

# How to Cancel a Residential Lease in 2024

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## INTRODUCTION<sup>1</sup>

There are a number of different laws that impact residential lease agreements. This article explores those relevant to the termination of a residential lease and explains the various proper procedures to be followed when cancelling a residential lease as a result of a breach by a tenant.

## TWO DIFFERENT TYPES OF NOTICE PERIODS

It is important to distinguish at the outset between two different and important notice periods. The first is relevant when trying to terminate a lease before the agreed fixed term of the contract has run its course, regardless of the reason behind the intention to terminate the agreement. Let's call this the 'early termination notice period'. Sometimes leases have these clauses, and sometimes they don't. If there is no such clause, then the lease can (save for in situations where the Consumer Protection Act 68 of 2008 or Rental Housing Act 50 of 1999 apply) be cancelled early provided reasonable notice is given<sup>2</sup>. What is considered to be reasonable will depend on the circumstances but industry standards usually require at least one to two months' notice.

The second notice period becomes relevant when a landlord or tenant has breached the lease, and the other party wants to give written notice for the breach to be remedied before the lease is cancelled. Failure to remedy the breach in the stipulated time period, will entitle the innocent party to cancel the lease and (where relevant) claim damages suffered from the offending party. Let's call this the 'breach notice period'.

## COURT DAYS v CALENDAR DAYS v BUSINESS DAYS

Before delving into the applicable acts, it is also important to note that lease agreements usually refer to calendar days, meaning every day on the calendar, including weekends and public holidays. The Consumer Protection Act ("the CPA") specifically refers to business days, meaning that you must ignore weekends and public holidays. Where the type of days is not defined, you must regard them as being calendar days, and include weekends and public holidays.

## THE RENTAL HOUSING ACT

The Rental Housing Act provides that if a tenant remains in occupation of the property after the period defined in a written lease expires, that the lease will continue to run on the same terms and conditions as contained in the initial agreement, save that the duration of the lease will be only one month (i.e. a month-to-month lease situation will arise). In circumstances such as these the Rental Housing Act expressly provides that the notice period for cancellation by either party is one month. This applies only to the situation where a landlord wants to stop the lease from renewing again for another month – it does however not apply to a cancellation by a landlord as a result of the tenant's breach.

The Rental Housing Act's Unfair Practice Regulations stipulates that a landlord must give the tenant 7 days in which to remedy the breach before cancelling the lease agreement, however, if the tenant is in default in regard to rental payments and remains in default for a period of 7 days of due date, the notice can be dispensed with.

## THE CONSUMER PROTECTION ACT

The CPA applies to the supply of goods and services within South Africa, and this Act expressly defines residential accommodation as a service, meaning that residential leases are affected by this Act.

Section 14(2)(b) of the CPA provides that :

1. A consumer ("tenant") can cancel the agreement upon the expiry of its fixed term without being subjected to any penalty or charge; and
2. A supplier ("landlord") can cancel the agreement 20 business days after giving the consumer/ tenant written notice of a material breach of the agreement unless the consumer has remedied said breach.

The application of Section 14 the CPA is only excluded in two instances, firstly, where the residential lease is concluded between two juristic entities regardless of their annual turnover and secondly, where the lessor is not leasing the property in the ordinary course of business. It is important to note that the CPA defines a

juristic person as including not only a company or close corporation but also a body corporate, trust and partnership.

In the event that the tenant elects to cancel section 14(3) (a) stipulates that the tenant can only be held liable for amounts owing in terms of the lease agreement up to the date of the cancellation and not for the remainder of the length of the lease agreement had the tenant not elected to cancel the lease agreement. However in this case then the landlord is entitled to a “reasonable cancellation penalty”, guidelines for which have been provided for in Regulation 5 of the Consumer Protection Act. Regulation 5 expressly draws the parameters of “reasonableness” in this regard and lists a number of notable factors, including; the length of the notice period by the consumer, the reasonable length within which the landlord would be able to procure a new tenant and general practice of the industry. Looking at the factors holistically, it is clear that between one to two months’ rental would amount to a reasonable penalty, along with any further damages claims and a claim for outstanding rentals incurred up to the cancellation of the lease agreement.

