

# Liens in comparative perspective: South African law and Dutch law before and after the enactment of the current *Burgerlijk Wetboek*

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## *Abstract*

South African law distinguishes between enrichment liens and debtor and creditor liens. The former are generally classified as real rights and the latter are not. This position is similar to the position in Dutch law before the enactment of the current BW, where *retentierechten* (liens) were divided into *zakenrechtelijke retentierechten* and *verbintenisrechtelijke retentierechten*. The former enjoyed real operation while the latter did not. Even though most authors are of the opinion that neither *zakenrechtelijke retentierechten* nor *verbintenisrechtelijke retentierechten* qualified as either real or personal rights, there were some authors who regarded *zakenrechtelijke retentierechten* as real rights. The current BW did away with the uncertainty regarding the nature of a lien. There is no longer a distinction between different types of lien. Article 3:290–3:295 BW deals with *retentierechten* and classifies a lien as a *verhaalsrecht* (right of redress) and a specific *opschortingsrecht* (right to suspend).

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## INTRODUCTION

There are different views regarding the nature of liens<sup>1</sup> in South African law. The aim of this article is not to establish the reason for the different approaches, or to determine which opinion is more tenable. In this article I compare the legal position in South Africa with the legal position in the Netherlands both before

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<sup>1</sup> Also referred to as a right of retention.

and after the enactment of the current *Burgerlijk Wetboek (BW)*. The purpose of my research is to establish whether South Africa has lessons to learn from the development of liens (*retentierechten*) in Dutch law.

## SOUTH AFRICAN LAW

### Three types of lien

A lien can, in general, be described as the creditor's right to withhold or to retain a thing until she<sup>2</sup> is paid for the work done or money spent on the thing.<sup>3</sup> South African law recognises three categories of lien. First, enrichment liens, which can be divided into salvage liens and improvement liens.<sup>4</sup> These are generally regarded as real security rights. Secondly, debtor and creditor liens, which are not classified as real security rights.<sup>5</sup> Thirdly, we have statutory liens arising from statutes such as the South African Transport Services Act,<sup>6</sup> the Merchant Shipping Act<sup>7</sup> and the Customs and Excise Act.<sup>8</sup> These Acts govern the nature and extent of the liens arising from them.<sup>9</sup>

### The legal nature of liens

This section discusses the different points of view with regard to the legal nature of a lien in South African law. I shall first look at the work of property law scholars, and then turn to case law. Some authors refer to a lien as a right,<sup>10</sup> others refer to it as a defence<sup>11</sup> against the owner's *rei vindicatio*, while Sonnekus and Neels,<sup>12</sup> regard it as a capacity to withhold. Like Sonnekus and

<sup>2</sup> Any reference to the one gender includes the other as well.

<sup>3</sup> Scott *The law of South Africa (LAWSA): lien* vol 15 part 2 2008 par 50; Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's the law of property* (2006) 412; Wiese 'Liens: a closer look at some conceptual foundations' (2011) 44/1 *CILSA* 80.

<sup>4</sup> Van der Walt & Pienaar *Introduction to the law of property* (2009) 279.

<sup>5</sup> Van der Merwe *Sakereg* (1989) 711; Scott 'The law of real and personal security' in: Scott (ed) *The law of commerce in South Africa* (2009) 273; Du Bois (ed) *Wille's principles of South African law* (2007) 661.

<sup>6</sup> 9 of 1989.

<sup>7</sup> 57 of 1951.

<sup>8</sup> 91 of 1964.

<sup>9</sup> Scott & Scott *Wille's principles of mortgage and pledge* (1987) 86; *Brooklyn House Furnishers (pty) Ltd v Knoetze & Sons* 1970 3 SA 264 (a) 270.

<sup>10</sup> Scott & Scott n 9 above at 85; Van der Merwe n 5 above at 711; Scott n 3 at par 50; Badenhorst *et al* n 3 above at 412 and Du Bois (ed) n 5 above at 661.

