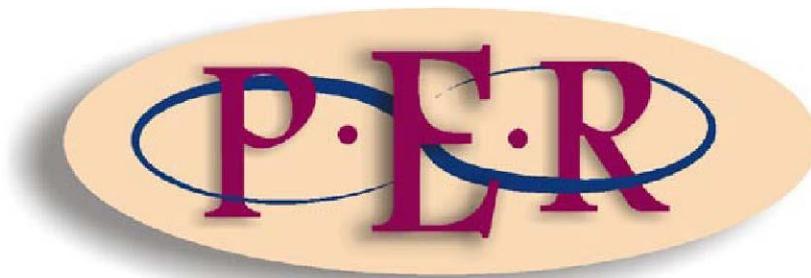


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## THE LEGAL NATURE OF A LIEN IN SOUTH AFRICAN LAW

M Wiese\*

### 1 Introduction

There are many uncertainties pertaining to the law of liens in South Africa. These include the real operation of a lien, the question whether a *mala fide* possessor can rely on a lien for money spent or work done on a thing which he knew he controlled unlawfully, the circumstances under which the lienholder has sufficient physical control over an immovable thing, the effect of involuntary loss of control over the thing by the lienholder and, finally, the influence of section 25 of the *Constitution of the Republic of South Africa*, 1996 on the validity of a lien in specific instances. In this article I focus on the following concern raised by Van Zyl J<sup>1</sup> in *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers*:<sup>2</sup>

Sonnekus is critical (at 464-9) of the reference to a lien as a 'right' rather than a 'competence' or a 'power'. He describes it (at 467) as a 'power to withhold' ('terughoudingsbevoegdheid') arising from a claim on whatever ground and (at 469) rejects the distinction between enrichment liens and debtor and creditor liens as real and personal rights respectively. His argument is persuasive and it would appear that the distinction should be reconsidered.

In view of the above I first consider the different approaches to liens in South African law before providing a brief overview of liens in Roman law. This is followed by a discussion of a lien - as a (subjective) right<sup>3</sup> - as a defence and as a capacity to withhold. By way of conclusion I make some suggestions pertaining to the legal nature of a lien in South African law.

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<sup>1</sup> *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 1 SA 939 (C) 944E-F.

<sup>2</sup> *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 1 SA 939 (C).

<sup>3</sup> Although the term "right" comprehensively describes the Afrikaans term "*subjektiewe reg*", I add the word "subjective" here in brackets to emphasise that when I use the term "right", it refers to the Afrikaans term "*subjektiewe reg*".

## 2 Approaches to liens in South African law

Most courts and scholars acknowledge two types of liens: enrichment liens (*verrykingsretensieregte*) and debtor and creditor liens (*skuldeiser-skuldenaarretensieregte*, also referred to as liens *ex contractu*).<sup>4</sup> This classification relates to the source of the personal right that the lien secures. In the case of enrichment liens the lien secures the creditor's enrichment claim against her debtor. In the case of a contractual lien it secures the creditor's contractual claim against her debtor. In the latter situation I prefer the term "lien *ex contractu*" or "contractual lien" to the term "debtor and creditor lien" because the latter term gives no indication of the source of the personal right which the lien protects. In addition, in both situations there are debtors and creditors, though the source of their obligations differs.

Enrichment liens are regarded as limited real rights which are enforceable against third parties, the third party being the owner of the thing. Contractual liens are not regarded as limited real rights: sometimes they are referred to as personal rights which are enforceable only *inter partes*.<sup>5</sup> There are three lines of thinking in case law and legal literature pertaining to the nature of a lien. In this sense a lien is described as

- (i) a right<sup>6</sup> (a personal right, a real right,<sup>7</sup> a limited real right or a real security right<sup>8</sup>);
- (ii) a defence against an owner's *rei vindicatio*;<sup>9</sup> and
- (iii) an ability<sup>10</sup> to withhold (*terughoudingsbevoegdheid*<sup>11</sup>).<sup>12</sup>

<sup>4</sup> Wiese 2013 *CILSA* 274-275.

<sup>5</sup> Wiese *Retensieregte* 178-179.

<sup>6</sup> Scott and Scott *Mortgage and Pledge* 85-93; Van der Merwe *Sakereg* 711-724; Scott "Lien" paras 49-50, 60, 70; Badenhorst, Pienaar and Mostert *Law of Property* 412-413, 418; Scott "Law of Real and Personal Security" 273-274; Mostert and Pope A *Beginsels van die Sakereg* 365-367.

<sup>7</sup> Although the term "real right" is used, it can be only a limited real right because it is a right to another person's property.

<sup>8</sup> The term "real security right" merely classifies this limited real right as a security right.

<sup>9</sup> Scott and Scott *Mortgage and Pledge* 86; Van der Merwe *Sakereg* 712; Scott "Lien" para 50; Badenhorst, Pienaar and Mostert *Law of Property* 418; Du Bois *South African Law* 662; Van der Walt and Pienaar *Inleiding tot die Sakereg* 305.

<sup>10</sup> I prefer to use the term "ability" at this stage. The problem with the term "capacity" is discussed in 4.3 below.

<sup>11</sup> See the discussion under 4.3 below.

To provide the background for my discussion and evaluation of the different lines of thinking in South African law I briefly consider the development of liens in Roman law.