A landlord, on the other hand, can only cancel a tenant’s lease if the tenant has materially breached the lease and after having given 20 business days written notice to the tenant to remedy the breach, the tenant has failed to remedy that breach. This is critical because it applies despite what the lease says – it thus overrides the provisions of the lease (or the common law, which would have applied if the lease was not reduced to writing, or if certain important provisions of the lease agreement were accidentally left out of the written lease document). Consequently, the CPA only deals with the breach notice period and not the early termination notice period.

The CPA also expressly provides that where its provisions conflict with those of any other law, the law that gives the consumer (the tenant) the most protection, will override the other. This is critical for reasons discussed below.

## COMMON LAW

Common law is relevant because it is the ‘default’ position that ‘kicks in’ when certain terms of a lease agreement are not agreed to. For example, the parties might forget to agree on how many days written notice is required for a tenant to make good a breach, before a landlord can cancel, or how many days / months’ notice must be given if either party wants to terminate the lease before its natural end. In fact, this happens quite commonly.

In terms of our common law, when notice is given to terminate a lease agreement, the notice must be given

for the same period as one cycle of the periods the lease is denominated in. For example, in a 12 month lease, with rental payments due monthly, the notice period would be a month. Notice must run for the whole of the calendar month, meaning that notice cannot be given from the 15th of April to the 14th of May for example, as it needs to be given from the 1st of any particular calendar month until the last day of that particular calendar month. In addition, our common law provides that notice periods must coincide with the rental payment intervals, meaning that if you pay rent every month, the notice given must be at least one month in advance. So if the parties agree that the lease can be terminated by either one of the parties before its natural conclusion, but they forget to stipulate how long the early termination notice period must be, then the answer is that at least one calendar month’s written notice is required to bring about an early termination of the lease by either party, and it must be given from the 1st of the month to the end of that month.

In relation to the breach notice period, if the parties fail to agree on this, the law provides that it will be a ‘reasonable’ period. What is ‘reasonable’ depends on the facts of each case, and the court will decide this.

## CONFLICT OF LAWS

Because there are so many laws that apply to residential leases in any given situation, it is often difficult to determine the number of days that must be given for breach and cancellation. The common law will always be subservient to any legislation that has been subsequently enacted to deal with a particular problem, and any legislation subsequently enacted that deals with the problem in general, will normally be subservient to legislation subsequently enacted to deal with the problem specifically. To confuse the matter further, the CPA (which is not specific to leases) says that if its provisions conflict with any other law, the law that provides the most protection to the consumer will apply.

Several difficult questions arise:

1. If your lease says 7 days breach notice is required, but the Consumer Protection Act says 20 business days written notice is required to cancel the lease, how do we reconcile the two?
2. It is still possible to cancel a lease after the ‘third strike’ by a tenant, without giving notice, as many leases provide for, in light of the CPA?
3. If a lease agreement (either oral or in writing) does not specify the early termination period, does the CPA ‘kick in’ and result in a situation where the common law, being overridden by the CPA, results in a lease not being prematurely terminable by a landlord, and only being terminable on the breach by the tenant?

## #1: Breach notice period and cancellation period

Firstly, look to the provisions of the lease itself. Most leases contain a breach clause, which indicate a period of the number of days that are necessary to be given as notice to the tenant of a breach. If there is no breach period specified, it will be a 'reasonable period' in terms of the common law.

If you give notice of the breach, and it is not remedied in the breach notice period, this means that you can take action to sue for whatever is owed or even issue summons and attach the tenant's goods by evoking your landlord's hypothec, but you cannot cancel the lease and evict, yet.

This is because you may need to have given 20 business days written notice to the tenant of his/her breach before you can cancel the lease (and therefore to evict, because you can't evict without having properly cancelled the lease) in terms of the CPA. So, if you ultimately think that you would like to or need to cancel the lease and evict, you can only do this after 20 business day written notice has been given, and the tenant has failed to remedy the breach as demanded.