<sup>11</sup> Van der Walt & Pienaar n 4 above at 301 and Mostert & Pope (eds) *The principles of the law of property in South Africa* (2010) 365.

<sup>12</sup> Sonnekus & Neels *Sakereg Vonnisbundel* (1994) 769.

Neels, Van der Walt and Pienaar<sup>13</sup> are of the opinion that a lien is neither a real right nor a personal right. According to Van der Walt and Pienaar, a lien is a capacity that places a real burden on the property of another. Susan Scott,<sup>14</sup> on the other hand, defines a lien not only as a real right, but as a real security right. This point of view is supported by Mostert and Pope,<sup>15</sup> who also define a lien as a real security right. Most of the authors agree that a lien is raised as a defence against an owner's *rei vindicatio*. Some authors are of the opinion that a debtor and creditor lien is a personal right,<sup>16</sup> others offer no opinion as to its nature.<sup>17</sup> Van der Walt and Pienaar<sup>18</sup> refer to a lien as a 'right' and not as a specific right, namely a real right or a personal right. Sonnekus and Neels<sup>19</sup> are the only authors who question the correctness of the classification of a lien as a 'right' (subjective right).<sup>20</sup> According to the authors the classification of a lien as a right is incorrect.

All authors agree that a lien is accessory in nature.<sup>21</sup> The existence of the lien depends on the creditor's claim that is secured by the lien. The creditor's claim may be either an enrichment claim or a contractual claim.

There are many reported cases in South African law that turn on various legal aspects of liens. Of these cases, only four concern the legal nature of a lien, namely *United Building Society v Smookler's Trustees and Golombick's Trustee*;<sup>22</sup> *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd*;<sup>23</sup> *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons*;<sup>24</sup> and *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*.<sup>25</sup> The 1906 case of

<sup>13</sup> Van der Walt & Pienaar n 4 above at 279.

<sup>14</sup> Scott n 5 above at 273.

<sup>15</sup> Mostert & Pope n 12 above at 365.

<sup>16</sup> Scott & Scott n 9 above at 85, Scott n 3 above at par 50; Badenhorst *et al* n 3 above at 412.

<sup>17</sup> Van der Merwe n 5 above at 711; Scott n 15 above at 273; Du Bois n 5 above at 661.

<sup>18</sup> *Inleiding tot die Sakereg* (6ed 2009) 301.

<sup>19</sup> Sonnekus *Ongegronde verryking in die Suid-Afrikaanse reg* (2007) 219–220.

<sup>20</sup> *Subjektiewe reg* in Afrikaans.

<sup>21</sup> See *inter alia* *Thienhaus v Metje and Ziegler Ltd* 1965 3 SA 25 (A); Scott & Scott note 9 at 86; Van der Merwe n 5 above at 614; Badenhorst *et al* note 3 above at 358–359; Du Bois n 5 above at 631 and Mostert & Pope n 11 at 301 for a discussion on accessory rights.

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

<sup>23</sup> 1960 3 SA 642 (A).

<sup>24</sup> 1970 3 SA 264 (A).

<sup>25</sup> 1993 1 SA 77 (A).

*United Building Society v Smookler's Trustees and Golombick's Trustee* was the first case to distinguish between enrichment liens and debtor and creditor liens, and their legal nature. Most of the cases decided after *United Building Society v Smookler's Trustees and Golombick's Trustee* followed Judge Bristowe's distinction between enrichment liens and debtor and creditor liens and his classification of enrichment liens as real rights.<sup>26</sup> It is remarkable that none of these judgments scrutinises or criticises the judgment in *United Building Society v Smookler's Trustees and Golombick's Trustee*.