### 3 Right to withhold in Roman law

In Roman law the term *retentio* was used in various contexts, *inter alia* as the keeping or holding back of a thing, remembrance, to maintain a certain factual situation, and a legal institution for compensation.<sup>13</sup> In the course of Roman legal development, three forms of real security rights were known: *fiducia cum creditore*, *pignus* and *hypotheca*.<sup>14</sup> Retention of the thing was a type of security for the enforcement of a claim. The maxim *minus est actionem habere quam rem* (it is less satisfying to have an action than to be in control of a thing)<sup>15</sup> applied. Julian<sup>16</sup> thus states that it is better to be in control of a thing and to wait than to claim from the debtor. In Roman law a right of retention was allowed at classical law: the defendant, who had made necessary or useful expenses on a thing, could resist the owner's *rei vindicatio* with the *exceptio doli* (defence).<sup>17</sup> The *exceptio doli* is a defence based on reasonableness that can be raised against a debtor who claims his thing, knowing that he himself still has to perform. Recognition of a lien was based on the principle of fairness (*aequitas*).<sup>18</sup> The operation of a lien was very simple: when a debtor reclaimed his thing with the *rei vindicatio* from the creditor (the lienholder), the latter could either return the thing or ask the praetor for an *exceptio doli* if the debtor had not fulfilled his obligation. One of two possible orders could be made:

- (i) temporary dismissal of the *rei vindicatio* whereafter the debtor had to perform before he could later institute the *rei vindicatio* again,<sup>19</sup> or

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<sup>12</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 771; Sonnekus *Ongegronde Verryking* 219-220; Sonnekus 1991 *TSAR* 462-482.

<sup>13</sup> Aarts *Het Retentierecht* para 46.

<sup>14</sup> Thomas *Textbook of Roman Law* 329.

<sup>15</sup> Hiemstra and Gonin *Drietalige Regswoordeboek* 230.

<sup>16</sup> D. 47.2.60 as discussed in Aarts *Het Retentierecht* para 24.

<sup>17</sup> Kaser *Roman Private Law* 142.

<sup>18</sup> Aarts *Het Retentierecht* para 54-55.

<sup>19</sup> Aarts *Het Retentierecht* para 55.

(ii) the debtor's *rei vindicatio* was granted conditionally, thus the debtor's claim for the return of his thing was granted on condition that he performed first.<sup>20</sup>

The *exceptio doli* is therefore the basis from which liens developed further.

## 4 Classification of liens in South African law

I now briefly consider the most significant judgments and literature dealing with the classification of a lien as a right (*jus/ius*), a defence or the capacity (power) to withhold.

### 4.1 Right (*jus/ius*)

#### 4.1.1 Case Law

In case law enrichment liens are often classified as limited real rights and I therefore reflect on the recognition of a lien as a right in the leading cases. The first important judgment dealing with the nature of liens in South African law was the 1906 case of *United Building Society v Smookler's Trustees and Golombick's Trustee*.<sup>21</sup> In this case Smookler entered into an agreement to buy a stand in the winter of 1904. On 5 October 1904 he signed a loan agreement with United Building Society. Thereafter he contracted with Golombick to erect some buildings on the stand. On 17 December the property was transferred into Smookler's name and the mortgage bond in favour of United Building Society was registered simultaneously. Golombick completed the buildings but Smookler failed to pay him. On 7 February 1905 the court ordered Smookler to pay Golombick the outstanding amount. Smookler did not comply with the order and was sequestrated. The question was if Golombick's lien over the property enjoyed preference over United Building Society's claim against Smookler's insolvent estate. In this case Bristowe J<sup>22</sup> noted the following:

Now a *jus retentionis* for *necessariae* or *utiles impensae* may well be, and we think is, a real right. No doubt it is not possession in the legal sense, but it is a right to exclude every one else from possession during continuance of a certain state of

<sup>20</sup> Aarts *Het Retentierecht* para 56.

<sup>21</sup> *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623.

<sup>22</sup> *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 632.

things. It is therefore a right to exclude the world from the enjoyment of one of the most important of the privileges which accompany *dominium*.

The judge<sup>23</sup> decided in favour of Golombick. This judgment declared that a lien as a real right enjoys preference over a registered mortgage bond over the property in question. Although this is an oft-quoted judgment and the conclusion is correct, the reason for this outcome is wrong. It can also be criticised on various grounds: the judge often made statements without reference to any authority; he contradicted himself and regularly used phrases like "we think", "it well may be" and "we doubt". In this specific part of his judgment the judge seems fairly unsure of the legal position and referred to no authority for his statement that an enrichment lien is a real right.<sup>24</sup> Consequently, I argue that this judgment is not conclusive authority for the statement that a lien is a real right. The judge's reference to "possession in a legal sense" also creates the impression that he might even regard possession as a right. Authors like Sonnekus and Neels<sup>25</sup> and Kleyn<sup>26</sup> indicate that possession is not a right. According to these authors possession is a factual physical relationship between a person and a thing and therefore it cannot be a right. They further explain that this factual situation is a legally recognised and protected relationship. They consider possession as a legal fact to which the law attaches certain consequences.

Possibly due to a misunderstanding of the nature of a lien, the judge thought that the only way in which he could protect Golombick in the circumstances (due to the insolvency of Smookler) was to regard a lien as a real right. This explanation of Bristowe J in *United Building Society v Smookler's Trustees and Golombick's Trustee* was followed in subsequent cases as authority for the view that a lien is a real right.<sup>27</sup>

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<sup>23</sup> *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 634.

<sup>24</sup> See n 8 above.

<sup>25</sup> See the discussion of possession as a right in Sonnekus and Neels *Sakereg Vonnisbundel* 125-126.

<sup>26</sup> Kleyn *Mandament van Spolie* 346, 438.

<sup>27</sup> See *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 3 SA 642 (A); *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A) 271; *D Glaser and Sons (Pty) Ltd v The Master* 1979 4 SA 780 (C) 787; *Syfrete's Participation Bond*

*Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd*<sup>28</sup> is an interesting case because it does not directly deal with reliance on a lien. Here OFS Land and Estate Co (Pty) Ltd sold their property - extensions of the town Allanridge - to Anglo American (OFS) Housing Co Ltd (the respondent). The property consisted of 329 vacant stands. In terms of the agreement the respondent could commence with building work, but the stands would be transferred into its name only once the Town Council approved the town plans. The purchase price was the price of the land excluding the value of the buildings. For taxation purposes the question was whether or not the value of the stands should include the value of buildings when calculating the transfer duty payable. The respondent averred that he had a lien for useful improvements and that the property was sold to him for the value of the land and not for the value of the land and the buildings thereon. Steyn CJ<sup>29</sup> and Ramsbottom JA<sup>30</sup> accepted that a lien for useful improvements is a real right, with reference to *United Building Society v Smookler's Trustees and Golombick's Trustee*. All the remarks pertaining to liens were, however, *obiter* since the case did not deal with the recognition of a lien. There was no need for the court to determine the nature of a lien. The existence of a lien was used merely to determine the purchase price under the particular circumstances.

