

THE LANDLORD'S TACIT HYPOTHEC

Landlords' hypothecs (and liens) are real security rights created by operation of law (not by agreement).

It is an implied term of every lease agreement that the lessor will be entitled to attach and sell the moveable property of a lessee if –

1. The property is on the leased premises; and
2. It belongs to the lessee.

The claim is for arrear rental. As soon as the lessee is in arrears with his rent, the hypothec comes into existence. When the arrears are paid off, it extinguishes again.

The lessor cannot simply take the lessees' goods as soon as the lessee falls into arrears. The hypothec must be **perfected** by court order. Once the court order is obtained, the goods may be attached (meaning that the lessee is not permitted to remove the goods from the leased premises).

Bloemfontein Municipality v Jacksons 1929 AD 266

In certain circumstances, the landlord's hypothec extends beyond the property of the lessee to the property of third parties on the leased premises. The requirements for subjecting the property of third parties to the hypothec are set out in Bloemfontein Municipality v Jacksons.

In this case, Jacksons sold furniture to Smit in terms of a hire purchase agreement. The agreement stated that Jacksons would retain ownership of the furniture until the last instalment in terms of the hire purchase agreement had been paid. Smit then

removed the furniture from premises in Shannon Valley to premises leased from Bloemfontein Municipality, without informing the seller or the landlord of the situation. When the rent fell in arrears the furniture was attached by the municipality as landlord for sale in execution. Jacksons then objected to the furniture being sold by the municipality.

In dealing with Jackson's objection, the Appellate Division held that, as a general rule the property of a third party will be subject to the hypothec if: the property is **permanently or indefinitely** on the premises **with the knowledge of the third party owner** for **the use and enjoyment of the lessee**, while **the landlord was unaware** that the property was not owned by the lessee, but by the third party.

The doctrine of constructive knowledge applied to the landlord. He cannot claim ignorance if, by reasonable care, he would have found out that the property's true owner was not the lessee.