A close look at the judgment opens it up to criticism on various grounds. The judgment can be said to be ambiguous, and in general illogical. The judge often contradicts himself.<sup>27</sup> The frequent use of phrases like 'We think it may be said ...';<sup>28</sup> 'we think ...';<sup>29</sup> 'we are inclined to think ...';<sup>30</sup> '[t]he rule then seems to be ...';<sup>31</sup> '[i]t is, we think ...';<sup>32</sup> and 'we doubt ...'<sup>33</sup> indicate that the judge was unsure of the statements he was making. The phrase 'but on the other hand'<sup>34</sup> is so frequently used that it is uncertain with which statement the judge is agreeing. The judge cited no authority for his statement that enrichment liens are real rights – he merely referred to 'the authorities'<sup>35</sup> and 'the books',<sup>36</sup> without stating which authorities or which books he had in mind. Furthermore, he failed to provide any reasons for such finding. In considering the effect of registration on the nature of a right, the judge contradicted himself by first stating<sup>37</sup> that registration is not a requirement to vest a real right, but he subsequently indicated<sup>38</sup> that a real right can only vest through registration. The registration of a right is naturally not always a clear indication of the nature of that right: the tacit hypothec of a lessor is one example of a real right that is not registered.

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<sup>26</sup> Note 23 above at 631 & 632.

<sup>27</sup> *Id* at 625, 632.

<sup>28</sup> *Id* at 627.

<sup>29</sup> *Id* at 629.

<sup>30</sup> *Id* at 630.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Id* at 632.

<sup>34</sup> *Id* at 628, 629.

<sup>35</sup> *Id* at 627.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Id* at 632.

<sup>38</sup> *Ibid*.

Three subsequent appellate judgments, *Kommisaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd*,<sup>39</sup> *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons*,<sup>40</sup> and *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*,<sup>41</sup> all of which deal with the legal nature of liens, refer to *United Building Society v Smookler's Trustees and Golombick's Trustee* as authority for the statement that an enrichment lien is a real right.

It is clear from the above that there are different opinions with regard to the legal nature of a lien in South African law. There has also been some criticism of the founding judgment dealing with the legal nature of a lien.

Since the basis of South African law of lien is Roman-Dutch law, I shall now consider the development of liens (*retentierechten*) in Dutch law, with specific focus on the legal nature of a lien.

## DUTCH LAW

### Development of liens (*retentierechten*)

The most significant influences on the 1838 *Burgerlijk Wetboek (BW)*<sup>42</sup> were Roman law, Germanic law, the *Ordonnances Royales* and the *Coutûmes* of the old French law, the *Oud-Vaderlands Burgerlijke recht*, the *Wetboek Napoleon* and the *Ontwerp Kemper*.<sup>43</sup>

A lien was not a self-reliant concept in Roman law. A person could exercise his capacity to withhold a thing through reliance on the *exceptio doli*.<sup>44</sup> A practical example of reliance on the *exceptio doli* is where X asks Y to make him a gown from his (X's) material. Y makes the gown after which X refuses to pay Y for his labour. X claims his gown from Y. Y raises the *exceptio doli* as a defence against X's claim. X's claim is in fact fraudulent given that he knows he has not paid Y for his labour. Consequently Y may withhold the gown until X pays him for his labour. Fesevur<sup>45</sup> also refers to Hijmans's<sup>46</sup> point of view that the principles of good faith, reasonableness and fairness form the basis of liens.

<sup>39</sup> 1960 3 SA 642 (A).

<sup>40</sup> 1970 3 SA 264 (A).

<sup>41</sup> 1993 1 SA 77 (A).

<sup>42</sup> Dutch Civil Code.

<sup>43</sup> Aarts *Het retentierecht* (1990) pars 71, 78.

<sup>44</sup> Fesevur *Retentierecht* (1988) 5.

