

debtor and creditor lien, which entitles him to retain the property until the whole amount of the expenditure authorized by the owner of the property, in other words the contract price, has been paid to him: *United Building Society v Smookler's Trustees & Golombick's Trustee* 1906 TS 623 at 631; *Van Niekerk v Van den Berg* 1965 (2) SA 525 (AD) at 538-41; *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 264 (AD) at 271. The nature of the expense is immaterial provided the owner has agreed to it expressly or impliedly; the question of the owner's consent will be briefly referred to and then some well-known examples of debtor and creditor liens will be mentioned.

#### CONSENT OF THE OWNER

The consent of the owner, as just stated, may be express or implied. Express consent means that the owner has made an agreement with the possessor for the expenditure or labour in question. The owner's consent is implied, on the other hand, where such implication arises from the circumstances, for example, where the owner of a motor-car hands it over to another person knowing that repairs will have to be made to it in the course of time by some third person: *Tyre & Motor Supply Co Ltd v Leibrandt* 1926 CPD 421.

#### EXAMPLES OF DEBTOR AND CREDITOR LIENS

The following are the better-known classes of persons who have debtor and creditor liens, and it will be noticed that the lien exists for the contract price, where that has been fixed, and where no amount has been agreed on, for the charges usual or reasonable in the circumstances:

A builder of a new house, or the repairer of an existing house, has a lien on it for the contract price: *United Building Society* case (above) at 627.

An artificer, that is someone who makes or repairs an article, has a lien on it for the amount of payment agreed upon (*ibid*).

An agistor has a lien on animals which have been grazed on his land for the grazing fees agreed upon: *Land Bank v Mans* 1933 CPD 16; *Van Niekerk's* case (above) at 538-9; provided that the animals are in his custody or under this control at the time they are grazing or are supplied with fodder: *Gazide & another v Nelspruit Town Council* 1949 (4) SA 48 (T).

A carrier has a lien on the goods carried by him for the freight: *Standard Bank v Wilman Spilhaus & Co* (1888) 6 SC 15 at 17; *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 264 (AD). The Administration of the SA Railways & Harbours has a lien not only over the goods carried, but over any other goods belonging to the same person which are or may in the future come into its possession: s 22(1-3) of the Railways & Harbours Control and

Management (Consolidation) Act 1956. A warehouseman has charges: *Anderson & Co House* case (above).

An agent for the land for his reasonable goods for his reasonable: *Durant & Co & Frazer* (1912) 100 S.C. 100.

A forwarding agent in possession for his expense out of his express or implied: *1923 AD 506*.

An auctioneer has a price of an article sold by him for his fees and charges: *1912 TPD 226*.

An attorney or conveyancer for his fees and charges: *Strange* 1912 TPD 226 at lien was raised in *Wells v ricke & Son v Auto Protec* SA 717 (AD) at 724. It even assuming that an attorney which he had worked for management or in liquidation obliged to pay in full before such time.

An arbitrator has a lien and certain expenses, as provided in the Arbitration Act 42 c.

It should be noted that a lien in favour of the Registrar specific property for expenses and not over any other property. A creditor may happen to be an accountant employed to prepare a statement from them has not on the books: *Trust v SC 354* at 355, and since prepared by him, but for the purpose of passing the EDC 299. Likewise, an attorney prepared by himself and on behalf of his client, but *Victoria (Rhodesia) Ltd v Transport Co (Pty) Ltd v 70 SALJ 119*.

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*den Berg* 1965 (2) SA 525  
*(Pty) Ltd v Knoetze & Sons*  
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A warehouseman has a lien on the goods stored by him for his charges: *Anderson & Co v Pienaar & Co* 1922 TPD 434; *Brooklyn House* case (above).

An agent for the landing and sale of goods has a lien upon such goods for his reasonable expenses incurred in such work: *Walker v Durant & Co & Frazer* (1882) 2 SC 361 at 365.

A forwarding agent has a lien on his principal's goods in his possession for his expenses incurred in respect of the goods in carrying out his express or implied duties to his principal: *Patel v Keeler & Co* 1923 AD 506.

