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INYUVESI YAKWAZULU-NATALI

A CRITICAL ANALYSIS OF THE SUBCONTRACTOR'S BUILDER'S LIEN

BY

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DECLARATION OF ORIGINALITY

I hereby certify that I am the sole author of this dissertation and that no part of this dissertation has been published or submitted for publication.

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To my late sister, Andisa Sphindile Mdletshe, may your beautiful soul rest in peace. You believed in me the most and I dedicate this dissertation to you.

ABSTRACT

This research paper looks at the South African common law right to lien as it currently stands as the only compensatory remedy for a construction subcontractor in the event of non-payment by the main contractor. The nature and scope of the builder's lien in this regard will be analysed and its limitations will be highlighted. Accordingly, having critically considered a potential alternative remedy, an unjustified enrichment claim, for the subcontractor, this research paper will illustrate that there is insufficient protection for an unpaid subcontractor in our legal system. Hence, there is a need for our common law builder's lien to be developed into a statutory builder's lien. An analysis of foreign jurisdictions legal position, in particular Canadian law, with regard to the construction subcontractor and the right to lien as a remedy has a commendable statutory measure in place to assist a subcontractor by attempting to prevent such a financial predicament and if it nonetheless still occurs, that in the event of non-payment, the subcontractor is adequately protected.

This research project proposes that our legal system should take influence from the Canadian legal system and be developed in accordance with our legal framework in order for construction subcontractors to also have sufficient and effective protection under our legal system.

KEY TERMS

In this dissertation, the following terms are to be understood in terms of the following definitions.

1. **Property**: The land, building or area that construction services are rendered on.
2. **Employer**: A person or an organisation that owns a property and enters into an agreement with a main contractor in which the latter renders services on the property of the former.
3. **Main contractor**: A person or an organisation that the employer enters into an agreement with to renders services on the employer's property.
4. **Subcontractor**: A person or an organisation that enters into an agreement with the main contractor to render services on the employer's property.
5. **Contract**: An agreement between two or more persons intended to be enforceable by law.
6. **Subcontract**: A contract between a party to an original contract and a third party; separate to the original one.
7. **Lien**: A right of retention available to a person who has increased the value of another's movable or immovable property.
8. **Builder's lien**: A charge against real property exercisable by a person or an organisation that has contributed material or manpower, increasing the value of another person or organisation's property.
9. **Unjustified enrichment**: A claim arising where one person, without reason or by chance, receives a benefit or value from another at the expense of the latter and an obligation for the former to reimburse the latter arises.

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CHAPTER 1: INTRODUCTION

1. BACKGROUND

As the title of this dissertation suggests, "*A critical analysis of the subcontractor's builder's lien*," the purpose of the dissertation is to analyse the South African legal position regarding a lien (builder's lien). The builder's lien will be analysed specifically with respect to subcontractors, in relation to the construction industry. This study is in view of the considerable increase in the amount of work carried out by subcontractors,[1] as subcontracting has become a common practice in the commercial construction industry.[2] This increase is owing to the fact that main contractors prefer delegating some of their contractual duties to subcontractors for various reasons.[3] Subcontractors are typically bound by the terms and conditions of the contract between the employer and the main contractor,[4] yet much of the actual construction work is accomplished under subcontracts. Though a convenient model, subcontracting comes with its own challenges. For instance, a particular construction project may involve 20 to 40 subcontractors,[5] and this arrangement could create financial complications for the subcontractors involved;[6] frequently where the main contractor and employer fail to honour their contractual obligations. It is internationally recognised that in all transactions with the employer and contractor, the subcontractor relies on the fairness of the former parties[7] for their long-term success. Failure to maintain a good relationship with one another may be to the subcontractor's financial detriment and may consequentially result in their insolvency.

The law relating to the builder's lien, in this circumstance, provides some form of security for prime contractors, and seems to provide little protection for a subcontractor. It is for this reason that it is important to study the law on builder's liens to attempt to identify or create

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[1] Construction Industry Development Board. "*Subcontracting in the South African Construction Industry; Opportunities for Development."* (2013) 1, 4-7. N Gould. *Subcontracts.* Fenwick Elliott http://www.fenwickelliott.com/files/nick_gould_-_subcontracts_paper_for_university_of_vienna.indd_.pdf (Accessed: 15 April 2015) 1.

