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*Without Prejudice*

Air BnB and other similar sites are short-term rental services intended for individuals renting out their homes to travellers and tourists. Websites like Air BnB can be accessed from any part of the world and from any smart device. Accommodation for all budgets can be found quickly, making it increasingly popular and a sought after service.

When booking accommodation on these websites, no disclosures are made as to whether the property is being rented out by the owner or the lessor. Furthermore, there are none of the normal rights and obligations afforded to the potential sub-lessee/guest that one would ordinarily find in a lease agreement. In South Africa, almost all residential leases contain the clause "the tenant may not sublet a dwelling without the written consent of the lessor, which may not be unreasonably withheld," a clause qualified by the Rental Housing Act 50 of 1999.

Short-term rental services can be taken advantage of since no lease agreements are signed, allowing people who are welshing to continue moving from home to home. Some hosts also offer weekly and monthly discounts, making it a viable option for persons who are between jobs or cannot come up with the requisite deposit for ordinary leases.

Air BnB encourages hosts to familiarise themselves with the laws that apply to short-term rentals in their city before listing their homes on the website. However, do these short-term rental services fall within the scope of subletting in South African law?

The lease contract is one where the lessee in the main contract is a sub-lessor to the sub-lessee in the Air BnB transaction. The sub-lessee cannot acquire from the lessee greater rights than the lessee has in the main lease agreement and so can be ejected if the lessee had no power to sublet [*Potgieter v van der Merwe* 1949 1 SA 361(A)]. A sub-lessee's rights terminate when the lessee's rights come to an end.

### **Why it is important to know if the lessee is subletting the home?**

In the event that short-term rental services are in breach of the lease agreement (provided your lease does not permit subletting) and if the breach is material, this would entitle cancellation even if there is no cancellation clause [*Abdulla & Kramer Bros* 1928 CPD 423].

Where a room or property is listed on the short-term rental websites, the property would be utilised by an influx of various paying guests. Homeowners may wish to increase their insurances, take further security precautions as well as be more attentive to wear and tear on the property.

Van Deventer J raised in *Bryer and Others v Teabosa CC t/a Simon Chuter Properties* 1993 1 SA 128 (C), that the purpose of prohibition in a lease against subletting without the consent of the landlord is to deprive the lessee of his common law right to sublet and to protect the lessor from having the premises used or occupied by an undesirable subtenant or in an undesirable way, even though that purpose may not be forbidden by the lease or the law.

### **The law on subletting**

Cooper WE, *Landlord and Tenant* 2nd edition Cape Town, Juta (1994) defines a lease as a reciprocal agreement between one party who is the lessor and one party who is the lessee, whereby the lessor agrees to give temporary use and enjoyment of a thing in return for the payment of money or rent.

In Estate *Ishmail v Sayed* [1965] 1 ALL SA 512 (C) it was held that subletting does not apply to a third person that occupies the property without payment being requested or given.

It therefore appears that short-term rental websites satisfy the requirements of a lease and as such a sub-lessee where there is an agreement of price paid for the rental and for temporary use and enjoyment of a room or property.

Although the paying guest or the sub-lessee shows the intention to occupy a room by clicking on the website and agreeing to its terms and conditions, these terms and conditions are not clear and not apt for South African law on subletting, thereby giving rise to a possible conflict of laws conundrum.

The time period of the sub-lease or period during which the paying guest is occupying the property is a critical factor. Landlords must give consideration to the frequency of guests and the duration for which the property or room is being hosted. It will be impractical for a lessee to be penalised for hosting guests for a significantly short period, that is once a year, unless the rules of the body corporate or homeowners' association specifically prohibit short-term letting, which many do in their rules.

Various paying guests could be transacting with the lessee who is "subletting" your home, in some instances for longer periods than the usual vacation. The court in Estate *Ishmail v Sayed* [1965] 1 ALL SA 512 (C) held that the contract should disclose its true nature, being that of letting and hiring. The court in *Fraenkel v Seewer* 1946 WLD 421 held that if a lessor does not wish anyone other than the lessee to occupy the premises, the lease should clearly express this. The sub-lease clause should be amended to reflect the expectations of both lessor and the intentions of the lessee.

Should the landlord be vehemently opposed to the hosting of paying guests or subletting via short-term rental websites, the lease agreement should reflect the landlord's express wishes. One must consider the unreasonable withholding of consent by the landlord.

As a general rule, a landlord can only refuse consent where his rights will be affected and where the landlord will be placed in a worse position. The grounds of refusal must have a connection to an attribute of the subtenant or proposed use of the premises.

Short-term rental websites provide control and management of the property, as the hosts or the sub-lessors are able to review their guests (sub-lessees) on the upkeep of the room or property.

Lessees must be encouraged to advise their lessors of their intentions to host the property on short-term rental websites, even when the lease agreement does not specifically preclude the lessee from the subletting the premises. Furthermore, lessees must ensure that they are not in contravention of any rules or regulations governing the property in respect of the short-term lease agreement.

Existing lease agreements concluded before the hype of short-term rental services should have an addendum addressing short-term rental services and subletting where the lessor or home owner is not desirous of subletting.

In conclusion, short-term rentals do satisfy the rental agreements for a sub-lease, however, short-term rental websites sets the circumstances apart from the traditional sub-lease agreement by allowing control and frequency of hosting guests.

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