In *Brooklyn House Furnishers v Knoetze and Sons*<sup>31</sup> the court had to decide if reliance on a lien for necessary expenses in respect of the thing could succeed against the owner who had no agreement with the lienholder. The facts are briefly as follows: Bond bought furniture in terms of a hire purchase agreement from Brooklyn House Furnishers (Pty). In terms of the agreement Bond was not allowed to transport or store the furniture without Brooklyn House Furnishers' consent. Despite this clause Bond contracted Knoetze and Sons to transport the furniture and

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*Managers Ltd v Estate and Co-op Wine Distributors (Pty) Ltd* 1989 1 SA 106 (W) 110C; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A).

<sup>28</sup> *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 3 SA 642 (A).

<sup>29</sup> *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 3 SA 642 (A) 649E-F.

<sup>30</sup> *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 3 SA 642 (A) 657H-G.

<sup>31</sup> *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A).

to store it. When this came to the attention of Brooklyn House Furnishers it immediately claimed the furniture from Knoetze and Sons, who then relied on a salvage lien for the transport and storage of the furniture. Brooklyn House Furnishers paid the amount claimed by Knoetze and Sons in order to get the furniture. Thereafter they instituted action in the Magistrates Court to reclaim the money paid. According to the Magistrates Court Knoetze and Sons proved that the carrying and storage of the furniture were essential for their preservation. Brooklyn House Furnishers' application was dismissed and they appealed this decision. On appeal Brooklyn House Furnishers averred that it was not enriched by the carrying and storage of the furniture, and, if it were enriched, it was not at the expense of Knoetze and Sons. Botha JA<sup>32</sup> acknowledged Knoetze and Sons' lien and the appeal was dismissed with costs. The judge<sup>33</sup> referred to *United Building Society v Smookler's Trustees and Golombick's Trustee* and *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* and stated that liens based on expenses for the preservation or improvement of things are real rights - the reason being that they do not arise from agreement but from enrichment.

In the case of *Lubbe v Volkskas Bpk*<sup>34</sup> the appellant (Lubbe) had an agreement with the owner of a piece of land to sow wheat on that land. After Lubbe sowed his wheat he was informed that the land would be sold by the bank, as mortgagee, to cover the owner's unpaid debts. Lubbe approached the court for an urgent order declaring that he had a lien over the land. The court dismissed Lubbe's *ex parte* application. All subsequent appeals against the court *a quo*'s finding were also dismissed. Smuts JP<sup>35</sup> made no finding on the nature of a lien but it seems as if the court accepted that a lien was a real right because it indicated, by way of *obiter dictum*, that the *prior in tempore* rule applies to liens.<sup>36</sup> This point of view is criticised by Van der Merwe<sup>37</sup> and Sonnekus.<sup>38</sup> Van der Merwe is of the opinion that a lien

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<sup>32</sup> *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A) 277A.

<sup>33</sup> *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A) 271C-D.

<sup>34</sup> *Lubbe v Volkskas Bpk* 1992 3 SA 868 (A).

<sup>35</sup> *Lubbe v Volkskas Bpk* 1991 1 SA 398 (O) 409E-F.

<sup>36</sup> *Lubbe v Volkskas Bpk* 1991 1 SA 398 (O) 408G-H.

<sup>37</sup> Van der Merwe *Sakereg* 724 fn 930.

disturbs the operation of the *prior in tempore* rule based on the principle of fairness. According to Sonnekus the mortgagee is enriched by the creditor's (the lienholder's) actions in the case of a *concursum creditorum*. Consequently, the lienholder's lien can be enforced against the mortgagee who holds a mortgage over the land and who is enriched by the creditor's improvements on the land.<sup>39</sup>

In *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*<sup>40</sup> the appellant applied for an eviction order against the respondent. The respondent had an oral agreement with Canadian Gold in terms of which the respondent would extract chrome for Canadian Gold. At the time of the agreement the land from which the chrome had to be extracted was owned by one De Waal. The respondent took all their equipment to the land and commenced with the extraction. Canadian Gold paid the respondent on a regular basis for the work done. De Waal sold the land to the appellant, who then contracted another company to extract the chrome from the said land. Consequently, the appellant requested the respondent to vacate the land. The respondent averred that Canadian Gold owed them money for work done. It claimed to have a debtor-creditor lien over the stockpile of excavated material which contained some chrome ore and two open pits. The court *a quo* did not grant the eviction order. The appellant appealed against this decision.

On appeal Nienaber JA<sup>41</sup> formulated the legal question as follows:

[W]hether the respondent's admitted debtor and creditor lien against Canadian Gold extended to the appellant, a non-contracting party, on the ground that the appellant was aware of, consented to and authorised the respondent to conduct its excavating activities on the appellant's property - this was essentially the issue on which the Court *a quo* found in favour of the respondent ...

The Judge<sup>42</sup> then referred to the classification of liens into enrichment liens and debtor and creditor liens and declared the former to be real rights, but not the latter. For this statement he relied on *United Building Society v Smookler's Trustees and*

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<sup>38</sup> Sonnekus *Ongegronde Verryking* 224.

<sup>39</sup> See the discussion in Wiese *Retensieregte* 342-344.

<sup>40</sup> *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A).

<sup>41</sup> *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 81G.

<sup>42</sup> *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 271C-D.

