

What are my rights when a tenanted property is sold?

Under South African law, a landlord is entitled to put their property up for sale at any time, but that doesn't mean that tenant rights and obligations are automatically forfeited.

Selling a rental with a tenant in residence isn't always an ideal situation, but the laws and processes in place are designed to treat all parties as fairly as possible.

"A lot of tenants rely on the South African legal principle of 'huur gaat voort koop' to protect their interests," says Jacqui Savage, National Rentals Business Development Manager for the Rawson Property Group. "Under this principle, a lease agreement is given precedence over an agreement of sale, which effectively entitles tenants to retain occupation until such time as their lease agreement expires."

While this is the default principle, Savage warns that there are circumstances in which it does not apply.

"'Huur gaat voort koop' only comes into play when a property is sold under 'normal' circumstances on the open market," she says. "In distressed sales, where banks and sheriffs are involved, things get a little more complicated."

Savage explains that if a property is being put on auction by the bank that holds the bond, and the bond was registered prior to the conclusion of the lease, the bank and sheriff must still attempt to sell the property subject to the lease if they're aware of its existence. If, however, the bids received are not sufficient to cover the bank's claim, the obligation to honour the lease falls away.

"The same is true if the bank and sheriff are unaware of the lease," she continues. "If a tenant with a valid lease comes forward after the auction has taken place, and the bid was sufficient to cover the outstanding amount to the bank, the lease must be honoured. If the bid was insufficient, however, the lease can be cancelled as required."

Thankfully, not all sales of tenanted properties are bank-enforced auctions, in which case "huur gaat voort koop" does apply. Or does it?

"A lot of landlords will include a sales provision in their lease to give themselves and their tenants more flexibility in the event of a sale," says Savage. "The terms could allow the tenant or landlord to cancel the lease early, with a prescribed notice period, if the property is placed on the market. As long as both parties have agreed to the terms, they replace the 'huur gaat voort koop' principle."

Without a sales provision in your lease, cancelling your contract early can be tricky. A tenant may be able to do so if their contract falls under the CPA, but this only occurs if the agreement is between two or more natural persons, or natural persons and a juristic person (a company, trust, body corporate, partnership or association). Any agreement between two or more juristic persons is not covered by the CPA.

"Even though you can legally cancel a lease early, there are often penalty fees to take into account," warns Savage, "so you'll need to decide whether the cost is worthwhile under your circumstances. Very often, it's easier for everyone to simply uphold the lease agreement. In these cases, all the terms and conditions of the lease will carry over to the new owner and landlord."

Of course, with a tenant in place, it can be challenging to find a new owner if show houses and property viewings aren't handled well.

"Tenants are required to allow reasonable access to their property for the purpose of showing it to prospective purchasers," says Savage, "and should make an effort to keep things as neat and clean as possible when visitors are expected. It's a two-way street, though – estate agents and landlords need to respect the tenant's rights as well. You can't force someone to vacate their home every Sunday for months on end, or allow visitors to wonder around at all times of day and night."

To keep tenant/landlord relationships amicable during the marketing of the property, Savage recommends negotiating set dates and times for holding viewings.

"Tenants do have the right to request to be present when the property is shown, but it's often less disruptive if the agent takes buyers around while the tenant is at work or away," says Savage. "It's always best if everyone can sit down and discuss their preferences for the marketing period in advance, and find a compromise that satisfies the most important factors for all involved."

According to Savage, this kind of open communication between landlord and tenant can make all the difference when it comes to a smooth sales process.

"It's often a difficult and emotional situation when a tenanted property is sold," she says, "but with the right attitude and sensitivity to all parties, it doesn't have to be unfair or unpleasant. If everyone is upfront and honest about their plans and expectations, and is willing to compromise for the sake of a positive outcome, both tenant and landlord can enjoy a stress-free experience."

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