[2] M Wiese. *"*A Critical Evaluation of the Nature and Operation Liens in South African Law in Comparison with Dutch Law." (2014) 26 *SAMERC LJ* 1.

[3] A contractor may delegate work to a subcontractor to expand on their construction capabilities depending on the specialised nature of the work and skills required.

[4] M Wiese (Note 2 above; 11).

[5] PJ McCord. "Subcontractor Perspective: Factors That Most Effect Their Relationships with General Contractors – A Pacific Northwest Study." (2010) *Washington State University* 1. Construction Industry Development Board (Note 1 above: i, 1).

[6] Individual persons or entities, depending on the particular subcontractor.

[7] M Furmston. *Cheshire, Fifoot & Furmston's Law of Contract*. 6ed (2007) 29. Construction Industry Development Board (Note 1 above: ii, 4).

an appropriate legal avenue in which the employer could also be held directly accountable to the subcontractor, where necessary.

2. HYPOTHESES

In terms of South African contract law, no person who is not a party to a contract will incur any liability or derive any benefit from the terms of that contract.[8] However, South African property law, specifically liens, serve as an exception to the above principle.[9] There are two types of liens, namely the debtor-and-creditor lien and the enrichment lien.[10] The exclusion of the subcontractor from the debtor-and-creditor lien could in certain circumstances yield unfair results for the subcontractor, and in light of this the common law on liens falls short in protecting the subcontractor. As a result, the legislator may therefore need to reconsider the current legal position.

3. RATIONALE

This is a topic of concern because currently, under the South African legal system, it seems to be a difficult task to find or create an appropriate legal avenue in which the employer could be held directly accountable to the subcontractor. The law of contract does not allow for such possibilities. It is for this reason this dissertation seeks for a solution in property law, specifically the law on liens in a statutory form. The search for a suitable compensatory remedy for a subcontractor against the owner creates is an important research question because should there be a better legal avenue, the legislator could consider using that position. The consequences would greatly influence and impact not only the subcontractor's position, but also that of the employer and main contractor. Therefore, the entire construction industry will be affected by such a change of the legal rights and obligations of each participant in the construction industry.

4. RESEARCH AIMS

The aim of this dissertation is to analyse the South African legal position regarding a lien (builder's lien), specifically regarding subcontractors as far as construction contracts are

[8] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co* [1915] AC 853. *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 478. SJ Cornelius. *Principles of the Interpretation of Contracts in South Africa*. (2002) 171. DG Cracknell. *Obligations: Contract Law*. 4ed (2003) 236. RH Christie. *The Law of Contract in South Africa.* 6ed (2011) 269, 270. E Peel. *The Law of Contract*. 13ed (2011) 613.

[9] DG Cracknell ibid at 237, 239-240.

[10] G Bradfield, et al. *Wille's Principles of South African Law*. 9ed (2007) 662. PJ Badenhorst, JM Pienaar and H Mostert. *Silberberg and Schoeman's The Law of Property. Silberberg and Schoeman's The Law of Property.* 5ed (2006) 412.

concerned. To achieve this aim, the dissertation will provide an overview of the general principles of the law of contract, particularly contractual privity, as far as it relates to the legal relationship between the employer, contractor and the subcontractor. In addition, it will consider the legal nature and the scope of the builder's lien, specifically in relation to subcontractors. The dissertation will also look at the general claim of unjustified enrichment by improvements to property. Lastly, the dissertation will compare and consider the legal position in some foreign jurisdictions, where construction subcontractors are protected by a statutory lien, which illustrate the gap in the South African common law.

5. RESEARCH QUESTIONS

In the process, this dissertation will comprehensively address the following questions on liens and subcontractors:

- What is the position of third parties (subcontractors) who are not party to a contract (between the employer and a contractor) in terms of contract law?
- How does the legal nature and scope of a builder's lien relate to subcontractors?
- How is the foreign legal position on a builder's lien, particularly the Canadian law, different from the South African legal position?

