



Before leasing, first do some reading

11 November 2022

1. Do you own a property subject to a bond registered in favour the bank?
2. Is the property currently being leased to a tenant or do you intend to do so?

If the answer to the aforesaid questions is “yes”, the following will likely be applicable to you.

Most, if not all, mortgaged properties, whether so encumbered under an outright or covering mortgage bond, have clauses similar to the following:

The mortgaged property or any portion thereof shall not be let for a longer period than X (usually 3 – 6) consecutive months without the written consent of the bank;

Should the bank give its consent to the letting of the mortgaged property, the mortgagor (i.e. the owner) cedes, transfers and assigns to the bank all the mortgagor’s rights, title and interest in and to all the rentals and other revenues of whatsoever nature, which may accrue from the mortgaged property as additional security for the due repayment by the mortgagor of all amounts owing to or claimable by the bank at any time in terms of this bond, with the express right in favour of the bank with irrevocable power–

To institute proceedings against lessees for the recovery of unpaid rentals, and/or eviction from the mortgaged property;

To let the mortgaged property or any part thereof, to cancel or renew and enter into leases in such a manner as the bank decides, to evict any trespasser or other person from the mortgaged property;

To collect on behalf of the mortgagor any monies payable in respect of the alienation by the mortgagor of the mortgaged property or any portion thereof;

Provided however, that the cession, transfer, assignment and authorities and powers specified above shall not be acted upon by the bank without the consent of the mortgagor unless the mortgagor has failed to comply with any term or condition of this bond or any loan secured thereby or has otherwise committed a breach thereof.

Should the written consent not be obtained from your bank prior to entering a lease for longer periods than stipulated in the bond, the effect thereof could result in your lease agreement, from the time of conclusion, being void from the inception, rendering the enforceability of the owner's rights against a tenant a nullity.

Furthermore, if the written consent of the bondholder has been obtained and a lease for a longer period than stipulated in the bond be entered into, the enforcement rights of the lessor will be ceded to the bank (as additional security for the loan), effectively limiting the lessor's rights, subject to the wording of the bond.

There is, however, a "light at the end of this dark tunnel" since the Supreme Court of Appeal has ruled on this issue previously.

In PICARDI HOTELS LTD v THEKWINI PROPERTIES (PTY) LTD 2009 (1) SA 493 (SCA) Boruchowitz AJA (Mpati P, Farlam, Cloete JJA, Kgomo AJA concurring) held that:

"Counsel for the respondent [owner] submitted that the interpretation [of the bond clause] would have the following consequences:

the transaction between the parties would be stultified, as the respondent [owner] would be unable to collect the rentals which it needed to be able to service the payments under the mortgage bond and to meet its expenses;

the bank would have to change its methods of doing business including its standard agreements; and

the bank would also have to create a rent collection department for the collection of the ceded rentals and would then have to account to the respondent in respect of such collections.

I do not agree with these contentions. On the evidence neither the bank nor the respondent [owner/mortgagor] understood the transaction to operate in this way. There is no practical bar to the respondent [owner] in such a situation from simply continuing to collect the rentals, the cession notwithstanding. This is a question of mandate. It is not unusual for a creditor to permit a debtor to collect ceded debts.



KEBD
KLAGSBRUN EDELSTEIN BOSMAN DU PLESSIS INC.

220 Lange Street,
Nieuw Muckleneuk,
Pretoria, 0181
PO Box 178, Groenkloof,
South Africa, 0027
Docex 42, Brooklyn
Tel: +27 (0) 12 452 8900
Fax: +27 (0) 12 452 8901
www.kebd.co.za

If however the respondent [owner] wished to sue for unpaid rentals [and/or eviction from the mortgaged property] it would have to obtain a recession of the ceded claims from the bank.

I am of the view therefore that an effective and unconditional transfer of rights occurred when the cession was executed. The consequence is that the respondent [owner] was divested of the power to sue the appellant in respect of the unpaid rentals.”

Conclusion:

Considering the above, and in order for property owners to prevent lease agreements being voided, owners should make every attempt to, first obtain written consent from the bank to lease the property for periods longer than stipulated in the mortgage bond, and, secondly, to obtain a recession of rights from the bank in writing, and by agreement between the parties, so enable the owner to sue for unpaid rentals and/or eviction of tenants.

By Ruhann Roos (Director) | Litigation Department

Disclaimer:

This article is for the purpose of general information only and does not constitute nor must it be construed as legal advice. Specialist legal advice must be sought in respect of a specific legal matter. We accept no liability, damage, loss and/or responsibility, whether direct or consequential, for any actions taken or failure to take any actions, based on the content contained herein.

© 2022 Klagsbrun Edelstein Bosman Du Plessis Inc. All rights reserved.