1. The lessee’s duty to pay rent

Study pp. 87-89.

This is the lessee’s primary duty. The lessor is entitled to insist on being paid in South African currency. In the absence of agreement to the contrary, rent is payable on the expiration of a lease or, if the lease is periodic, on the expiration of each period, in which event it is said that rent is payable in arrears.

Rent may be paid until midnight of the due date. If rent has to be paid at an office or another place of business the implication is that it has to be paid on a business day during business hours and that, if it falls on a Sunday or a public holiday, the lessee will be excused from tendering payment on the due date and be entitled to pay on the first business day thereafter.

It is expected of the lessee to take reasonable steps to ensure timeous payment of the rent. Should the parties not agree upon the place where payment of rent is to be made the lessee must seek out the lessor, provided the parties agreed upon a date by which the rent must be paid. Where the last-mentioned date was agreed upon, the lessor must seek out the lessee and a date of payment must be determined before the lessee can be placed in mora. The risk of the possible unreliability of the method used to transmit the rent to the lessor is, in principle, on the lessee.

In a periodic lease prescription of each payment begins to run when that particular payment is due.

1.1 The lessor’s remedies on the lessee’s breach

Study pp. 89-90.

Because a breach of the duty to pay rent can take place in two ways, namely by defaulting in payments and by repudiating liability for rent, the normal remedies for mora debitoris or repudiation are at the disposal of the lessor. The lessor is furthermore
entitled to (a) uphold the contract and claim the rent, (b) cancel the contract under certain circumstances or (c) claim for damages if loss has been suffered.

A former lessee who remains in occupation after cancellation of the lease will be in breach of the duty to return the thing let and be liable for damages on that basis. The lessee may under these circumstances also be liable in delict or on the ground of undue enrichment. Some decisions state that the lessor is entitled to bring an action for rent for the period between the date on which the lease terminates and the date on which the lessee actually vacates the premises. It is submitted that these decisions are wrong.

1.1.1 The lessor’s tacit hypothec for unpaid rent

Study pp. 90-94, Bloemfontein Municipality v Jacksons 1929 AD 266 and Eight Kaya Sands (Pty) Ltd v. Valley Irrigation Equipment (Pty) Ltd 2003 (2) SA 495 (T).

The tacit hypothec secures the lessor’s claim for arrear rent. All movable things brought or carried on to the property let (invecta et illata) are subject to the lessor’s hypothec. So too are fruits and crops yielded by the property, whether standing or separated. Money on the premises is also subject to the lessor’s hypothec.

The hypothec comes into existence the moment the lessor falls into arrear with rental payments, but the lessor must take steps to perfect the hypothec (See paragraph (c) hereunder).

(a) In no reported decision has the lessor’s hypothec been extended beyond arrear rent.

(b) Besides the lessee’s property, the movables of a sublessee and a third party may also be subject to the lessor’s hypothec. The property of a sublessee is covered only to the extent to which the sublessee owes the lessee rent. In Bloemfontein Municipality v Jacksons 1929 AD 266 the court set out the following requirements for subjecting property belonging to third parties to the lessor’s hypothec:

(i) The property must be on the lessor’s premises with the knowledge of its actual owner.

(ii) The property must be on the premises with some degree of permanence, and not merely temporarily.

(iii) The property must be on the premises for the lessee’s own use and benefit.

(iv) The landlord must have been unaware of the fact that the property belongs to someone else and not the lessee. (In Paradise Lost Properties v Standard Bank of South Africa 1997 (2) SA 815 (D) it was held that the lessor cannot claim ignorance when the exercise of reasonable care would have established that the movables belonged to someone else than the lessee).

The security afforded by the hypothec is lost if the lessor acquires knowledge of the third party’s ownership at any stage before the hypothec has been perfected (See Eight Kaya Sands v Valley Irrigation Equipment 2003 (2) SA 495 (T)).

The Security by Means of Movable Property Act 57 of 1993 places a limitation on the reach of the lessor’s hypothec. Section 2(1) (b) determines:
“Notwithstanding anything to the contrary in the common law or in any other law, movable property – to which an instalment sale transaction as defined in section 1 of the National Credit Act (Act No 34 of 2005) relates, shall not be subject to a landlord’s tacit hypothec.”

(c) Until the *invecta et illata* are attached the lessor has no real right in them and a third party would therefore not be subject to the lessor’s hypothec. To perfect his hypothec over the *invecta et illata* the lessor is required to obtain a judicial order and, in the absence of such an order, the goods may be removed by a third party who secured an attachment thereof and his security lost. *Eight Kaya Sands (Pty) Ltd v. Valley Irrigation Equipment (Pty) Ltd* 2003 (2) SA 495 (T). A lessor is not entitled to perfect his hypothec by seizing *invecta et illata* and, if he does so against the lessee's wishes, he is a spoliator, and can be ordered by the court to restore the goods to the lessee.

