

# Covid-19: Block exemption regulations for shopping mall tenants and landlords

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On Tuesday, 24 March 2020, the SA government, in response to the Covid-19 pandemic, gazetted special regulations titled 'Covid-19 Block Exemption for the Retail Property Sector, 2020', which encourages retail tenants and retail tenants who are competitors to meet with shopping mall owners and reach agreements aimed at addressing matters such as payment holidays, rental discounts and limitations on the possibility of being evicted.



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The regulations exempt a category of agreements or practices between designated retail tenants and retail property landlords from the application of sections 4 and 5 of Competition Act, 1998 ('the Act'). This is an effort to curb the socio-economic effects of the national disaster on the retail property sector and to assist retail tenants, including small independent retailers, in managing their finances with the view that operations continue as normal after the national disaster.

Sections 4 and 5 of the Act prohibits the conclusion of agreements between competitor firms i.e.: those in a horizontal relationship with one another as well as those agreements concluded between suppliers and their customers i.e. those in a vertical relationship with one another.

The block exemption therefore only finds application in certain sections of the Act and players within the retail property sector will not be in violation should they be required to collectively co-ordinate for the sole purpose of responding to the Covid-19 pandemic. Similar block exemptions have been declared for the banking and healthcare sector.

## Achieving socio-economic stability

The basis of these block exemptions, which are used to exempt conduct that would be otherwise prohibited, lies in Section 10 of the Act, which is to promote public policy goals in the achievement of socio-economic stability.

The regulations deem three categories of retail tenants as “designated retail tenants” namely:

- Personal care services;
- Restaurants and;
- Clothing, footwear and home-textile retailers.



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A comprehensive list detailing the ambit of each category can be found in Annexure A of the Regulations.

The “category of agreements or practices” amongst and between designated retail tenants and retail property landlords exempt from the application of sections 4 and 5 of the Act include:

- Those with the sole purpose of ensuring the survival of tenants of retail properties during the national disaster, which are limited to:
  - Payment holidays and/or rental discounts for tenants;
  - Limitations on the eviction of tenants and;
- The suspension or adjustment to lease agreement clauses that restrict the designated retail tenants from undertaking reasonable measures required to protect viability during the national disaster.

Such agreements extend to all South African retail tenants deemed designated retail tenants including small, independent retailers, unless otherwise authorised by the Minister or the Competition Commission.



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## Not an invitation to negotiate prices

It is important to keep in mind that the “category of agreements or practices” exempted i.e. block exemptions, exclude communication and agreements in respect of prices unless specifically authorised by the Department of Trade, Industry and Competition. Therefore, the block exemptions are not an invitation for competitors to negotiate prices. The exemption must be applied strictly to co-ordinate necessary measures for the sole purpose of responding to the Covid-19 pandemic national disaster.

Furthermore, retail property landlords and designated retail tenants who participate in any agreements or practices falling within the scope of these exemptions are mandated to keep minutes of meetings held and written records of such agreements or practices.

These regulations which promote co-ordinated behaviour are indeed welcomed. Not only do they provide the necessary flexibility to retail tenants, including smaller independent retailers whose income would be falling sharply during the lockdown, but they also encourage open dialogues between retail tenants, retail tenants who are competitors and landlords, all in a joint effort to ensure socio-economic stability during this time.

## ABOUT THE AUTHOR

Marie-Lou Gillespie is a Director of De Abreu & Cohen Inc and is the head of the litigation department. An expert and experienced trial lawyer Marie-Lou attends to Matrimonial matters as well as Insolvency law including Liquidations. Her speciality is High Court and Magistrate's Court Litigation.

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