<sup>45</sup> *Ibid.*

<sup>46</sup> Hijmans *Romeinsch zakenrecht* (1926) 166 *et seq.*

Germanic law acknowledged a right of pledge. The pledgee could retain control over the pledged thing if the pledgor did not pay his debt. The pledgee had a preferential claim ranking above that of the pledgor's other debtors. Germanic law therefore granted the pledgee a preferential capacity to withhold the thing until payment of the debt.<sup>47</sup>

The *Ordonnances Royales* and the *Coutûmes* of French law acknowledged liens. The French *Code Civil* of 1804 did not grant any preference to a creditor's lien above the claims of other creditors of the debtor. Consequently the Dutch *BW* of 1838 granted no preference to liens.<sup>48</sup>

In the *Oud-Vaderlandse Recht*, liens could arise *ex lege* or from an agreement. Liens vested over movable and immovable things. In terms of the *Oud-Vaderlandse Recht*, liens enjoyed preference over other creditors' claims against the debtor.<sup>49</sup>

*Wetboek Napoleon* of 1809 (for the Kingdom of Holland) acknowledged liens and various aspects thereof in the same way as the current *BW* does. Article 1833 acknowledged a lien for labourers, and article 1834 an innkeeper's lien and a lien in favour of persons who carry (transport) things over land or sea. Article 1835 granted preference to liens in general. In terms of article 1836, a lien could only vest if there was a close connexion between the creditor's claim and the thing.<sup>50</sup>

The 1820 *Ontwerp Kemper* acknowledged a lien in favour of holders and possessors in good faith for the cost of safekeeping, preservation, or improvement of a thing, as well as an innkeeper's lien and a carrier's lien. The *Ontwerp* granted preference to liens.<sup>51</sup>

The 1838 *BW* originates from all the above sources. This code acknowledged liens but granted no preference to them.<sup>52</sup> According to Aarts,<sup>53</sup> the reason for not granting preference to a lien lies in the fact that a lien was no longer

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<sup>47</sup> Fesevur n 44 above at par 71.

<sup>48</sup> *Id* at par 78.

<sup>49</sup> *Id* at pars 71–72.

<sup>50</sup> *Id* at par 73.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Id* at par 28.

regarded as a quasi pledge (*pignus*), but rather as a peculiar (*sui generis*) right.

The current *BW* contains a section on liens for the first time, with general provisions with regard to liens. There is also a section on *opschortingsrecht* which is generally applicable to liens.<sup>54</sup> Aarts<sup>55</sup> explains the effect of the proposed provisions in the *Nieuwe Burgerlijk Wetboek (NBW)*<sup>56</sup> as an attempt to address important issues with regards to liens, specifically the requirement of adequate connection (*samenhang*) between the outstanding obligation and the thing, as well as the real operation of liens.

The current *BW* classifies a lien as a *verhaalsrecht* that functions as an *opschortingsrechten*. In terms of article 3:292 *BW* a *verhaalsrecht* grants preference to the entitled person. It is interesting to note that the aim of this complete exposition of the legal position pertaining to liens is to resolve previous controversial aspects.

I shall now consider the difference between the legal position regarding the legal nature of a lien in the 1838 *BW* and the current *BW*.

#### **Before enactment of the current *BW***

Two theses address some of the problems regarding liens (*retentierechten*) in Dutch law before the enactment of the current *BW*. The authors of these theses are Fesevur<sup>57</sup> and Aarts.<sup>58</sup> I shall focus mainly on their respective discussions of the nature of liens in this evaluation of liens pre-enactment of the current *BW*. The 1838 *BW* acknowledged liens, but granted them no preference. The 1838 *BW* contained no specific provisions dealing with the nature and extent of liens. Consequently the legal position pertaining to the nature and extent of liens was somewhat uncertain.<sup>59</sup>

Aarts<sup>60</sup> indicates that a lien was regarded as an *accessoir recht*. As in South African law, this means that the lien is accessory to an obligation and can only exist for so long as the original or principal obligation exists.<sup>61</sup> Furthermore, a

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<sup>54</sup> *BW* a 6:5257.

<sup>55</sup> Van der Walt & Pienaar n 4 above at par 94.

<sup>56</sup> It is the 1992 *BW* to which I refer to as the 'current *BW*'.

