

WITHHOLDING OF PROPERTY: timing crucial for parties

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Many times tenants and landlords have had to withhold personal property because the other party has failed to fulfil a promise of paying a debt. Here are some of the circumstances under which the two parties can do that.

What is a lien?

A lien is the right to possess or hold onto the personal property of the tenant until the debt is paid, or the right a tenant has to hold onto the leased dwelling until she or he is compensated for the improvements made.

What is a landlord's tacit hypothec?

The landlord has the right to seize the tenant's moveables that are in the dwelling (*Webster v Ellison* 1911 AD 73), but this right, which is implied or unspoken, has to be perfected. In other words, the landlord has to follow certain legal procedures. The Rental Housing Act 50 of 1999, as amended (RHA) recognises this common law right of the landlord/lady over the tenant-debtor's personal property. This right is referred to as the landlord's lien or tacit hypothec to seize the tenant's moveable through a sheriff.

What is an enrichment or tenant's lien?

An enrichment lien allows a tenant to hold onto the property when the lease is terminated until the landlord/lady has compensated the tenant for the costs of necessary and useful improvements. Should the landlord/lady issue a proper notice terminating the lease, duly served on the tenant, the tenant can refuse to vacate because of the claim to be reimbursed for necessary and useful improvements. The tenant can exercise this right in the absence of governing provisions of the lease; i.e., when there is no clause that prevents the tenant from carrying out the necessary and useful improvements.

The Supreme Court of Appeal in *Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd* 2006 (6) SA 605 held that a tenant who is in possession of the leased property in an urban area has an enrichment lien for expenses he/she incurred to protect or preserve the landlord's property and for the useful improvements to the property.

In the *Hyprop Investments Ltd & another v NSC Carriers & Forwarding CC & another* [2010] JOL 25348 (GSJ) where the tenants claimed the right to hold onto and occupy the leased premises until the landlord compensated the tenants for useful and necessary improvements was dismissed because of a clause in the lease that restricted them from doing so.

What is prescription?

When does the tenant's lien or claim for compensation, expire? Does prescription apply? A person has a legal right to claim a debt, but he/she must make the claim within a specified period. If the person fails to exercise that right within the time stipulated in the Prescription Act, 1969, the right is lost forever. There are different time

period for different types of debts. A judgment obtained for a debt in South Africa will prescribe after 30 years; so would a debt for a mortgage bond, taxation and certain debts owed to the state. It is six years in respect of any debt arising from a negotiable instrument such as a cheque or from a notarial contract, and three years in respect of any other debt, except where stipulated otherwise by another Act of Parliament.

Prescription is a way to 'punish' the creditor for taking long to claim the debt, and the claim is extinguished or rendered unenforceable. The tenant who has a lien cannot seize or sell the landlord's property, but can retain it until the landlord settles the claim. Prescription does not apply in this instance since the tenant can retain the leased premises even after a valid termination of the lease.

According to van der Walt & Pienaar (1997) a tenant is a special lawful holder for unjust enrichment who can enforce her/his claim at the end of the lease term. In *Syfrets Participation Bond Managers Ltd v Estate and Co-op Wine Distributors (Pty) Ltd* 1989 (1) SA 106 (W), van Zyl J states:

"A lien or right of retention (*ius retentionis*) may be described as the right accruing to the possessor or occupier of another's property, in respect of which he has incurred expenses, to retain possession or occupation of such property until he has been duly compensated for his said expenses. In this sense a lien is a form of security which does not create a cause of action but merely affords a defence against the rei vindicatio of the owner of the property in question. The compensation may be in an agreed amount or, if there is no agreement, it may constitute actual expenditure or at most the unjustified enrichment of the owner as a result of such expenditure."

"Ultimately a *lien* is a form of security for the claim." (In *Standard Bank of SA Ltd v D Florentino Construction CC & others* [2008] JOL 21941 (C).

The reason for the Dutch courts in the 17th century restricting or abolishing tenant's lien was due to the tenants of agricultural land deliberately making unnecessary, costly 'improvements' and, by claiming the common law right to retain and continue to occupy the property until compensated, they ended up owning the properties, since the landlords could not compensate their tenants.

In conclusion, a lien provides security against a claim – a right to detain or hold possession and continued occupation, which arises at the time of the termination of the lease.

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