An auctioneer has a lien for his commission on the purchase price of an article sold by him: *Sassin v Phillips* 1912 CPD 382 at 385.

An attorney or conveyancer has a lien upon documents prepared by him for his fees and incidental expenses: *Stoffberg v Ludorf & Strange* 1912 TPD 226 at 235. The ambit and effect of an attorney's lien was raised in *Wells NO v Molin* 1965 (4) SA 480 (T) and *Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation)* 1968 (1) SA 717 (AD) at 724. The decision in the *Goodricke* case was that, even assuming that an attorney did have a lien on documents on which he had worked before his client was placed under judicial management or in liquidation, the liquidator of the client was not obliged to pay in full fees and disbursements relating to work done before such time.

An arbitrator has a lien on his award for the amount of his fees, and certain expenses, and the same applies to an umpire: s 34(4) of the Arbitration Act 42 of 1965.

It should be noted that in all these cases (except for the statutory lien in favour of the Railways Administration) the lien exists over specific property for expenses incurred in respect of such property, and not over any other property belonging to the debtor which the creditor may happen to have in his possession for example, an accountant employed to examine certain books and draw up a statement from them has a lien for his charges on the statement, but not on the books: *Trustee of Walker v Jones, Cosnett & Ball* (1883) 2 SC 354 at 355, and similarly a conveyancer has a lien on a bond prepared by him, but not on title-deeds entrusted to him for the purpose of passing the bond: *Hudson's Trustee v Wiley* (1884) 4 EDC 299. Likewise, an architect has a lien on the documents prepared by himself and also on copies of letters written by him on behalf of his client, but not on the replies to such letters: *Hotel Victoria (Rhodesia) Ltd v Alexander* 1952 (2) SA 637 (SR). A further example is the case of a repairer of an article: *Lamontville African Transport Co (Pty) Ltd v Mtshali* 1953 (1) SA 90 (N); see also (1953) 70 SALJ 119.

An inn-keeper and a boarding-house keeper, have a lien for their

die persoon wat uit hoofde van sy besit bestee het.<sup>869</sup> Hieroms om werk aan 'n saak te ingsooreenkoms voort. Hulle ontraksprys, sonder inagniek bestee word noodsaaklik, swalle waar sodanige retensies 'n nuwe gebou oprig,<sup>872</sup> 'n doen,<sup>873</sup> 'n kleremaker klere eienaar goedere berg,<sup>876</sup> 'n op,<sup>877</sup> 'n vervoerkontraakteur<sup>879</sup> of waar 'n skeepseienaar ry die persoon wat geld of

*Smookler's Trustees & Golombick's Trustee* 1906 TS 623 628; *Berg* 1965 2 SA 525 A 538-541; & *Sons* 1970 3 SA 264 A 271G.

*Bus* 1 20 18; Van Zutphen *Nederik Judicieel* 1 22 76; *United Building Trustee* 1906 TS 623 628; *Levy* ontstaan slegs wanneer die voorord: *Conness (Pty) Ltd & Another*

retensiereg aanspraak kan maak, *Succession* par 193-210. Sien ook

*Golombick's Trustee* 1906 TS 623 628; *Scholtz v Faifer* 1910 TPD 45; *Spitz v Kesting* 1923 WLD 45; *Evvy v Tyler* 1933 CPD 377; *Beetge SA* 62 W; *Hasewinkel v Simoes Allic Construction (Pty) Ltd* 1981

421; *Lamontville African Transpreek* deur Burchell 1953 SALJ 100; *ootes (Central Africa) (Pvt) Ltd* onder soorte herstelwerk, sien Van *Idochi* 1907 TS 523. Cf *Beetge v* A 62 W 69B.

*an, Spilhaus & Co* 1888 6 SC 15; 37; *Patel Keeler & Co* 1923 AD 100; *ort (Pty) Ltd T/A Frasers Inter-*

*another v Nelspruit Town Council* 1965 2 SA 525 A 538.