<sup>57</sup> Fesevur n 45 above.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Id* at par 73.

<sup>60</sup> *Id* at par 151.

<sup>61</sup> Hutchison (ed) *Wille's Principle's of South African law* (1991) 334.

lien was considered an *ondeelbaar recht*. This means that the lien can be exercised over each part of the thing or things under the creditor's control until full settlement of the obligation.<sup>62</sup>

Before the enactment of the current *BW*, liens were divided into *verbintenisrechtelijke retentierechten* (contractual lien) and *zakenrechtelijke retentierechten* (real lien).<sup>63</sup> A lien was classified as a *verbintenisrechtelijke retentierecht* when there was a contractual relationship between the creditor and the person against whom she (the creditor) was enforcing her lien.<sup>64</sup> In such an instance the creditor could enforce her lien only against her debtor. The following are examples of a contractual relationship that gives rise to a *verbintenisrechtelijke retentierecht*: a contract for work or a service agreement (*werkaannemingsooreenkomst*), a mandate (*lastgewings-ooreenkomst*), and a contract of deposit (*bewaringsooreenkomst*). In general, a creditor who refuses to hand the debtor's thing to him would be guilty of breach of contract (*mora debitoris*). However, if the creditor is able to rely on a *verbintenisrechtelijke retentierecht*, her retention of the thing would not constitute *mora debitoris*.<sup>65</sup>

In terms of the 1838 *BW*, a *zakenrechtelijke retentierecht* arises *ex lege* when one person improves or salvages another person's thing. *Zakenrechtelijke retentierechten* were applicable where the debtor was not the owner of the thing improved or salvaged by the creditor. In this case the creditor could enforce her lien against the third party (the owner of the thing). In general it is an unlawful act to retain control over the thing of an owner who claims the thing from you. However, if the creditor relies on a *zakenrechtelijke retentierecht* her retention does not constitute an unlawful act.<sup>66</sup>

Before the enactment of the current *BW*, a lien was regarded as a *zekerheidsrecht* (security right).<sup>67</sup> According to Aarts,<sup>68</sup> most authors classified liens as *zekerheidsrechten* and always discussed liens together with *zekerheidsrechten* like pledge and hypothec. However, a lien did not provide its holder with

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<sup>62</sup> Articles 1652, 1766 and 1849 of 1838 *BW* and n 12 at par 148.

<sup>63</sup> Fesevur n 44 above at par 4.

<sup>64</sup> Fesevur *De zakelijke zekerheidsrechten naar tegenwoordig en toekomstig Nederlands recht* (1997) 204–205.

<sup>65</sup> Aarts n 43 above at par 4.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Id* at par 136.

<sup>68</sup> *Ibid.*



absolute security since the lien holder could not ensure fulfilment of the obligation through execution. A pledgee's right of pledge and a hypothec holder's hypothec are security rights that grant the lien holder the right of execution.

Aarts<sup>69</sup> analyses the view of Diephuis, who is of the opinion that a lien was a real right (before the enactment of the current *BW*). Diephuis argues that a lien is related to a thing and not to a person and that it should therefore be classified as a real right. Aarts<sup>70</sup> disagrees and argues that the creditor's physical control over the thing is not sufficient to classify a lien as a real right. The author indicates that Dutch law has a *numerus clausus* of real rights.<sup>71</sup> In article 584 of the 1838 *BW*, the legislature provides a list of real rights and neither *verbintenisrechtelijke retentierechten* nor *zakenrechtelijke retentierechten* appear on the list. Aarts<sup>72</sup> draws a very interesting analogy between liens and other rights which are regarded as intermediate – that is, existing between real rights and personal rights. The personal right of a lessee that has real operation against a subsequent owner is one such example. This illustrates that some rights are neither real rights nor personal rights, but have characteristics of both real and personal rights.

