

THE LEGAL NATURE OF A LIEN IN SOUTH AFRICAN LAW**M Wiese*****SUMMARY**

The South African law acknowledges two types of liens or rights of retention, namely enrichment liens and contractual liens (also known as debtor and creditor liens). Enrichment liens are regarded as limited real rights which are enforceable against 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*. Thus, a lien is classified as a right (*subjektiewe reg*) (ie a real right or a personal right). This article reflects on the correctness of this classification of liens. The term "right" can have various meanings and the aim of this article is to determine the exact meaning of the term "right" in the context of "right of retention". In my opinion a lien is not a right. I therefore reject the classification of liens into contractual liens and enrichment liens with its concomitant consequences. A lien is a defence against an owner's *rei vindicatio* in that it allows a creditor (a lienholder) to retain control of the owner's thing until the debt has been paid. Because the law grants a defence to a creditor in control of a thing, the owner cannot succeed with her *rei vindicatio*. A distinction should be drawn between an entitlement that flows from a right (it describes the content of the right) and a competency or capacity which emanates directly from the law. A lien is not an entitlement flowing from a lienholder's personal right - based on a contract or an enrichment claim - against the debtor. It is rather a capacity to withhold because the law grants this defence. The term "capacity" is not used in a technical sense but rather in the context of the ability to withhold, which is granted by the law.

KEYWORDS: Lien (right of retention); capacity to withhold; real security right; real right; personal right; defence against *rei vindicatio*; *exceptio non adimpleti contractus*.

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