6. LITERATURE REVIEW

The doctrine of contractual privity, in terms of South African contract law, provides that no person who is not a party to a contract will incur any liability or derive any benefit from the terms of that contract.[11] In other words, a subcontractor who is not a party to the main contract between the employer and the main contractor does not have a claim against the employer for work done for the benefit of such party. The reason for this is that the contract between the employer and contractor, and that between the contractor and subcontractor are two separate contracts. Should the employer breach his contractual duties to the contractor, the latter could be protected in terms of a builder's lien.

Given the legal position that the subcontractor has no claim against the employer, its legal recourse is limited to exercising an enrichment lien over the property of the employer. This may present financial challenges for subcontractors if they are not remunerated for the work

[11] *Dunlop Pneumatic Tyre Co Ltd* supra at 853. *Coulls* supra at 478. SJ Cornelius (Note 8 above; 171). RH Christie (Note 8 above; 269, 270). In relation to Irish law - KT O'Sullivan. "Privity of Contract: The Potential Impact of the Law Reform Commission Recommendations on Irish Contract Law." (2010) 2. *Judicial Studies Institute Journal.* 110. In relation to American law - JD Fullerton. "Mechanic's Liens." 104 *Construction Law Survival Manual.* 514.

they have done in terms of the subcontract in fulfilment of the main contract. The existing dilemma faced by the subcontractor is reflected in numerous articles.[12] Although this is a prevalent issue in the construction industry, it has not yet been appropriately and adequately addressed under the South African legal system. Construction law scholars have written and shared concerns about the risks associated with subcontracting, particularly the financial risk of non-payment. [13] In respect of the South African legal context, no literature focuses directly subcontractors and on addressing the subcontractor's difficulty; literature which reveals and illustrates the existence of a shortfall does not go far enough and address the issue at hand. More especially, no particular focus is given to the builder's lien with regards to the subcontractor. Authorities on subcontracting shall be sought in foreign literature, in particular, English scholars, as same derives closely from common law which currently regulates subcontracting in South Africa.

7. RESEARCH METHODOLOGY

This dissertation relies on desktop information, using various written legal sources such as statutes, case law, journal articles, books and newspaper articles.

To illustrate the need for an intervention in light of the prevalence of the subcontractor builder's lien issue, case law, newspaper articles and scenarios relating to the problem will be incorporated in the dissertation. Because the basis of the issue dealt with in the dissertation is located in South African common law, specifically the law of contract and property, an overview and analysis of these areas of law will be considered in respect of the relationship between employers, contractors and subcontractors. Particular focus will be given to the subcontractor's inability to demand direct payment from the employer. Furthermore, a comparative analysis of the legal position in foreign jurisdictions, particularly that in British Columbia and Quebec, viewed in the context of the existing South African law and literature on this topic, will be undertaken. Quebec, like South Africa has a hybrid legal system. The South African hybrid legal system includes common law as followed by British Columbia. For this reason, these legal systems are appropriate jurisdictions to borrow from in order to conduct this study. Finally, drawing from and incorporating the existing black letter research and comparative study of foreign law, the dissertation will propose

[12] Construction Industry Development Board (Note 1 above: 25, 26). PA Challer. "Contractual risks in the documentation of construction contracts." (1988) *The Civil Engineer* 565. N Gould. (Note 1 above; 1-2). PJ McCord (Note 5 above; 1).

[13] M Furmston (Note 7 above; 29). M Schneider. "Withholding payments due to a subcontractor disputes." (2009) 4 (3) *Construction Law International* 35-36**.** Construction Industry Development Board (Note 1 above: 25, 26).

statutory intervention to remedy the current legal predicament of subcontractors' entitlements in terms of the builder's lien.

