlord became aware of the defect

⁴¹⁷ Art 258 (1) read together with art 107 (1) OR.

⁴¹⁸ Art 258 (3) read together with art 259a (1) OR.

⁴¹⁹ Art 259a (a) OR.

⁴²⁰ Lachat et al op cit (n2) at 168.

⁴²¹ See art 259b (a) OR.

⁴²² See art 259b (b) OR.

⁴²³ Lachat et al op cit (n2) at 169.

⁴²⁴ See art 259c OR.

until it is eliminated.⁴²⁵ If the defect is serious, the tenant is completely exempt from the payment of the rent.⁴²⁶ Incidentally, the reduction of the rent is calculated by comparing the defective state of the property let with the condition which complies with the rent contract.⁴²⁷

Thirdly, the tenant may claim compensation for damages suffered, provided the landlord is at fault⁴²⁸, and fourthly, summon the latter to assume the power over a legal dispute initiated by a third party.⁴²⁹

Finally, the tenant is entitled to deposit the future rent payments with an office designated by the canton in order to assert his claim for resolution of the defects, whereby the tenant must first set in writing a reasonable time limit to the landlord with a corresponding warning that in case of non-fulfilment the rent will be deposited; and secondly has to notify the landlord in writing of his intention to pay rent on deposit.⁴³⁰ Ultimately, the landlord not only becomes entitled to the rent paid on deposit if the tenant does not bring claims against him before the conciliation authority within 30 days of the due date for the first rent payment paid into deposit, but he may also apply for the release of rent unjustly paid on deposit.⁴³¹

⁴²⁵ Art 259d OR.

⁴²⁶ Lachat et al op cit (n2) at 173.

⁴²⁷ See BGE 130 III 504 E. 4.1.

⁴²⁸ See art 259e OR.

⁴²⁹ See art 259f OR.

⁴³⁰ See art 259g OR.

⁴³¹ See art 259h OR.

4 ANALYSIS OF THE TWO LAWS

The South African rental housing market appears to be a rather complex legal field, not only because it is characterised by the interaction between common-law principles and statute law, but since there is also an abundance of acts that need to be considered when dealing with rental matters at the same time. In Switzerland conversely, the main substantive rules of lease are gathered in one regulation only. It is obvious that the unification of rules enormously facilitates their application. On the other hand, it is quite comprehensible that in some specific areas (as currently the case in evictions), the South African rent legislation still draws a distinction between rural and urban areas. This may result from the fact that unlike in Switzerland, the South African economy may still largely depend on the agricultural sector, and thus special protection for renting farmers in particular is required. However, a large variety of acts is likely to lead to confusion regarding the application of law, which may render access to justice more difficult as well as discourage people from seeking legal assistance. Thus it may be advisable to unify some of the different acts of South African law as for example the PIE and ESTA, or integrate them into another act. The RHA would be very suitable for this purpose, as it is increasingly developing as the authoritative legal framework for the lease. This would undoubtedly help to consolidate the rent legislation and consequently improve not only legal certainty, but also lead to better access to justice.

The two rent legislations do not just differ in the quantity of regulations to be considered when dealing with the lease. It is also noteworthy that in South Africa's rent legislation, the residential tenants seemingly enjoy better protection than commercial tenants. This can be seen on the one hand in the examples of lease termination, where the landlord of residential leases, contrary to those of commercial leases, basically may terminate a lease only for reasons that do not constitute unfair practices (see 2.5.1.2). On the other hand, with eviction proceedings relating to commercial leases and unlike residential leases, the court basically has no discretion in refusing the