*Golombick's Trustee*<sup>43</sup> and *Brooklyn House Furnishers v Knoetze and Sons*.<sup>44</sup> As he indicated in the formulation of the legal question, this case did not deal with the existence of an enrichment lien but with the operation of a debtor-creditor lien against a new owner who was not a party to the agreement. Furthermore, the respondent had ceded all his rights in terms of the agreement to a bank. Consequently, he no longer had a right to enforce his contractual right against Canadian Gold. The bank, as the holder of the contractual right against Canadian Gold, could also not rely on a lien because it was not in control of the premises. Nienaber JA<sup>45</sup> implied that the respondent should have relied on an enrichment lien against the new owner. In my opinion the respondent was advised incorrectly, but would also not have succeeded in relying on an enrichment lien because he had ceded all his rights to the bank and was therefore no longer a creditor.

Although the above judgments followed *United Building Society v Smookler's Trustees and Golombick's Trustee*<sup>46</sup> with specific reference to Bristowe J's unsubstantiated statement that an enrichment lien is a real right, I am of the opinion that none of these judgments provide conclusive authority for such an interpretation of the nature of a lien.

#### 4.1.2 Literature

In academic literature as well as several judgments the term "right" (*jus/ius*) is used to describe a lien. The term "right" can have various meanings. I now briefly discuss some definitions of a "right" in order to determine the exact meaning of the term "right" in "right of retention".

Van der Vyver and Van Zyl<sup>47</sup> distinguish between seven different depictions of the term "right". Only two of these are relevant for the current discussion. First, a "right" can be defined as the unity of relationships between a legal subject and the legal

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<sup>43</sup> *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623.

<sup>44</sup> *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A).

<sup>45</sup> *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 85I-86A.

<sup>46</sup> *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623.

<sup>47</sup> Van der Vyver and Van Zyl *Inleiding tot die Regswetenskap* 183.

object and all other legal subjects regarding the legal object. For example: I have a right (eg ownership) over a horse. This is the generally accepted description of a right.<sup>48</sup> Secondly, a "right" can be defined as a legal subject's entitlement (*geoorlooftheid*) to deal with his thing in a certain manner, for example to use and enjoy it. This could be explained as the owner's right to ride his horse, in other words, it describes the content of his right. The correct term here is "entitlement". The authors<sup>49</sup> distinguish between a legal capacity or competence (*kompetensie*), namely the capacity to participate in legal commerce, and an entitlement (*bevoegdheid*), namely the entitlement to use a legal object in a certain manner.

Hahlo and Kahn<sup>50</sup> also analyse different descriptions of a "legal right". According to the authors the different definitions of a legal right fall in one of the following two groups: a legal right is seen as the exercise of human will or the protection of an interest. They list the following as objects of a legal right: (i) corporeal things (ii) personal integrity; (iii) domestic relations; (iv) incorporeal things or rights; (v) intellectual property and (vi) performances and services. The essence of Hahlo and Kahn's<sup>51</sup> definition of a legal right is that it is the legally recognised power to realise an interest.<sup>52</sup>

In order to get to the core of the meaning of a "right" Van Warmelo<sup>53</sup> explains that the law (*objektiewe reg*) grants a right (*subjektiewe reg*) to a legal subject. The author<sup>54</sup> indicates that there are four elements to a right: it must enure to the benefit of a legal subject, there must be a legal object (a thing, value or interest) to which the right pertains, there must be an abstract legal relationship between the

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<sup>48</sup> Afrikaans: "*subjektiewe reg*".

<sup>49</sup> Van der Vyver and Van Zyl *Inleiding tot die Regswetenskap* 184.

<sup>50</sup> Hahlo and Kahn *South African Legal System* 78.

<sup>51</sup> Hahlo and Kahn *South African Legal System* 78.

<sup>52</sup> "Many attempts have been made to define a legal right. The classical definition is that of Austin: 'A party has a right, when another or others are bound or obliged by the law, to do or forbear, towards or in regard of him.' Other definitions appear in the main to fall into one of two groups: 1. An exercise of the human will. [...] 2. The protection of an interest. [...] Allen attempts to combine the two types of definitions by defining a legal right as 'the legally guaranteed power to realize an interest'."

<sup>53</sup> Van Warmelo *Regsleer* para 225.

<sup>54</sup> Van Warmelo *Regsleer* para 225-242.

legal subject and the legal object and the law must acknowledge this legal relationship (for example the legal relationship between an owner and a thing, which the law acknowledges as ownership) and, finally, the right must be protected by the law.

Although Van Warmelo<sup>55</sup> lists the protection of the legal relationship as an element of a right, he does not consider it necessary for the existence of a right.<sup>56</sup> He refers to the so called *leges imperfectae*, which do not enjoy protection.<sup>57</sup> Furthermore, the protection does not necessarily take the form of an action or similar legal remedy, since this postulates a legal community with a reasonable measure of organisation, such as a state. A description of a right that always requires a legal remedy would negate the existence of, for example, public international law, since a legal action or a legal remedy is not always available.<sup>58</sup>

The reference to public international law (*volkerereg*) creates uncertainty. Possibly Van Warmelo requires protection as an element of a right in private law, but not necessarily in public international law. Regrettably, the author does not explain this statement further. Sonnekus and Neels,<sup>59</sup> on the other hand, argue quite the reverse: they insist that an action is always required as an element of a right.

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<sup>55</sup> Van Warmelo *Regsleer* para 242.

<sup>56</sup> Van Warmelo distinguishes between "reg in die objektiewe sin (ROS)" - the law and "'n reg in die subjektiewe sin (RSS)" - a right. Van Warmelo *Regsleer* para 225.

<sup>57</sup> See Schiller *Roman Law Mechanisms* 247-248 for a comprehensive discussion on *leges perfectae*, *leges imperfectae* and *leges minus quam perfectae*. In brief *leges imperfectae* is a statute which forbids something to be done, but that does not rescind or impose a penalty on a person who acted contrary to the law. According to Schiller "leges imperfectae are ancient or obsolete pre-classical laws, reinvigorated in an era in which the conviction of the immutability of the *ius civile* was still the governing idea".