SC 15; *Bell, Webb & Bell Ltd v* 101.

arbeid aan die saak uit hoofde van 'n ooreenkoms bestee het, 'n retensiereg op die betrokke saak ter versekering van die kontrakspys. Analog hieraan bestaan daar ook 'n retensiereg ten gunste van prokureurs,<sup>881</sup> rekenmeesters,<sup>882</sup> aktebesorgers,<sup>883</sup> boekhouers<sup>884</sup> en argitekte<sup>885</sup> op dokumente soos pleitstukke, transportaktes, rekeningstate of bouplanne wat deur hulle voorberei is ter versekering van gelde waarop ooreengekom is.<sup>886</sup> 'n Retensiereg *ex contractu* ontstaan ook ten gunste van 'n hotel- of losieshuiseienaar ten opsigte van bagasie of ander sake wat aan gaste of loseerders behoort ter versekering van gelde wat vir kos en inwoning verskuldig is.<sup>887 888</sup>

Daar bestaan enkele belangrike verskille tussen bergings- of verbeteringsretensieregte en retensieregte *ex contractu*:

(i) Bergings- of verbeteringsretensieregte is meestal op die beginsel van ongeregverdigde verryking gebaseer en dien ter versekering van 'n skuldverdering ten bedrae van die verryking van die eienaar of die verarming van die *retentor*, welke van die twee bedrae ook al die kleinste is.<sup>889</sup> Retensieregte

881 *Wells NO v Molin & Another* 1965 4 SA 480 T; *Goodricke & Son v Auto Protection Insurance Co Ltd (In Liquidation)* 1968 1 SA 717 A 724.

882 *Trustee of Walker v Jones, Cosnett & Ball* 1883 2 SC 354.

883 *Hudson's Trustee v Wiley* 1884 4 EDC 299; *Queen's Town Assurance Co v Wood's Trustee & Others* 1887 5 SC 327; *Jewell & Rutter v Hazell & Steer* 1897 14 SC 16 20-21; *Estate Van der Merwe v Thorne* 1907 24 SC 70; *Stoffberg v Ludorf & Strange* 1912 TPD 226; *Looock v The Sheriff & Others* 1925 OPD 166.

884 *Spangenberg's Trustee v Cousins* 1839 2 M 343; *Spurrier v Coxwell NO* 1914 CPD 83; *Neiman v Scrivenor NO* 1922 OPD 101 105.

885 *Hotel Victoria (Rhodesia) Ltd v Alexander* 1952 2 SA 637 SR.

886 Sien verder Van Leeuwen *RHR* 4 40 2; Voet 3 1 6; *Howat Motors (Pty) Ltd v Water-son* 1963 3 SA 669 T. Dit is te betwyfel of 'n prokureur 'n retensiereg oor gelde onder sy beheer verkry ter versekering van die betaling van koste en vergoeding vir arbeid namens sy kliënt verrig. Die vraag is in *Kayser & De Beer v Estate Liebenberg* 1926 AD 91 98 geopper, maar nie beslis nie.

887 Van Leeuwen *RHR* 4 40 2, *CF* 1 4 37 9; Van Hasselt *Aanteekening op de Hollandsche Consultatien* 1 140; *Marais v Andrews* 1914 TPD 290; *Ford v Reed Bros* 1922 TPD 266 276; *Holmes Garage Ltd v Levin* 1924 GWL 58; *SA Philips (Pty) Ltd v Vermouth* 1932 CPD 377; *Hilson & Taylor Ltd v Teukolski* 1933 TPD 83; *General Garage v Plough Hotel* 1961 3 SA 449 N. Sien *John Robert Hook v The Singer Manufacturing Co* 1890 11 NLR 301; *General Garage v Plough Hotel* 1961 3 SA 449 N ivm die onderskeid tussen 'n retensiereg en die stilswyende hipoteek van die verhuurder in hierdie gevalle.

888 Die Suid-Afrikaanse reg erken nie 'n *quasi*-retensiereg ten gunste van die verkoper van 'n saak op die saak ter versekering van die koopsom nie. Sien *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola & Others* 1976 4 SA 464 A 495. *Quaere*: bestaan daar 'n verband tussen 'n retensiereg *ex contractu* en die *exceptio non adimpleti contractus*?