eviction request of the landlord (see 2.5.2.3). In contrast, Swiss rent legislation does not really distinguish between commercial and residential leases, particularly in relation to the protection against unlawful termination of leases and unfair rents (see 3.6.1.1 and 3.6.1.4). This is quite understandable, since there are no overriding reasons why commercial tenants should benefit from less protection than residential tenants. Of course, today, due to their financial strength, large corporations not only possess greater bargaining power over landlords when negotiating the rent contract, but also benefit from access to a rental market where the freedom of contract is as unrestricted as possible. But commercial tenants running small businesses are as equally in need of protection as residential tenants, and perhaps even more so, since they often invest their entire wealth in the business and may have employees towards whom they have financial and social responsibility. Therefore, in order to find a better balance between the interests of the usually financially stronger landlords and weaker commercial tenants, the Swiss rent law may reduce the protection to smaller commercial tenants while the South African rent regulation, conversely, may provide at least a modicum of protection for them. This may, for instance, be achieved by also making the termination of the commercial lease conditional on grounds that do not constitute unfair practice (see 2.5.1.2). Another idea is to introduce a kind of formal right of extension of the lease in case of hardship which, however, should be open to both the residential and commercial tenants, as prescribed by Swiss law (see 3.6.1.4).

It is further noteworthy that in the Swiss rent law, the exercise of many rights is mostly combined with the strict observation of a forfeiture period as, for instance, in connection with the landlord's obligation to notify defects within a short time limit after the return of the property let (see 3.3.4). In the South African rent legislation, however, their exercise is apparently bound by only a few notification periods, if at all. In isolated cases, the Swiss regulation may lead to unhappy situations: for example when tenants do not challenge unquestionably unlawful notices of rental termination within the deadline that would allow the regular continuation of the lease (see 3.6.1.4), and thus are obliged to definitely vacate the premises. But, as a whole, the existence of

forfeiture periods is useful, as it ultimately helps to create more legal certainty and clarity. Moreover, unlike the South African rent legislation, according to the Swiss rent law the exercise of some rights is also subject to strict formal requirements as exemplified by the need of an official form containing basic legal information if the landlord wishes to terminate the lease (see 3.3.4) or increase the rent (3.5.1.5). Such a regulation undoubtedly helps to ensure that tenants unacquainted with the law are in any case informed of their rights.⁴³² To put it more simply, it ensures greater transparency and legal security. Since in South Africa many people apparently still have a lack of basic legal knowledge due to the still existing poor access to education, and since legal counselling is often bound up with costs, an introduction of a similar rule, particularly in connection with residential leases, would be advisable.

However, the two rent legislations are not only characterised by their differences. It is generally noticeable that they also have many features in common, what is already evident with regard to the structure of the rent contract of both legislations (see 2.2 and 3.2). In terms of residential leases, however, a difference exists. The South African law, unlike the Swiss regulation, stipulates the written form for residential leases if demanded by the tenant (see 2.6.1.1). Such a provision makes sense, as along with better transparency it provides greater legal security to the tenants, who in connection with residential leases are normally the more vulnerable party. Hence, the introduction of a corresponding rule in Swiss rent law would be a valuable option, particularly as the cantons are only entitled to oblige the landlord to communicate in written form the initial and previous rent, but not all terms of a lease (see 3.3.2). Finally, upon the occurrence of certain events both rent legislations provide the same or at least quite a similar level of protection. Examples include insolvency of renting parties (see 2.5.1.4, 2.6.1.2, 3.5.1.4 and 3.6.1.4) or the sale of the property let by the landlord to a third party (in the latter case the tenant's protection under South African rent legislation is more extensive than under the Swiss rent law).

⁴³² See also Bisang et al op cit (n206) note 6 to art 266I-266o.

The reason why in general Swiss and South African rent legislations are essentially quite similar is likely to be found in the fact that both legal systems are today pursuing similar objectives (see 1.1). In addition, both legislations ultimately have their origins in the Roman law. Therefore, it is not surprising that the respective rights and obligations of the tenants and landlords according to the two legislations are often fairly similar, or on occasions even textually equal, as for instance the commitment of the landlord to deliver and maintain the property let (see 2.3.1, 2.3.2, 3.3.1 and 3.3.3) as well as the payment of certain taxes and fees (see 2.3.4 and 3.3.5). In addition, the landlord's duty of warranty of undisturbed use (see 2.3.3) leads to a similar result of the possessory rights in the South African law as they are granted to the tenant by the Swiss law (see 3.3.1). Also, the rules regarding the improvements to the property performed by the tenant do not differ radically (see 2.6.1.4 and 3.6.1.2). Besides, pursuant to both rent legislations, the tenant is under the duty to pay the rent (see 2.4.1 and 3.4.1), take care of the rented premises, as well as consider other possible tenants that live in the building (see 2.4.2 and 3.4.2) and return the rented premises upon termination of the lease (see 2.4.3 and 3.4.4). In terms of the rights granted, the rent legislations of both countries provide, inter alia, a bundle of similar remedies if the tenant and the landlord do not fulfil their respective commitments (see 2.5.2, 2.6.2, 3.5.2 and 3.6.2).