<sup>58</sup> "In die reël wanneer een van die vier elemente ontbreek, dan is daar geen RSS [right in the subjective sense] nie. Die beskerming is egter nie 'n noodsaaklikheid nie. Daar is die sg *leges imperfectae* wat geen beskerming ken nie. Die beskerming het ook nie noodsaaklik die vorm van 'n aksie of soortgelyke regsmiddel nie, want so 'n regsmiddel veronderstel 'n regsgemeenskap met 'n redelike mate van organisasie soos 'n staat. 'n Standpunt wat altyd 'n regsmiddel verwag sou bv die bestaan van die volkerereg in 'n groot mate negeer, aangesien daar nie altyd 'n aksie of ander soort gelyke regsmiddel beskikbaar is nie." Van Warmelo *Regsleer* para 242.

<sup>59</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 769.

Hutchison *et al*<sup>60</sup> emphasise the importance of a legal right and indicate that it is extremely challenging to define a right. The authors then analyse some definitions:

Various definitions of 'legal right' have been formulated by leading jurists. For example 'an interest protected by the authority of the State'. This definition, it will be noticed, refers merely to the *legal effect* of a right. Next we have 'an interest recognized and protected by law'. This definition gives a little information concerning the *formation* of a right. Other jurists, again, say 'a party has a right, when another or others are bound or obliged by the law, to do or to forbear, towards or in regard of him'. This definition refers in more detail to the *nature* of the duty corresponding to a right. Lastly we have 'a capacity residing in one man of controlling, with the assistance of the State, the actions of others'. From this definition we obtain more comprehensive information, though it is not very precise. [My emphasis.]

The authors distinguish the following three elements of a right: its nature, its formation and its legal effect. With this in mind the authors then define a right as:

... an interest conferred by, and protected by the law, entitling one person *to claim that another person or persons either give him something, or do an act for him, or refrain from doing an act.* [My emphasis.]

In terms of this definition a right is an interest derived from and protected by the law. It entitles the holder to expect other persons<sup>61</sup> to give her something, to do something or to refrain from doing something. This definition contains most of the elements of a right<sup>62</sup> but refers to only one leg of the legal relationship (ie the one between the two legal subjects). There is no mention of the object of the relationship, an element that Sonnekus and Neels regard as essential. The emphasised part of the definition appears to limit this right to a creditor's right (a personal right). Unlike Van Warmelo they require legal protection for it to qualify as a right. This definition of Hutchison *et al* is a very broad and general definition of a right.

Sonnekus and Neels<sup>63</sup> explain that a right in terms of the subjective-rights theory is a relationship between the entitled person and other legal subjects (the subject-subject relationship) in regard to a certain legal object (the subject-object

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<sup>60</sup> Hutchison *et al* *South African Law* 38. [The latest edition of *Wille's Principles of South African Law* 9<sup>th</sup> ed (2007) does not define a legal right.]

<sup>61</sup> Legal relationship between two legal subjects.

<sup>62</sup> Also see Sonnekus and Neels *Sakereg Vonnisbundel* 7.

<sup>63</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 7.

relationship). A right in terms of this theory is always a dual relationship, namely the subject-subject relationship and the subject-object relationship.

Hosten *et al*<sup>64</sup> write in a similar vein and define a right as a relation between legal subjects, which relationship is regulated by law. The authors explain that a legal subject does not only have a right against someone, but also a right to something. A right is therefore a dual relationship consisting of a legal subject's relationship with the object of his right and the relationship with all other legal subjects who must respect this right.

Sonnekus and Neels<sup>65</sup> are not convinced that a lien is a right in the above sense, and reject the classification of liens as real rights (enrichment liens) and personal rights (debtor creditor liens). Sonnekus<sup>66</sup> argues that if liens are regarded as rights in the above sense they must form part of the legally recognised categories of rights, namely real rights, personal rights, immaterial property rights and personality rights. Furthermore, in such categorisation one would expect that all liens fall under the same category of rights.

If one regards liens as rights and has to categorise them with reference to their objects, all liens should be classified as real rights since the object of the right is a thing. Liens can therefore also not be classified as personal rights, since the object of a personal right is performance. Although the lienholder has a personal right against the debtor for performance, depending on the circumstances, this right originates from either a contractual agreement or enrichment. In my opinion Sonnekus correctly indicates that a lien cannot in some instances qualify as a real right and in other cases as a personal right.

Although a lien appears to have elements of a right in the above sense, taking into consideration the subject-subject relationship, as well as the subject-object relationship, other elements of a right should also be considered. As I indicate

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<sup>64</sup> Hosten *et al* *South African Law* 543-544.

<sup>65</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 771-772.

<sup>66</sup> Sonnekus 1983 *TSAR* 102-106.

above, there are different descriptions and definitions of the term "right". However, if one accepts the views expounded above, which are generally in line with the subjective-rights theory of private law, one should rethink the classification of liens as rights.

A further very important aspect of rights, namely their enforcement by means of an action, has been disregarded in the case law discussed above. Contrary to Van Warmelo's statement that a right does not always have to be protected by the law, Sonnekus and Neels<sup>67</sup> refer to the maxim *ubi ius ibi remedium*. The authors explain that where there is a right there has to be an action or legal remedy to enforce that right. It is clear from the general principles of the operation of liens that the lienholder can never actively enforce his lien with an action. The legal remedy to protect retention of the thing is merely a defence.<sup>68</sup>

As indicated above, a lien developed from the *exceptio doli*, which is an equitable defence (*billikheidsgefundeerde verweer*). A lien cannot be enforced as an independent right against the debtor. Sonnekus and Neels<sup>69</sup> emphasise the fact that a lien is a passive ability to withhold, which does not grant a right of action to the creditor. To explain the operation of a lien the authors<sup>70</sup> refer to the analogous position in *estoppel* where an owner's *rei vindicatio* is met with the defence of *estoppel*. A successful reliance on *estoppel* does not mean that the person relying on *estoppel* has a right to the thing. He therefore cannot institute action against the owner. He must wait for the owner to institute the *rei vindicatio* but then he has a defence (*estoppel*). Similarly, the lienholder cannot institute action against the owner but has a defence (a "right" of retention) when the owner acts. Sonnekus and Neels argue that the person raising *estoppel* has no right but relies on the factual circumstances. A lienholder has no right, but relies on his *ex lege* ability to withhold.