The *Magistrate’s Court Act* 32 of 1944 provides two remedies for the lessor’s protection: an interdict which is automatically obtainable on issue of summons and operates pending an order of court (section 31), and an attachment order granted by the court on application (section 32).

(d) One of the main advantages of the hypothec is the preference it affords over the proceeds of the lessee's goods subject to the hypothec at the date of sequestration. Our courts have not yet decided which hypothec would prevail if there is a clash between a lessor's hypothec that has been perfected and an instalment agreement hypothec in a claim on an insolvent estate.

(e) The lessor’s hypothec terminates upon the payment of the arrear rent by the lessee or any other person.

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**Activity 1**

1. Discuss the lessee’s duty to pay rent in full.
2. What property is subject to the tacit hypothec of the lessor?
3. Discuss the two valuable remedies at the disposal of the lessor, which are respectively set out in sections 31 and 32 of the *Magistrate’s Court Act* 32 of 1944.

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**2. The lessee’s duty of proper use and care of the property**

Study pp. 94-95.

The lessee may use the thing only for the purpose for which it was let. The purpose could be expressly stated in the terms of the contract, or may be agreed upon tacitly. A lessee must use the property let to him with the degree of care with which a *bonus paterfamilias* would use his own property, i.e. with reasonable care.
2.1 The lessor’s remedies on the lessee’s misuse of the property
Study p. 95.

Under these circumstances the normal contractual remedies are at the disposal of the lessor.

3. The lessee’s duty to restore the property on termination of the lease
Study pp. 95-96.

Failure to restore the property on termination of the lease constitutes unlawful holding over in most cases, which is both a breach of contract and delict. It appears as if the provisions of the Rental Housing Act 50 of 1999 (sections 4 (5) (c) and (d) limit the lessor’s common-law right to terminate residential leases by stating that the grounds on which such termination is based, should not constitute and unfair practice and must be specified in the lease.

The lessee must return the thing in the condition in which it was received, reasonable wear and tear expected.

3.1 The lessor’s remedies on the lessee’s breach
Study pp. 96-99, Ndlovu v Ngcobo: Bekker & Another v Jika 2003 (1) SA 113 (SCA) and “The Supreme Court of Appeal and PIE” by Hopkins and Hofmeyr (2003: 15-17).

Should a lessee fail to fulfil his obligation, the lessor has the usual contractual remedies at his disposal. He is entitled to an order for specific performance, and to damages for financial lost suffered.

A lessee who upon termination of a lease fails to redeliver the premises to the lessor commits a breach of contract as well as a delict. A lessor’s remedy against a lessee who holds over after a lease has come to an end is an action for damages and not for rent. A lessor is entitled to eject a lessee who holds over, but he may do so only by legal process.

In the case of Ndlovu v. Ngcobo and Bekker and Another v. Jika 2003 (1) SA 113 (SCA), the Supreme Court of Appeal decided that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) apply to cases of holding over. PIE provides certain procedural and substantive protective measures against eviction from land to those who occupy such land unlawfully. According to the SCA, the term “unlawful occupier” as it appears in section 4 (1) of PIE ought to be regarded as sufficiently broad so as to include not only those who unlawfully took possession of land (commonly referred to as squatters), but also those persons who once
had lawful possession, but whose possession, from some reason, subsequently became unlawful (like tenants or mortgagors who fail to comply with their contractual obligations). With regard to the legal significance of this decision, study the article by Hopkins and Hofmeyr (2003) in De Rebus, referred to above.

Since the above-mentioned decision was handed down a draft Bill to amend PIE was published. Section 2(a) thereof reads:

“(2) This Act does not apply in respect of any proceedings:

(a) for the eviction of any tenant or former tenant or any person occupying land through the title of such tenant or former tenant; ...

Kerr (2004: 414) indicates that if this becomes law consideration of PIE will no longer be relevant in expositions of the law of lease. Until that happens PIE however remains relevant.

The legal position therefore is that the common law rules governing eviction continue to apply, principally in, respect of commercial leases. If the lease in issue however is a residential urban lease, lessors seeking the eviction of a lessee who is unlawfully holding over must comply with the provisions of PIE, and if the lease is a rural lease, the lessor must comply with the provisions of the Extension of Security of Tenure Act 62 of 1997.

Activity 2

1. Briefly discuss the lessee’s duty of proper use and care of the property.
2. Discuss the possible remedies at the disposal of the former lessor in a case of ‘holding over’ by his former lessee.