Nevertheless, a closer look at the singular duties and rights in question reveals, first, that they may differ in detail. This is for instance the case with the 'extraordinary' termination of rent contract due to non-payment of rent or misuse of the property by the tenant. While for this purpose under the South African rent legislation specific substantive requirements are required (see 2.5.2.1 and 2.5.2.2), according to the Swiss rent law only formal conditions are to be strictly met (see 3.5.2.1 and 3.5.2.2).

Besides, another important difference pertains to the deposit. While in the South African law a regulation of the deposit only exists in connection with residential leases (see 2.5.1.3), the Swiss rent law allows the landlord to

ask for a deposit for commercial leases as well (see 3.5.1.1). Far more importantly, however, is that unlike under the OR, under the RHA the landlord is not obliged to deposit the money on a frozen account, which can normally only be released with the consent of both parties (see 2.5.1.3 and 3.5.1.1). This enables him to deduct money from the deposit at the end of the lease to pay for repairs or damages, even if the latter are not acknowledged by the tenant. Thus, there is a risk of misuse especially by unscrupulous landlords. Therefore, if the tenant should not agree with the damages claimed by the landlord, he will probably have no other choice to approach the RHT, as it is to be expected that the landlord will deduct the money against the tenant's will. Needless to say this regulation may well lead to highly unfair results, although the risk of a misuse of a deposit may be reduced by an in-depth incoming inspection. Nevertheless, the tenant still remains in a disadvantaged position. Hence, it is desirable that the legislator rectifies this legal grievance in the future by, for instance, introducing the obligation to place the deposit on a frozen account so that a misuse of the deposit by landlords can virtually be excluded, as under the Swiss law.

Also, as far as subletting is concerned the rules differ to the extent that under the Swiss rent law a landlord's consent is always required (see 3.6.1.3), while under South African legislation this normally only applies to rural properties (see 2.6.1.3). Even more remarkable is that in contrast to the Swiss rent regulation⁴³³, the South African rent law allows a full prohibition of subletting by way of agreement (see 2.6.1.3). Of course, with a general contractual prohibition of subletting, the potential for abuse associated with it would be removed. Conversely, a full prohibition may, inter alia, intensify the lack of housing, especially in countries like Switzerland where the housing shortage is a chronic problem. Hence, both approaches have their justifications.

Secondly, some matters, as for instance the landlord's right to renovate the rented premises during the course of the lease or the tenant's right to

⁴³³ See Bisang et al op cit (n206) note 1 to art 262.

transfer the commercial lease to a third party, are regulated in the Swiss rent law (see 3.5.1.2 and 3.6.1.3), while the South African rent legislation seems to be silent on these topics.

Thirdly, in other matters again the Swiss rent law has some peculiarities. One of the special features of the Swiss rent law not explicitly mentioned in the corresponding South African regulation is the tenant's right to challenge the initial rent immediately after conclusion of the rent contract (see 3.6.1.1), and the right of the cantons to oblige the landlord to communicate the initial rent agreed between the parties and the rent paid by the previous tenant, if a specific condition is met (see 3.3.2). Both rules should mainly aim to create more transparency and to prevent landlords from excessively increasing the rent. Furthermore the obligation of communicating the initial and previous rent should additionally enable tenants to challenge the initial rent with the appropriate authorities.⁴³⁴ However, despite the introduction of this duty in some cantons, the challenge of the initial rent continues to be at a low level across Switzerland compared to other dispute matters.⁴³⁵ The main reason for this is certainly that the majority of the tenants do not want to start the rental relationship immediately with a dispute. In addition to this psychological hurdle, the unfairness of the initial rent is hard to prove by the tenant. Therefore, it is questionable whether or not the existing two provisions are really useful. A similar conclusion may be drawn for another special feature of the Swiss rent law, namely the tenant's right to deposit the rent in the event of the property being defected. This solution is not very popular because the tenant must meet strict formal criteria (see 3.6.2.3). In order to simplify and accelerate the rent deposit procedure and thus to make it more attractive, the rule for instance that additionally obliges the tenant to notify the landlord the intention to pay the rent on deposit could