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<sup>67</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 769.

<sup>68</sup> See Wiese *Retensieregte* 315-318.

<sup>69</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 769-770.

<sup>70</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 771.

The authors<sup>71</sup> furthermore compare a lien with the *exceptio non adimpleti contractus*. This exception can be raised where a creditor claims performance from the debtor, but is also in default. Such a creditor cannot demand performance until she has performed.<sup>72</sup> The authors consequently describe reliance on a lien, *estoppel* and the *exceptio non adimpleti contractus* as passive weapons in the hands of the excipients.<sup>73</sup> They describe a lien as a legally recognised ability to withhold, which is granted to the lienholder in terms of his personal right against the owner. From their discussion it is not clear whether Sonnekus and Neels regard this ability as an entitlement in terms of the personal right. For example, they describe the lawfulness of the relationship as flowing from "*die onderliggende vorderingsreg*" and as a legally recognised "*terughoudingsbevoegdheid*" afforded to a creditor "*uit hoofde van sy vorderingsreg*". It entitles the lienholder to suspend his duty to return the thing in his control until his claim against the debtor has been discharged. The lien therefore secures the lienholder's personal right against the debtor. Although it has a security function, it is not a right because it grants the lienholder no active entitlements to the thing in his control.<sup>74</sup>

In the light of the above approach the term "right" in "right of retention" to my mind is used in a loose and imprecise way referring to an interest protected by the law. I agree with Sonnekus and Neels that it is not a right at all. Therefore, it can also neither be a real right<sup>75</sup> nor a personal right.<sup>76</sup> I now consider the proposition that a lien is a defence.

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<sup>71</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 769.

<sup>72</sup> Christie *Law of Contract* 421.

<sup>73</sup> "... passiewe wapen in die hand van die vorderingsgeregtigde". Sonnekus and Neels *Sakereg Vonnisbundel* 769.

<sup>74</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 771.

<sup>75</sup> Enrichment lien.

<sup>76</sup> Debtor and creditor lien.

## 4.2 Defence

### 4.2.1 Case law

Three of the judgments describing a lien as a right also refer to the procedural nature of liens. In *United Building Society v Smookler's Trustees and Golombick's Trustee*<sup>77</sup> the judge<sup>78</sup> remarked as follows:

Furthermore we doubt whether it is correct to say ... that the *jus retentionis* is a mere weapon of defence, for we think that if a person exercising that right were forcibly dispossessed he might make use of it as a weapon of offence in an action for spoliation.

Again, as so often in this judgment, the judge was uncertain ("we doubt") of the correctness of the proposition that a lien is a mere defence. His subsequent exposition of the legal position is also completely wrong and provides no explanation of why a lien is not a defence. The spoliation remedy does not protect a lien; it protects a person's control over a thing. The spoliation remedy therefore protects a factual situation, not a right. If control is taken from a lienholder against her will, she can institute the spoliation remedy to restore control. In *Brooklyn House Furnishers v Knoetze and Sons*<sup>79</sup> the court clearly and correctly stated that a lien never constitutes a cause of action, but that it is a defence against the owner's *rei vindicatio*.

In *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*<sup>80</sup> the court held that both classes of liens can be raised as defences against an owner's *rei vindicatio*. The court held that a debtor and creditor lien is a contractual remedy and not a real right. This contractual remedy is maintainable by the one party (the lienholder) to a contract against the other party. According to the court the other party (the debtor) may or may not be the owner of the property. The court explains the operation of this defence: If a person (the lienholder) effected necessary or useful improvements to another person's (the debtor's) property by agreement, the lienholder can defend

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<sup>77</sup> *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623.

<sup>78</sup> *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 632.

<sup>79</sup> *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A).

<sup>80</sup> *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A).

his possession when the debtor sues him for the return of the thing before being compensated for his work. He can defend his possession against his contractual counterpart on the basis of his debtor and creditor lien<sup>81</sup> or against the owner who is not the contracting party, on the basis of his enrichment lien. In the case of reliance on the debtor and creditor lien he can defend his possession until the agreed remuneration (regardless of the extent of the debtor's enrichment) has been paid. In the case of reliance on an enrichment lien, the lienholder can defend his possession until his actual expenses alleviated by the owner's enrichment have been paid.<sup>82</sup>

#### 4.2.2 Literature

Most authors<sup>83</sup> describe a lien as a defence against an owner's *rei vindicatio*. Only Sonnekus and Neels<sup>84</sup> go further and regard a lien as a defence against the owner's *rei vindicatio* and any other real action (*sakeregtelike aanspraak*).<sup>85</sup> Although the authors do not provide an example of such other claims, they probably had limited real right holders such as servitude holders or mortgagees in mind.

As indicated above, Sonnekus and Neels<sup>86</sup> draw an analogy between reliance on a lien and the defence of *estoppel* or the *exceptio non adimpleti contractus*. Van der Merwe *et al*<sup>87</sup> explain the operation of *estoppel* as a defence. Like Sonnekus and Neels they explain that *estoppel* is not the basis for a creditor to claim, but a defence on which the person averring *estoppel* can rely only when a claimant institutes action against him. The person relying on *estoppel* can never institute action based on the misrepresentation.

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<sup>81</sup> An interesting question, which falls outside the scope of this article, is if the appropriate remedy in this situation is not the *exceptio non adimpleti contractus*. See the brief reference to this remedy below.

<sup>82</sup> *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 85E-H.