CHAPTER 2: THE LAW OF CONTRACT

1. INTRODUCTION

When a person wishes to renovate or extend an existing building, or to construct a new building, to accomplish the desired result, they usually employ the services of various construction-related organisations or persons.[14] There are various ways which may be used by a potential client to obtain these services.[15]

The construction industry is one of the biggest industries worldwide.[16] This industry often involves numerous participants with different skills for the co-ordination of various interrelated activities[17] of trade such as civil engineers, quantity surveyors, architects and interior designers.[18] It is a business of a precarious nature,[19] and it is subject to more risk and uncertainty than other industries.[20] Therefore, the management of associated risks is a vital administrative task in such business, and as a result, contractual arrangements are important in this regard. Such contractual arrangements are created to organise the relationship between the contributors in a construction project and to manage the associated risks thereof.[21] Parties to these arrangements (construction contracts) are ordinarily the employer and the contractor (main contractor). These parties immediately accept and undertake the potential risks involved when they sign such contracts.[22]

Owing to the complexity and specialised nature of contemporary construction, as a result of more extravagant building designs desired by clients, an essential and prevalent model in the construction industry is that the main contractor may engage another person, a subcontractor, to undertake performance of a particular part of the main contractor's work.[23] This, of course,

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[14] Construction Industry Development Board (Note 1 above: 1, 4, 7, 9, 25). A Othman, N Harinarain. "An Investigation Into Contractors' Evaluation of Risks Associated With The JBCC Principal Building Agreement in South Africa." (2011) 1 (1) *JCPMI* 4.

[15] A person seeking construction services may directly approach a construction contractor, a specialist in the field, a registered person, a person who they know has the skills to do the job or bid out a tender.

[16] Construction Industry Development Board (Note 1 above: 3, 7). A Othman, N Harinarain (Note 14 above; 2).

[17] Construction Industry Development Board (Note 1 above: 1, 4, 7, 9, 25). A Othman, N Harinarain (Note 14 above; 2).

[18] PJ McCord (Note 5 above; 1).

[19] A Othman, N Harinarain (Note 14 above; 1).

[20] A Othman, N Harinarain (Note 14 above; 2).

[21] Construction Industry Development Board (Note 1 above: 13, 16, 18). A Othman, N Harinarain (Note 14 above; 1).

[22] Potential risks associated with construction projects include product size risks, business solvency, environmental risks, technology, staff size and experience affecting the completion, product quality and remuneration for the services. Construction Industry Development Board (Note 1 above: 4, 18). A Othman, N Harinarain (Note 14 above; 2). JP Bobotek. Pillsbury Law. "Top 10 Issues in Construction Contracts." (Summer 2011) *Perspective on Insurance Recovery Newsletter*.

[23] Construction Industry Development Board (Note 1 above: 4) N Gould (Note 1 above; 1).

is dependent on the main contractor's capabilities or workload capacity and competence.[24] This means that where the main contractor requires or finds it more efficient to make use of a subcontractor, the chosen subcontractor is given a part of the work site to perform a portion of the work which the employer initially required the main contactor to do. The main contractor's ability to decide and to choose whether a subcontractor is required is supported by one of the first cases on subcontracting, *Davies v Collins*.[25] Lord Greene held that "It is to be inferred that it is a matter of indifference whether the work should be performed by the contracting party or by some subcontractor whom he employs."[26]

2. SUBCONTRACTING

Subcontracting is the practice of assigning part of the obligations and tasks under a contract to another party known as a subcontractor. Subcontracting is especially prevalent in areas where complex projects are the norm, such as construction and information technology. Subcontractors are hired by the project's general contractor, who continues to have overall responsibility for project completion and execution within its stipulated parameters and deadlines.