⁴³⁴ See also I Spirig 'Formularpflicht für Anfangsmietzins neu auch in Zürich' (25. Oktober 2013) available at <http://www.nzz.ch/formularpflicht-fuer-anfangsmietzins-neu-auch-in-zuerich-1.18173398>, accessed on 7 July 2015.

⁴³⁵ See media release Federal Office of Housing (17. April 2015) available at <http://www.bwo.admin.ch/themen/mietrecht/00161/>, accessed on 8 July 2015.

be completely eliminated, since due to the previous warning letter the former anyway must expect the deposit of the rent by the tenant.

Further, although both rent laws determine, as an exception to the landlord's duty to maintain the property, that the tenant must repair or replace defects of minor nature, the Swiss rent law (unlike the South African rent regulation which for the determination of the minor repair apparently seems to refer to the single case) prescribes a rigid cost limit (see 2.3.2, 3.3.3 and 3.4.2). The Swiss solution, however, must clearly be regarded as inadequate, since due to its inflexibility it hinders an adaptation of the rule to the inflation and the decreasing spending power, which may occur over the years.⁴³⁶ Consequently, it would be more preferable to determine the cost limit for a single repair according to objective criteria, which are more adaptable to socio-economic changes.

There are other peculiarities in the Swiss rent law which are unknown in the South African rent legislation. One of these is the linking of the rent to the reference interest rate, which entitles the landlord to increase the rent and the tenant to ask for its reduction, depending on whether the reference interest rate increases or decreases (see 3.5.1.5 and 3.6.1.1). However, this rule is also highly questionable, since it leads to a high degree of rent volatility and is not easy to apply in practice. Hence, the author agrees with those who advocate the delinking of rent from the reference interest rate.⁴³⁷ Anyway, the tenant's right to demand a reduction of the rent is limited in its effectiveness, as he is obliged to approach the conciliation authority or ultimately the rent tribunal if the landlord does not grant the reduction voluntarily.

⁴³⁶ See also T Winiger 'Der «kleine Unterhalt»' (2011) 10 *Der Zürcher Hauseigentümer* 700 at 700.

⁴³⁷ See Amtliches Bulletin der Bundesversammlung Nationalrat – Herbstsession 2010 – Zweite Sitzung – 14.09.2010 – Miete und Pacht (Geschäfts-Nr. 08.081) available at http://www.parlament.ch/ab/frameset/d/n/4815/333171/dn4815333171_333210.htm, accessed on 16 July 2015.

The tenant's right to propose a new tenant in case of early return of the rented dwelling and the explicit right to request an extension of the lease in case of hardship (see 3.6.1.4) are likewise two other distinctive features of the Swiss rent law, which are today used very actively by the tenants. The first feature is – especially from the tenant's point of view – particularly important, as it enables withdrawal from the rent contract coupled with release from rent liability in cases of fixed-term rent contracts, which cannot be terminated by notice, and unlimited leases, where the next termination date is still far away. Unlike in Switzerland, in South Africa the risk of an extended rent liability in the event of termination on the part of the tenant appears to be marginal, since on the one hand the notice periods are usually quite short and formal termination dates do not exist, and on the other hand due to the application of the CPA, the fixed-term leases may be terminated as well in many cases by giving very short notice (see 2.6.1.2). Thus the introduction of a corresponding provision does not currently seem to be necessary in the South African rent regulation. The situation, however, is different concerning the right to request an extension of the lease. To date, in the South African rent legislation, an extension of the lease is only granted indirectly by means of a refusal of the judiciary eviction (because considered as unjust and equitable), or due to a temporary suspension of the eviction (because of the lack of alternative accommodation) or just by virtue of the duration of the proceeding itself (see 2.5.2.3). This means that the tenant does not have the opportunity to officially apply for an extension regardless of the eviction proceedings. However, a formal separate treatment of the extension question would definitely simplify the eviction proceedings and thus contribute to more procedural efficiency. Furthermore, in a separate proceeding that treats the question of the extension of the lease separately the tenant might present his arguments better. After all, as discussed above, the current South African legal regime can be regarded as unsatisfactory too, since commercial tenants are practically not protected from eviction.