Many landlords include both time periods in their breach notice, saying that if the breach is not remedied in 7 calendar days (or whatever number of days is stipulated in the lease, or whatever number of days is reasonable in terms of common law) then they will take action to recover amounts owing, but if the breach is not remedied in 20 business days, then the lease will be cancelled and the tenant evicted. This way you give one notice, but it is valid for both breach and cancellation and the tenant is adequately warned of the consequences of non-compliance and how and when he needs to remedy the breach to avoid those consequences.

## #2: Third strike clauses

These are sometimes clauses in lease agreements that provide that once a tenant has breached the lease (usually with specific reference to late payment) three times within a 12 month period for instance, the landlord is entitled to cancel the lease without further notice to the tenant. In instances such as these, the landlord would not give the tenant a third opportunity to remedy the breach, but would simply send a cancellation letter. However, it is questionable whether this is legally permissible in light of the CPA, which provides that the landlord may only cancel the lease on 20 business days written notice of the material breach, and after the tenant has failed to remedy the breach. Further, although a late payment of rental is considered a breach, it may not be considered a material breach like non-payment.

It thus seems that these 'third strike' clauses are no longer legally valid. In the author's view, this is a grave injustice to landlords, because it means that they are forever doomed to accept late payments and other breaches of the lease by their tenants – provided that the tenant remedies the breach in the 20 business days, the landlord would not be entitled to cancel. The only way to get rid of a pesky tenant in such a situation would be to allow the lease to run its full course and ensure cancellation without further renewal.

## #3: Is there an early termination period, if the lease does not specify, and what is it?

3.1 Firstly, ask whether the CPA applies at all to the lease in question. Our courts have recently clarified<sup>3</sup> that a lessor who does not conclude lease agreements in their ordinary course of business are not subjected to the CPA when it comes to renewal or termination of the agreement. In other words, if a landlord does not lease out his property on a continual basis and they do not solely derive his income from the rental property, then the CPA will not apply because the lease is not in the "ordinary course of the landlord's business". It was held that a "once off lease", or a "private lease", which is not part of the lessor's core business of income earning activity, will not be subjected to the CPA's prohibition against early termination of a fixed term lease agreement. So for these types of "once off private leases" you don't have to worry about the CPA provisions at all – you look only at what your lease, and the common law, says.

3.2 If the CPA applies, then you cannot have an early termination clause.

3.2.1 If the lease is a month-to-month lease as contemplated in the Rental Housing Act, then it can be terminated by either party only by the giving of one full calendar month's written notice.

3.2.2 If neither the CPA nor the RHA apply, you look only to the lease terms and common law if necessary where the lease terms aren't fully comprehensive.

a. If the parties have agreed that there is an early termination period applicable and they have agreed on what that notice period is, then either party can cancel by providing the requisite notice to the other side. This will apply so long as the lease is not one hit by the provisions of the Rental Housing Act – i.e. one where the written lease expired and the parties simply continued with the lease on a month-to-month basis thereafter.

b. If the parties have agreed that there is an early termination period applicable but they have not agreed on what that notice period is, then the common law will kick in and one full calendar month's notice should suffice – provided that this is "reasonable" in the circumstances and provided that the rental is payable monthly.

## CONCLUSION

To be certain, consult an experienced property attorney before sending breach and/or cancellation and/or early termination and/or renewal or non-renewal notices to ensure that you don't find yourself supplying your pesky tenant with accommodation (and paying him/her damages) for unlawfully evicting them.



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<sup>1</sup> This is an update to the article *How to Cancel a Residential Lease* published in 2015 by Renand Pretorius and Chantelle Gladwin-Wood.

<sup>2</sup> *Amalgamated Beverage Industries Limited v Rond Vista Wholesalers* [2003] 4 All SA 95 (SCA).

<sup>3</sup> *Venter and Another v Els and Another* (3639/2024) [2024] ZAWCHC 83 (18 March 2024).