According to Fesevur,<sup>73</sup> a lien arises from the relationship between the creditor and the debtor. A lien is attached to the obligation and that obligation is a personal right. When a creditor is confronted by a third party (not the debtor) who claims the item over which a lien is being exercised from her, there is no longer a connection between the item and the creditor's obligation as the third party is not a party to the agreement between the creditor and the debtor. The third party can claim her item or thing with the *rei vindicatio*. If a creditor can rely on her lien against the owner, this means that her lien has real operation against the owner, who was not a party to the agreement. This real operation of a lien does not, however, make it a real right. Fesevur is consequently of the opinion that while a lien is neither a real right nor a personal right it exhibits characteristics of both.<sup>74</sup>

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<sup>69</sup> *Id* at par 130.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Id* at par 135.

<sup>72</sup> *Id* at par 131.

<sup>73</sup> Fesevur n 44 above at 230–231.

<sup>74</sup> *Ibid.*

To summarise: Before the enactment of the current *BW*, a lien was regarded as an accessory right. The lien granted the creditor the capacity to retain the thing of another person which she had improved or salvaged, until full settlement of the principal obligation. According to Fesevur and Aarts this right was neither a real right nor a personal right, but had characteristics of both rights. Although this view reflected the most common and generally accepted approach, it was not so stipulated in the 1838 *BW* and authors like Diephuis argued that a lien is indeed a real right.

#### **After the enactment of the current *BW***

In terms of the current *BW* a lien is regarded as an accessory right that can only exist while the principal obligation exists.<sup>75</sup> A lien can be exercised over each part of the thing or things under the creditor's control until full settlement of the principal obligation.<sup>76</sup> Therefore, it qualifies as an *ondeelbaar recht*. These characteristics of a lien in terms of the current *BW* are the same as before its enactment.

A distinction is no longer drawn between *verbintenisrechtelijke retentierechten* and *zakenrechtelijke retentierechten*; the *BW* merely refers to *retentierechten*. The current *BW* specifically stipulates the nature of a lien (*het retentierecht*) in Book 3 articles 3:290-295 (which deal with liens). Book 3 deals with *vermogensrechten*<sup>77</sup> which can be described as rights that are transferable, either individually or jointly with another right, or that can be of physical benefit to the entitled person. Title 10 of Book 3 deals with *verhaalsrechten op goederen*, and liens are dealt with there. It is clear from the placing of liens in the *BW*, that a lien is regarded as a *verhaalsrecht* (right of recourse) in the form of an *opschortingsrecht* (right to defer or suspend). In terms of article 3:276 *BW*,<sup>78</sup> a *verhaalsrecht* entitles a creditor to redress her claim against all the things in her debtor's estate, unless another Act or an agreement provides otherwise. A lien

<sup>75</sup> Nieuwenhuis, Stolker & Valk *Tekst & Commentaar: Burgerlijk Wetboek* (2003) 1500.

<sup>76</sup> *Id* at 1502.

<sup>77</sup> *BW* a 3:6 'Rechten die, hetzij afzonderlijk hetzij tezamen met een ander recht, overdraagbaar zijn, of er toe strekken de rechthebbende stoffelijk voordeel te verschaffen, ofwel verkregen zijn in ruil voor verstrekt of in het vooruitzicht gesteld stoffelijk voordeel, zijn vermogensrechten.' ('"Property rights" are rights which, either separately or together with another right, are transferrable, or which intend to give its proprietor material benefit or which are obtained in exchange for supplied or the prospect of still to supply material benefit.')

<sup>78</sup> 'Tenzij de wet of een overeenkomst anders bepaalt, kan een schuldeiser zijn vordering op alle goederen van zijn schuldenaar verhalen.' ('A creditor may recover his debt-claim from all assets belonging to his debtor, unless the law or an agreement provides otherwise.')

is no longer regarded as a *zekerheidsrecht* but is seen instead as a *verhaalsrecht*.