With regard to the remedies in case of non-payment, an important finding is that the South African rent regulation is more comprehensive than the Swiss rent law, as it apparently allows the pledging of goods in

connection with commercial and residential leases (see 2.5.2.1). Indeed, there is no obvious reason why the right to pledge goods should only apply to commercial leases, as foreseen in the Swiss rent law (3.5.2.1), especially since under the Swiss insolvency law normal debt collection proceedings do not guarantee to the landlord the settlement of the outstanding rent in every case.

Lastly, differences can also be discovered between the Swiss and South African jurisprudence, notably in relation to the eviction of the tenant. In South Africa, it is above all disadvantageous for the landlord that according to the opinion of the Constitutional Court the eviction proceedings before the ordinary court must be suspended until the decision of the RHT if the tenant claims that the termination of the lease constitutes an unfair practice (see 2.5.2.3). Clearly this jurisprudence widely opens the door to potential abuse, especially as wealthy tenants may purposely delay the eviction by claiming an unfair practice and therefore, provoking the suspension of the eviction proceedings. Furthermore, it has not yet been shown that the judges of the RHT are legally better trained than judges of the ordinary courts to decide a matter of unfair practice.⁴³⁸ On the contrary, the Swiss jurisprudence, by recognizing this procedural deficiency, allows the court of the eviction proceedings to decide over the legitimacy of a lease termination (see 3.5.2.3). However, the Swiss jurisprudence is not free of faults either. By determining that a tenant is not committing a criminal offense despite his unlawful occupation after the termination of the lease, the Swiss Federal Court almost encourages abusive conduct (see 3.5.2.3). Therefore, it is to be hoped that the two courts change their practices again.

⁴³⁸ See also Bradfield & Lehmann op cit (n15) at 203.

5 CONCLUSION

The key finding of this comparative analysis is that the Swiss and South African rent regulations, despite being subject to different legal systems, are not fundamentally different, but in many aspects very similar.

Both regulations generally aim, albeit for different reasons, to promote accessibility to rental housing by creating mechanisms that ensure the proper functioning of the rental housing market. In this context, the idea of social protection plays an important role for both, which correspondingly has an effect on the rights and duties of the tenants and landlords.

The Swiss rent law is mainly characterised by its extensive rules and the strict formal requirements that must be met by the renting parties when asserting claims as a rule. Therefore, it may well be seen as a finely tuned regulation that guarantees not only legal certainty and equity, but transparency as well, since in addition the main substantive rules are unified in one law. However, as this work has demonstrated, the current rent regulation also has some shortcomings. In certain points, the existing rules appear to be outdated or too rigid and, thus, less adaptable to ongoing social and economic development. Hence, there may now be a need to slightly ease the existing strict tenant protection in certain matters.

On the contrary, South African rent regulation is more distinguished by the existence of several acts that are applicable together with the common law principles. Further, concerning the granting of rights and the imposition of duties, it draws a distinction between rural and urban areas as well as commercial and residential tenants. However, the South African rent rules are not as extensive as the Swiss rent law; in particular, some special features of the Swiss rent law are unknown to the South African rent legislation. But this does not necessarily mean that the South African rent regulation is less developed than the Swiss rent law. As shown in this dissertation, the South African rent legislation basically lays down the same main rights and duties for landlords and tenants. In a few points, it is even

considered to provide a better solution. Thus, the introduction of some Swiss special features, as recommended by the author, would merely complete the already functioning and advanced South African rent legislation.

No matter to what extent the rent legislation of both countries will be reformed in the future, one common goal will never change, namely guaranteeing accessibility to adequate housing, which ensures a healthy life in urban and rural areas.

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