<sup>83</sup> Scott en Scott *Mortgage and Pledge* 86; Van der Merwe *Sakereg* 712; Scott "Lien" para 50; Badenhorst, Pienaar and Mostert *Law of Property* 417-418; Du Bois *South African Law* 662; Van der Walt and Pienaar *Inleiding tot die Sakereg* 305; Mostert and Pope *Beginsels van die Sakereg* 365.

<sup>84</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 774.

<sup>85</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 774.

<sup>86</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 769.

<sup>87</sup> Van der Merwe *et al Kontraktereg* 35.

Van der Merwe *et al*<sup>88</sup> inform us that the *exceptio non adimpleti contractus*<sup>89</sup> is a means of enforcing actual performance. Furthermore, the *exceptio non adimpleti contractus* can be described as a temporary defence aiming at actual performance where performance is still possible. In essence it means that in reciprocal contracts a party cannot claim performance without having performed herself.

Both *Brooklyn House Furnishers v Knoetze and Sons*<sup>90</sup> and the literature regard a lien as a defence against an owner's *rei vindicatio*. A lienholder has the capacity to withhold control over an owner's thing until the owner has satisfied her debts to the lienholder. The law provides a defence to the lienholder to protect this capacity. When an owner claims her thing with the *rei vindicatio* the lienholder can rely on her capacity to withhold (*terughoudingsbevoegdheid*). The latter term is propagated by Sonnekus. In the Dutch *Burgerlijk Wetboek*<sup>91</sup> the term "*opschortingsbevoegdheid*" (capacity to suspend) is used.<sup>92</sup>

### **4.3 Capacity to withhold**

In private-law literature we distinguish between rights, entitlements,<sup>93</sup> capacities (*bevoegdhede*) and competencies (*kompetensies*).<sup>94</sup> Sonnekus and Neels<sup>95</sup> warn against the tendency to refer to "rights"<sup>96</sup> in a loose sense. The term "right" used in this loose sense can refer to a right (*subjektiewe reg*), entitlement, competency or a capacity. An entitlement flows from a right - it describes the content of the right. A competency or capacity emanates directly from the law and a legal subject can therefore not increase or limit another legal subject's competencies. Competencies are not transferable. The most prominent examples of competencies are contractual capacity, legal capacity and the capacity to appear in a court of law. The total sum of a legal subject's competencies determines his legal status and is dependent on

<sup>88</sup> Van der Merwe *et al Kontraktereg* 413.

<sup>89</sup> See *Smith v Van den Heever* 2011 3 SA 140 (SCA) paras 14, 15.

<sup>90</sup> *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A) 27.

<sup>91</sup> See *Nederlands Burgerlijk Wetboek* s 3:290.

<sup>92</sup> See Wiese 2013 *CILSA* 282.

<sup>93</sup> Real rights, personal rights, immaterial property rights and personality rights.

<sup>94</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 12.

<sup>95</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 12.

<sup>96</sup> See the discussion under 4.1 above.

factors such as age, domicile and marital status.<sup>97</sup> Sonnekus and Neels<sup>98</sup> show that the competency of one legal subject can limit a right of another legal subject: a traffic officer has the competency (emanating from the law) to take away the car keys from an owner who drives under the influence of alcohol. This limitation on the owner's ownership does not grant the traffic officer a correlative right to the car – he has a mere competency emanating from the law.

Although I thoroughly agree with Sonnekus and Neels that a lien is not a right, I have difficulty in understanding and translating the term "*terughoudingsbevoegdheid*". To my mind "*bevoegdheid*" cannot be translated as "entitlement" because it is not an entitlement flowing from the lienholder's personal right. It is not a capacity or competency in the meaning ascribed to these terms by Sonnekus and Neels. Perhaps one can turn to the Roman-Dutch authority to whom Sonnekus and Neels refer, namely Kersteman. He states as follows:

Retentie, is een regtmatige wederhouding van eens anders zaak, die wy in onze magt of bezit hebben, ter tyde en wylen de Eigenaar van de zaak, ons, het geen hy wegens dezelve zaak aan ons schuldig is, voldaan of betaald heeft ... (*Rechtsgeleerd Woorden-Boek* (1768) *sv* 'retentive')

From this statement the *sui generis* nature of a lien<sup>99</sup> is clear. He describes "*retentie*" as a lawful withholding of an owner's thing. It is lawful because the law grants a remedy (defence) against the owner's *rei vindicatio*. Due to its exceptional nature it is difficult to describe the ability to withhold in legal terms. This is possibly also the reason why the courts refer to the "right" of retention.<sup>100</sup> Because the law grants a defence to a creditor (the lienholder) in control of a thing, the owner cannot succeed with her *rei vindicatio*. I suggest for practical reasons that the term

<sup>97</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 13; Hosten *et al South African Law* 293.

<sup>98</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 12.13.

<sup>99</sup> S 3:290–3:295 *Nederlands Burgerlijk Wetboek* deals with *retentierechten* and classifies it as a *verhaalsrecht* (right of redress) and a specific *opschortingsrecht* (right to suspend). The term "*recht*" in *het retentierecht* is used in a loose sense. Although a lien is classified as an "*opschortingsrecht*", s 3:290 clearly states that: "*Retentierecht is de bevoegdheid die in de bij de wet aangegeven gevallen aan een schuldeiser toekomt, om de nakoming van een verplichting tot afgifte van een zaak aan zijn schuldenaar op te schorten totdat de vordering wordt voldaan.*" A lien in Dutch law is not classified as a right, but as a capacity (*bevoegdheid*) to withhold. See Wiese 2013 *CILSA* 279-282.

<sup>100</sup> *Het retentierecht*.

"*terughoudingsbevoegdheid*" can be translated as "capacity to withhold", because the law grants this defence. Capacity is used here not in the technical sense described by Sonnekus and Neels, but in the meaning of the ability to withhold granted by the law.