Part 4 of Title 10<sup>79</sup> deals specifically with liens. A lien is defined in article 3:290 as:

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.<sup>80</sup>

In terms of article 3:290, a lien is the creditor's capacity to defer the obligation to return the thing to her debtor until the principal obligation is satisfied. The *BW* specifies the instances in which the creditor may exercise this capacity.<sup>81</sup> These specific instances are set out in Book 5 and Book 7 of the *BW*. The aim in setting out the specific instances in the *BW* is to ensure legal certainty and to avoid situations where it is uncertain whether a creditor has a lien or not. If the instances in Book 5 and Book 7 do not give rise to a lien, a creditor could still rely on an *opschortingsrecht* (right to suspend) in terms of Book 6, Title 1, Part 7. Article 6:52 deals with an *opschortingsrecht* and provides that a debtor who must perform in terms of an obligation can suspend her performance if the creditor himself has not yet performed. The connexion (*samenhang*) between the performance and the obligation must be adequate.

According to Nieuwenhuis *et al.*,<sup>82</sup> a lien is a species of the genus *opschortingsrechten*. All the provisions applicable to *opschortingsrechten*<sup>83</sup> are also applicable to liens in so far as they do not contravene the provisions of *BW* articles 3:290–295. An important difference between a general *opschortingsrecht*<sup>84</sup> and a lien, is that a lien always bears a relation to a thing, whether movable or immovable. A general *opschortingsrecht*, on the other hand, grants the holder thereof the right to defer his own performance (not necessarily the return of a thing) in terms of the agreement between the parties until the

<sup>79</sup> *BW* a 3:290295.

<sup>80</sup> 'A right of retention is the right of a creditor, granted to him in situations specified by law, to withhold the performance of his obligation to return a movable or immovable thing to his debtor until his debt-claim has been fully satisfied.'

<sup>81</sup> *BW* a 3:290.

<sup>82</sup> Nieuwenhuis *et al* n 75 above at 1500.

<sup>83</sup> *W* Book 6, Title , Part 7, a 6:52 *et seq.*

<sup>84</sup> *BW* a 6:52.

other party performs. An *opschortingsrecht* in terms of *BW* article 6:57 that relates to a thing will constitute a lien provided that it also complies with the other requirements for the vesting of a lien.

Book 5 of the *BW* deals with real rights (*zakelijke rechten*), namely ownership, co-ownership (*mandeligheid*), servitudes (*erfdienstbaarheden*), quitrent (*erfpacht*), *postal*, and *appartements-rechten*. Liens are not dealt with in Book 5 and are therefore not regarded as real rights.

To summarise: A lien is a *verhaalsrecht* that secures the satisfaction of the creditor's claim against the debtor through a specific thing in the debtor's estate. In terms of the *BW* article 3:290, this *verhaalsrecht* is also a specific *opschortingsrecht* that grants the capacity to the holder thereof to defer the return of the thing to the debtor. In terms of the provisions of the current *BW*, a lien can be described as the creditor's capacity to suspend his obligation to return the thing to the debtor for as long as the creditor's claim is due.

### EVALUATION

Nieuwenhuis *et al*<sup>85</sup> indicate that a lien is accessory in nature. Dutch law no longer distinguishes between *verbintenisrechtelijke retentierechten* and *zakenrechtelijke retentierechten*. All liens are dealt with in the same way and are available to specific persons as indicated in article 3:291 *BW*. A lien no longer secures a claim based on enrichment – a contractual claim is the only claim secured by a lien. The contract price can, however, be claimed from the owner who claims his thing from the lien holder even though she (the owner) was not a party to the contract. In South African law a lien that secures a claim based on enrichment is limited to the extent of the enrichment and a lien based on a contractual claim is limited to the contract price.

In my opinion the Dutch law of lien has moved away from pure property law principles. The current *BW*'s approach is more pragmatic than dogmatic. The uncertainties surrounding the nature of liens, as well as other aspects thereof, have been dealt with by statutory means. It would appear that the intention of the legislature was that theory should serve practice. Consequently, all statutory provisions regarding liens in the *BW* are practical. Liens in the *BW* stand on two legs: Book 3 deals with *verhaalsrechten*, and Book 6 deals with

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<sup>85</sup> Note 30 above at 1502.

