

Can landlord and tenant freely agree rents in Namibia?

Safe for the basic contractual formalities, all terms of lease agreements can be freely negotiated between the parties. Issues such as the initial rent, the increase thereof during the lease term and the payment of deposits can be freely agreed by the parties to the contract. “Key Deposits” equal to one month’s rental are customary. Best practice is to state in agreement exactly how such deposit will be utilised.

What rights do landlords and tenants have in Namibia, especially as to duration of contract, and eviction?

The initial period of lease and the extension thereof, use of the premises, breach, eviction, maintenance (who is responsible for what), insurance, etc., should clearly be stipulated in the agreement. One year leases are customary, but leases are often either longer or shorter. A fixed term contract simply runs out at the end of the tenure; after that, the lessee has no further right to occupy the property.

If no termination date has been established, a “reasonable” period of termination notice is required, which will be measured against the time it would normally take to re-let the property. Three months for residential properties would be acceptable unless there are specific circumstances which would render it unreasonable.

Note: In case of lease of a business premise (commercial), the Rent Ordinance has specifications that must be followed strictly regarding the notice period **which can only be amended by separate addendum to the lease agreement**. This differs substantially from notice periods of ordinary residential properties.

How effective is the Namibian legal system when it comes to leases?

The common law is applied strictly as the basis of the interpretation of the agreement between the parties, which can be verbal, in writing or tacitly created (i.e. by the conduct of the parties). Our Courts will not lightly interfere where the terms of a contract of lease are unambiguous, not contra bones mores (against good moral standards), or against public policy.

Unfortunately the process of getting legal redress can be cumbersome and time consuming, because the right of the other party to be heard (the audi alterem in partem rule) is a central pillar of our law.

However the landlord has a very effective remedy in the Magistrate's Court Act. The issuing of a summons in the Magistrate's Court for arrears of rent causes an automatic rent interdict to apply to the tenant's movables. Such movables cannot be removed from the property, until judgment by the Court in respect of the matter has been given.

Legislation

- Common Law - which allows freedom of contract, is the basis for Landlord and Tenant relations ("Huur gaat voor koop rule" stipulates that lessee is entitled to remain in occupation of the premises for the full duration of a valid lease);
- The Rents Ordinance No. 13/1977;
- Formalities in respect of Leases of Land Act;
- Magistrates Court Act;
- The Value Added Tax Act 10 of 2000 determines that 15% of the rental amount is payable in tax, provided that the lessor is registered for tax, which he must be if he has a turnover of N\$200 000 or more per annum.

STAMP DUTY ON LEASE AGREEMENTS

In terms of the Stamp Duties Act, 1993, a revenue stamp for a specified amount must be attached to the first page of the document or in certain instances (where the duty is a very large amount) paid duty can be denoted by the endorsement on the lease of a certificate of due payment (this is done at the Revenue Office).

Duplicate original copies of a stamped original must be stamped with a N\$1.00 stamp.

Although the lessor (the property owner) must stamp the lease, most leases stipulate that the lessee (the tenant) has to bear the cost of revenue stamps.

Leases are stamped to raise revenue and not as a formality to make the lease valid. Unlike the sale of land, a valid verbal lease agreement may even be concluded between parties; however, ones written a lease agreement should be stamped according to the Stamp Duties Act. If the stamps are not attached and cancelled (by initialing them and adding the date) at the time of execution of the lease, either the owner or the tenant can attach and sign the stamps within 21 days.

Even if the lease is not stamped within this period, the contract between the parties does not become invalid. The problem is: In terms of the Act an unstamped document may not be presented until it is stamped. In short, no one can approach the Courts for relieve with an unstamped document/lease agreement.

The adhesive stamps must be defaced by the person who is required or authorised to stamp the document. The defacing entails the writing of such person's name or initials in ink on or across the face of the stamp(s) and writing the date upon which the document was stamped and so as to render the stamps incapable of use on any other document.

STAMPING A LEASE AGREEMENT

The Stamp Duties Act has a formula for calculating the stamp duty on a lease. In complex cases you may need expert advice such as the cash office at the Receiver of Revenue. The following explanation should be sufficient for most ordinary cases:

FIRST DETERMINE THE PERIOD / DURATION:

- If the period has been fixed, say, for one year, you will not have a problem;
- For an indefinite period - for example, a monthly tenancy - with the rent payable monthly and terminable by one month's notice, the period is fixed at two years;
- For a fixed period, with a renewal option, the original period **and** (plus) the optional period are taken together to calculate the duration of the lease. Should the option be for an indefinite period, the optional period will be set at two years for the purpose of stamp duty.

RENT: After you have worked out the duration of the lease, calculate the rent payable for the full period (explained above), now use the formula as set out in the Act and remember that duty is calculated on the total (aggregated amount) rent paid for the period/duration of the lease.

FORMULA:

- A lease for five years or less: for every N\$ 1000, 00 or part thereof – N\$ 5, 00;
- More than five years, but less than 10 years: for every N\$ 1000,00 or part thereof – N\$ 8,00;
- More than 10 years, but less than 20 years: for every N\$ 1000,00 or part thereof N\$ 10,00
- 20 or more years: for every N\$ 1000,00 or part thereof N\$ 15,00

Example:

- 1 A flat with a rent of R 5000.00 per month, on a one year lease:
\$5 000.00 x 12 months = \$ 60 000.00
The period of the lease for the purpose of stamp duty is one year:
(N\$ 60 000.00 / 1000 = 60 x N\$ 5,00 = N\$ 300, 00

In this case the stamp duties payable would be N\$ 300, 00

2. A flat with a rent of R 5000.00 per month, on a two-year lease:

$\$5\,000.00 \times 24 \text{ months} = \$ 120\,000.00$

The period of the lease for the purpose of stamp duty is two years:

$(\text{N\$ } 120\,000.00 / 1000 = 120 \times \text{N\$ } 5,00 = \text{N\$ } 600, 00$

In this case the stamp duties payable would be N\$ 600, 00

3. A property owner lets property for a year, giving the tenant an option at the end of that period to turn the tenancy into an indefinite one with a monthly rental of \$ 5000.00.

The period of the lease for the purpose of stamp duty is:

One year, initially plus two years for the indefinite option = three years, or 36 months.

$\text{N\$ } 5\,000 \times 12 = \text{N\$ } 60\,000,00$ (per year)

$\text{N\$ } 60\,000, 00. \times 3$ (for three year period) = N\$ 180 000. 00

$(\text{N\$ } 180\,000.00 \text{ (aggregate)} / 1000 = 180 \times \text{N\$ } 5,00 = \text{N\$ } 900, 00$

In this case the stamp duties payable would be N\$ 900, 00.

In certain instances, stamp duty can be refunded, upon application to the permanent secretary of the Ministry of Finance. For instance where the lease is terminated before the end of the period for which duty has been paid, a refund can be claimed.

Penalties

The Act makes provision for a fine or penalty to be paid for late stamping (generally, the attachment to the document of penalty stamps equal to the value of the penalty payable).

If the stamps have not been attached and signed within six months of execution of the lease, twice the normal duty will have to be paid in addition to the normal stamp duty.

A penalty of three times the stamp duty will be imposed if, after more than six months of the starting date of the lease, the stamps have still not been attached and signed.

The penalties cannot, exceed \$ 2000.00, nor can they be less than \$1. If an incorrectly stamped lease is not voluntarily presented to the revenue officer for correct stamping a penalty of up to \$200 may be imposed by the Receiver of Revenue.