889 *United Building Society v Smookler's Trustees & Golombick's Trustee* 1906 TS 623 632; *Anderson & Co v Pienaar & Co* 1922 TPD 435 438-439; *Land Bank v Mans* [vervolg]

such payment or our titles on *The Rom Words*.<sup>8</sup>

...ing agreement or obligation was con- pliedly fixed for carry what is to s such a covenant however who are e of the creditor

absence of contract & *Another v. Receiver*

..., at p. 391); Folld. said that there was seek creditor or vice

XIII, 4, whole title. rt Voet; held after te he must tender or where contract may 775-76—(latt. tw.); ras silent as to place defendand *Walker v. struction of contract e—payment was to Refd. but held that ode of lender *Erwee**

*Dutch Consultations*,

what Voet says is a *Venter v. Venter* (1949 inciple", and held p. 289; 9 C.T. 305, gest not very helpful . in sense that Voet of debtor *Shapiro v. as stated in Shapiro's diction and definite r *Northmore v. Scala**

it it was for him to d. and held that in itzburg on contract it p. 653).

*Payment forthwith, unless otherwise agreed.*—Then again account of time must be taken in payment. If no time has been expressly or impliedly attached to the obligation, reason dictates that, just as a claim can straightway be made, so also ought payment to be made straightway.<sup>(1)</sup> This however must be understood with some allowance, since the creditor need not be on hand with his moneybag.<sup>4</sup>

*Effect of day or condition, where treated.*—But if a day or condition has been appended, the debtor cannot be forced against his will to make payment unless the day has arrived or the condition has been fulfilled, in terms of what has been more fully laid down in my title on *Obligations arising from Words*.<sup>5</sup>

*Meaning of "this year", etc. where treated.*—Among other things it was discussed in that title and section when a person ought to pay who has promised that something will be handed over "this year" or "this month", or "on 1st January" without adding the word "next", or "after some days" or "after some years".

*Anticipation of payment, where treated.*—But as to whether a debt due on a definite day can be paid before the day to the creditor against his will a ruling has been given with the aid of a distinction in my title on *Loan for Consumption*.<sup>6(a)</sup>

*Payment "when one wills", where treated.*—That one who has bound himself to pay "when he may please" does indeed leave his heir under obligation for payment, but can by no means be himself forced into payment against his will so long as he lives has been stated in my title on *The Actions on Purchase and on Sale*.<sup>7</sup>

SECTION 13

*Payment discharges obligation with accessories.*—The effect of payment is that the principal debtor is released as well as sureties and pledges.<sup>1</sup>

*Exceptions in case of eviction after payment, or of fraudulent underpayment.*—It is an exception if what has been paid (whether it is what was due, or it has been given in payment instead of something else which was due) or a single one of a number of things given in payment is evicted in whole or as to part, inasmuch as in that case no payment is regarded as having been made. Thus the original obligation is wholly preserved along with its accessories, for the reason that, when the matter was entire, the creditor would not have been likely to accept a part, or one thing

SEC. 12

(1) Approvd. with possible addition that payment may be made at time of delivery, but held that if seller expressly or tacitly agrees to wait he gives credit *Newmark, Ltd. v. The Cereal Manufacturing Co., Ltd.* (1921 C.P.D. 52, at p. 59); Refd. apparently *Jacobs Levitz & Braude v. Kroonstad Roller Mills* (1921 O.P.D. 38, at p. 45); Refd. but South African practice contrasted by which payment on sale of land takes place *pari passu* with transfer *Milner v. Friedman's Trustee* (1925 O.P.D. 296, at p. 299).

<sup>4</sup> *Dig. XLVI, 3, 105; Inst. 3, 15, 2; Dig. XLV, 1, 41, 1.*

<sup>5</sup> Book 45, title 1, sec. 19 above.

<sup>6</sup> Book 12, title 1, sec. 20 above.

<sup>(a)</sup> Refd. *Bernitz v. Eward* (1943 A.D. 595, at p. 602).

<sup>7</sup> Book 19, title 1, sec. 17 above.

SEC. 13

<sup>1</sup> *Inst. 3, 29 in pr.; Dig. XLVI, 3, 43.*