## 5 Practical implications

This "new" approach to liens is not only of academic value, but has practical implications. It clearly separates the question of whether a lien exists in a particular case from the determination of the nature of a lien. It recognises different forms of rights of retention, some falling under property law and others under the law of obligations. For example, when an owner institutes her *rei vindicatio* against the lienholder, the latter has a right to retain the thing, provided she has a claim against the owner. Where the owner has no contract with the lienholder, the only basis for the claim can be enrichment. Enrichment law determines both the existence of a claim in the particular circumstances and the extent of that claim. Where the owner has a contract with the lienholder, the latter has a contractual claim and its extent is determined by the contract between the owner and the lienholder. A lien should therefore not be classified as a limited real right, but as a defence to the *rei vindicatio*. This approach separates reliance on this defence from the operation of the *exceptio non adimpleti contractus*, which is historically also derived from the *exceptio doli*. Where a non-owner claims return of a thing on which a person has spent money or work in terms of a contract, the latter will rely on the *exceptio non adimpleti contractus*<sup>101</sup> before returning the thing to the non-owner. The extent of the claim is determined by the contract. There is, to my knowledge, no case in the South African law where in the latter situation the non-owner (the debtor) claimed a thing from her creditor, who then relied on a lien. This strengthens my argument that a lien is a mere defence against the owner's *rei vindicatio*. In the event that a

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<sup>101</sup> See the discussion of the *exceptio non adimpleti contractus* in 4.1.2 above. For further reading consult Lamine *Retentierecht*.

non-owner (a debtor) claims a thing from her creditor, the creditor should rely on the *exceptio non adimpleti contractus*.

Therefore a clear distinction should be drawn between the existence of a lien (as a defence against the *rei vindicatio*) and other rights of retention on the one hand, and the consequences of this distinction both for the parties and third parties affected by the existence of such rights of retention (third party operation):

(i) X, the creditor, has a contract with Y, the debtor, who is not the owner of the thing. When Z claims the thing with *rei vindicatio*, X can raise the defence that she is entitled to retain control of the thing until her claim (based on enrichment, in other words for necessary and useful expenses) has been satisfied; or

(ii) X, the creditor, has a contract with Z, the owner of the thing. When Z claims the thing with the *rei vindicatio*, X can rely on the defence that she is entitled to retain the thing until Z has fulfilled her contractual duty to pay (in other words, for all expenses provided for in the contract);

(iii) X, the creditor, has a contract with Y, the debtor, who is not owner of the thing. Without tendering payment of the contractual debt, Y claims return of the thing based on X's contractual duty to return the thing on completion of the work. X can rely on the *exceptio non adimpleti contractus* to enforce the payment of the expenses agreed upon in the contract before she returns the thing.

The above discussion concerns the classification of rights of retention and their creation. A different issue, related to the nature of the different rights of retention, pertains to their enforceability against third parties<sup>102</sup> such as creditors of the owner or the other contracting party in (iii). Since this article deals with the legal nature of a lien, the issue of the real operation does not fall within the discussion.

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<sup>102</sup> Despite the fact that the lien in *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 was a so-called creditor-debtor lien, the court held that it had third-party operation (*derdewerking*) against a secured creditor (the mortgagee) of the owner (the debtor). This is the only authority for the third-party operation of a lien in South African law.

## 6 Conclusion

The discussion above clearly indicates that Van Zyl J was correct in suggesting a reconsideration of the nature of liens.<sup>103</sup> A brief evaluation of case law shows great uncertainty and a lack of proper historical evaluation or fundamental thinking on the issue.

Sonnekus and Neels in their casebook<sup>104</sup> and Sonnekus in his articles<sup>105</sup> are the only authors who thoroughly investigate the issue. They rightly show that a lien is not a right (*subjektiewe reg*). Apart from minor reservations,<sup>106</sup> I endorse their view. I agree that a lien is not a right and therefore reject the classification of liens into debtor and creditor liens and enrichment liens with its concomitant consequences. This debate is not merely about terminology, but highlights fundamental issues for the law of property. The real effect or third party effect of liens, for example, requires further examination. The complexities of enrichment law are not relevant for determining the nature of a lien, but enrichment law serves to determine whether a person relying on a right of retention in a particular situation has a claim against the owner.

Most authors understandably<sup>107</sup> and correctly acknowledge that a lien is a weapon of defence against an owner's *rei vindicatio*. The law allows a creditor to retain control until her debt has been paid. There are two requirements for successful reliance on this defence: the person relying on the lien must be a creditor of the owner (either in terms of a contract or enrichment) and she must be in control of the owner's thing. The nature of the founding obligation is relevant only to determine the extent

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<sup>103</sup> Dutch law before the enactment of the current *Burgerlijk Wetboek* divided *retentierechten* (liens) into *zakenrechtelijke retentierechten* and *verbintenisrechtelijke retentierechten*. The former enjoyed real operation and the latter did not. Even though most authors are of the opinion that neither *zakenrechtelijke retentierechten* nor *verbintenisrechtelijke retentierechten* qualified as real rights or personal rights, there were some authors who regarded *zakenrechtelijke retentierechten* as real rights. The current *Burgerlijk Wetboek* did away with the uncertainty pertaining to the nature of a lien. There is no longer a distinction between different types of liens. See n 92 above and Wiese 2013 *CILSA* 279-282.

<sup>104</sup> Sonnekus and Neels *Sakereg Vonnisbundel*.

<sup>105</sup> Sonneks 1983 *TSAR*; Sonnekus 1991 *TSAR*.

<sup>106</sup> See discussion above.

<sup>107</sup> Due to the historical foundation of a lien as a defence (*exceptio doli*) in Roman law.

of the creditor's claim. This defence is therefore a reasonable limitation on an owner's *rei vindicatio* in circumstances where she owes money to the lienholder.

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**Legislation**

*Constitution of the Republic of South Africa, 1996*

*Nederlands Burgerlijk Wetboek* Artikel 3:290

**LIST OF ABBREVIATIONS**

CILSA      Comparative and International Law Journal of Southern Africa

TSAR      Tydskrif vir die Suid-Afrikaanse Reg