

EXPLORING THE RIGHT TO WITHHOLD PROPERTY TO SECURE PAYMENT OF A DEBT – Karen Phiri (Associate)

A person who has done work on another's property, or has provided a service under a contract may be entitled, in certain circumstances, to retain the other's property as security for payment. This limited real right to retain property is called a lien. A lien allows a person who is in possession of property to decline to return property to the owner unless the owner pays the outstanding debt. In order for the lien to be valid, the property must be in the control of the holder of the lien, and a debt must also be in existence at the time. The property must have come into the possession of the lien holder lawfully.

Liens do not form the basis of an action, but are a defence to a claim by the owner who seeks to recover control from the lien holder.

There are generally two categories of liens recognised by law. The first is an improvement or salvage lien. This arises when a person has protected the property of another against loss or damage, either as an occupier of land believing in good faith that he was the owner of the property, or where there was an agreement between the owner of the property and the person in possession of the property, or where a person acted as a duly authorised agent or an agent out of necessity. The rationale is that the owner has been enriched at the other person's expense, or because the possessor has incurred expense preventing the property from losing value. Note: not all improvements can warrant the exercise of a lien over property. The improvement must be necessary in that it was affected in order to maintain or keep the property in existence, and in its absence the property would be destroyed or would have lost a significant portion of its value.

The second broad category of liens is the debtor–creditor lien. This is the most common type which arises when a person has provided a service or done work for which payment is due. Examples of this include the right of a landlord to attach and retain the property of a tenant in rental arrears, the right of professionals to hold books, files or work done for their clients as security for outstanding fees and disbursements, the hoteliers right to retain guest property for accommodation and meals provided, and a repairer's right to retain property repaired.

Historically, a builder had the right to retain possession of a structure he has built or repaired as security for sums due to him. Section 8 of the Tacit Hypothecs Act Cap 12:01 abolished this type of lien. The abolition of this type of lien was confirmed by the High Court in the case of **Whitacon (Pty) Ltd v Botswana Building Society and Another**.

It is of fundamental importance to note that where a lien holder voluntarily surrenders possession of the property, the lien is extinguished and cannot (even if the property is subsequently recovered) be revived. A lien is also extinguished upon payment of the debt or the provision of another form of security by the owner, or on the removal of the improvement or on destruction of the property. A lien holder may be held

liable to the owner if the property in his possession is damaged, deteriorates or is lost on account of his negligence.

In order for a Court to exercise its discretion to enforce a lien, the circumstances of the case must justify it. Each case will be decided on its own merits. A lien is merely a defence to a claim by the owner who seeks return of the property. It does not allow the lien holder to retain or sell the property to recover the amount owed.