

PERSONALISED LEGAL ASSISTANCE

Professional legal and property consulting

SONNENBERG & ASSOCIATES PROPERTY AND LEGAL ADVICE NEWSLETTER #52

1. Legal Quotes

"Misery is the company of lawsuits." [Francois Rabelais]

"The law is like Swiss cheese. The holes are the truth, and lawyers are like roaches crawling through the cheese. You can use the holes to get from one part of the cheese to another, but you can't eat the holes, you can only eat the cheese." [Don Nigro, *Tainted Justice*]

"When a man is denied the right to live the life he believes in, he has no choice but to become an outlaw." [Nelson Mandela, *Long Walk to Freedom*]

2. Legal short

A little boy was in a cemetery with his mother. "Mommy," the boy asked, "do they ever bury two people in the same grave?"

"of course not, dear," replied the mother. "Why would you ask that?"

The boy replied, "The tombstone back there said 'Here lies a lawyer and an honest man.'"

3. Inspiring quotes

"The ultimate measure of man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy." [Martin Luther King Jnr]

"Having courage doesn't mean we are unafraid. Having courage and showing courage means we face our fears. We are able to say, "I have fallen, but I will get up." [Maya Angelou]

"You only live once, but if you do it right, once is enough." [Mae West]

4. The Landlord's tacit hypothec

In terms of our common law, a Landlord in terms of his "**Landlord's hypothec**" enjoys special protection in the collection of arrear rental from Tenants. **The hypothec allows a Landlord to sell the movable goods of a Tenant (and in certain instances movables of a third party) which are on the leased premises, if the Tenant fails to pay the rent.**

The hypothec exists from the date of the Tenant's occupation of the leased premises, **but only becomes legally enforceable once a court order is obtained** (this is called "**perfecting**" the hypothec). **Prior to a court order being obtained, the Tenant is free to remove the movable goods from the premises at any time** (even after the issue of any summons). The hypothec is lost as soon as the goods are removed from the leased premises, irrespective of whether the person who removed the goods was aware of the Landlord's hypothec or not.

To obtain a court order, a Landlord must first serve a **rent interdict summons** on the Tenant (in terms of section 31 of the Magistrates' Court Act 32 of 1944) ("the Act"). A Landlord may also choose to attach the Tenant's movables in terms of section 32 of the Act.

Once perfected, the Landlord's hypothec also gives him preference over other creditors on the Tenant's insolvency (section 85(2) of the Insolvency Act 24 of 1936).

When goods are attached as a result of the Landlord's hypothec, ownership of goods is mostly disregarded and **goods belonging to third parties that are found on the premises are usually subject to the same treatment** (especially where the property was brought onto the leased premises by the Tenant with the express or implied knowledge of the third party, was intended for permanent use by the Tenant and where the Landlord is unaware that the property belongs to a third party).

In the *Bloemfontein Municipality v Jacksons Ltd* case, the Appellate Division held that, where a third party has not taken reasonable steps to protect his property from the Landlord's hypothec, the courts will infer that the property was brought onto the leased premises with the implied knowledge and consent of the third party.

Recent case law suggests however that such deprivations of property belonging to third parties are in fact arbitrary and unconstitutional and it is now appropriate that the Landlord's tacit right of hypothec be legally reviewed to reflect the current constitutional values in South Africa.

It is important to note that **The Security by Means of Movable Property Act, Act 57 of 1993**, **excludes the Landlord's hypothec** in respect of property purchased in terms of a **hire purchase agreement**. Similarly, **movable property subject to a special notarial bond** (this is a bond registered over movable property used to secure a creditor's right to payment from a debtor), and in the possession of a third party (someone other than the notarial bondholder) **is excluded from the lessor's hypothec**, *unless the hypothec was perfected before the registration of the bond*.

Note further that only movable property encumbered by a special notarial bond (where the movable property is specified) and not a general notarial bond (which is registered over the debtor's movable property generally and where the assets are not specifically listed) will exclude the Landlord's hypothec.

Next week I will be moving back to my old cellphone number (083 2515451). Until then I am available on 063 263 2887 or fritz@sonnenberg.co.za.

All newsletters can be obtained on our website: www.sonnenberg.co.za.



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