*opschortingsrechten*. The *BW* no longer acknowledges liens based on enrichment.

Nieuwenhuis *et al*<sup>86</sup> describe a lien as the capacity of a creditor to retain her debtor's thing should she wish to do so. The legal position with regard to liens in Dutch law is very similar to the legal position in Roman law. A lien is the capacity of a creditor to withhold a thing should she wish to do so. This capacity is similar to the procedural capacity in Roman law where the creditor had the opportunity to either return the thing, or to raise the *exceptio doli*. The *exceptio doli* was given to a creditor as a defence against an owner who claimed the thing from the creditor without paying her debt. In terms of the *BW* a creditor who chooses to make use of her lien must, in order to meet the criterion of reasonableness and fairness, inform the debtor of the reason why she chooses to exercise her lien.<sup>87</sup> The underlying philosophy of reasonableness and fairness correlates with the approach in Roman law that the *exceptio doli* is attributable to the sense of justice and the *aequitas* as stipulated by Paulus.<sup>88</sup> The basis of the *exceptio doli* is fairness: the creditor must return the debtor's thing to her, but only if the debtor has paid her dues. This is currently the position in Dutch law – in terms of article 3:290 *BW* a creditor can withhold the thing until the debtor pays her dues.

The legal position of liens in South African law is similar to that in Dutch law before the enactment of the current *BW*. The classification of liens into enrichment liens and debtor and creditor liens can be compared to the Dutch *zakenrechtelijke retentierechten* and *verbintenisrechtelijke retentierechten*. The enrichment of an owner due to the improvement or salvage of her thing is the source from which the enrichment lien arises. Debtor and creditor liens, on the other hand, arise from an agreement between the debtor and the creditor. According to most South African authors, enrichment liens have real operation, while debtor and creditor liens are only enforceable *inter partes*.<sup>89</sup> In my opinion the Dutch authors Fesevur and Aarts came to the right conclusion with their finding that liens are neither real rights nor personal rights, but have certain characteristics of both.

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<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> Aarts n 43 above at pars 39–70.

<sup>89</sup> Scott & Scott n 9 above; Van der Merwe n 5 above; Scott n 3 above; Badenhorst *et al* n 3 above; Du Bois n 5 above; Scott n 5 above; Van der Walt & Pienaar n 4 above; and Mostert & Pope (eds) n 12 above.

Furthermore, I am of the opinion that the current *BW* correctly did away with the distinction between *verbintenisrechtelijke retentierechten* and *zakenrechtelijke retentierechten* and elected to deal with all liens in the same way.

Dutch law derives a certain advantage from its codification in the *BW*. The provisions in Book 5 and Book 7 relating to specific instances that give rise to a lien, are very helpful and afford legal certainty to creditors who wish to rely on a lien. In South African law, it is often more difficult to determine the exact nature and extent of a lien from case law and common law. The codification of Dutch law and the specific provision regarding liens, and the instances when liens will vest, provide greater legal certainty and leave less room for differing interpretations.

My research<sup>90</sup> on the South African legal theory indicates that a lien cannot, in my view, be classified as a subjective right and can therefore not be regarded as a limited real right. This conclusion is based on the fact that liens do not have all the characteristics of a (subjective) right. Dutch law effectively classifies a lien as a *verhaalsrecht* (right of recourse) against the owner's estate. This *verhaalsrecht* is exemplified as an *opschortingsrecht* (right to suspend). A lien is therefore a capacity to withhold, which capacity emanates from the (objective) law and is available to creditors. The correct interpretation of the term would make it possible to follow a similar approach with regard to liens in South African law.

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<sup>90</sup> Wiese n 1 at chapters 4 & 5.