In the construction industry, a relationship between the main contractor and subcontractor can be created by making a distinction between two types of subcontractors, namely, the domestic subcontractor and the nominated subcontractor.[27] On the one hand, a domestic subcontractor is one selected and employed by the main contractor. The main contractor is exclusively and completely responsible for the domestic subcontractor.[28] In this case, the main contractor alone has full discretion as to whom to employ to do the required subcontract work, and without the employer's say. It is for this reason that any and all obligations to and for such subcontractor lie with the main contractor. On the other hand, a nominated subcontractor is one selected by the employer but employed by the main contractor.[29] The employer generally retains some liability for the nominated subcontractor.[30] In this alternative instance, the main contractor gives the employer discretion to choose the subcontractor whom the main contractor will employ. It is important to note that it is not the

[24] Construction Industry Development Board (Note 1 above: 5, 9, 10). N Gould (Note 1 above; 1).
[25] *Davies v Collins* [1945] 1 All ER 247.
[26] *Davies* supra at 247-249.
[27] Construction Industry Development Board. "*Subcontracting Arrangements*." Inform Practice Note 7 (May 2007) 1. N Gould (Note 1 above; 2).
[28] Construction Industry Development Board (Note 27 above: 3). N Gould (Note 1 above; 3).
[29] Construction Industry Development Board (Note 27 above: 3). N Gould (Note 1 above; 3).
[30] Construction Industry Development Board (Note 27 above: 3). N Gould (Note 1 above; 3).

employer, but the main contractor, who employs the subcontractor. Consequently, the employer does not assume full responsibility for the subcontractor but has only limited responsibility, as there is no direct contractual relationship between them, like there is between the main contractor and the subcontractor. The main contractor is liable to the employer for any default by his domestic subcontractors in performing the main contract work, and likewise, the main contractor is responsible for and to the subcontractor.

This dissertation focuses on the subcontractor selected, engaged and employed by the main contractor; the domestic subcontractor. Of importance to this dissertation is that, upon due fulfilment of his contractual obligations, the subcontractor can only enforce his contractual rights by a claim against the main contractor, and not against the employer.

Although the use of the subcontracting model is beneficial, consideration should also be given to the central risk associated with subcontracting. The issues that may arise in the circumstances are occasionally rooted in the principles of the law of contract. However, these issues may sometimes be settled by the principles of the law of property. One of the potentially challenging issues arising out of the subcontracting business model is in respect of the contractual relationship between the employers, main contractors and subcontractors. In particular, the question of a contractual relationship, if any, between the employer and the subcontractor. Incidentally, there are a range of general principles applicable to subcontractor relationships[31] that need to be explored in order to have a better understanding of the difficult and potentially detrimental situation arising from subcontracts.

3. GENERAL PRINCIPLES OF THE LAW OF CONTRACT

For there to be an enforceable contractual obligation, there has to be a valid contract.[32] A contract is an agreement between two or more persons[33] with the intention of creating legal obligation(s)[34] and which the law recognises as binding between the parties.[35] A legally binding contract requires the necessary contractual capacity to contract, an agreement in the form of an offer and acceptance, the intention to create obligations, certainty as to the

[31] Construction Industry Development Board (Note 27 above: 3-4). N Gould (Note 1 above; 1).
[32] G Bradfield, et al. (Note 10 above; 738).
[33] SJ Cornelius (Note 8 above; 1). M Havenga, et al. *General Principles of Commercial Law*. 8ed (2015) 47.
[34] S Van der Merwe, et al. *Contract: General Principles.* 4ed (2012) 7. DG Cracknell (Note 8 above; 2).
[35] G Bradfield, et al. (Note 10 above; 736). E Peel (Note 8 above; 1). J du Plessis, et al. *The Law of Contract in South Africa.* 2ed (2012) 3, 4, 5.

contents of the agreement, lawfulness of the agreement, possibility to perform the obligations and formalities relating to that specific type of contract.[36]

The foundational core element of contract is an agreement[37] between two or more persons to the contract.[38] The conclusion of an agreement requires the meeting of the minds between the contracting parties, known as *consensus ad idem*.[39] Meaning, the parties need to agree on all aspects of the contract.[40] All aspects of the contract entailed in *consensus ad idem* include all material aspects of the proposed agreement, such as the agreement terms, the identity of the parties and the agreement's subject matter.[41]

Flowing from the requirement that there must be an agreement between the parties, is the requirement of intention to create legally enforceable obligations known as *animus contrahendi*.[42] The purpose of consensus *ad idem* is to ensure that each party has real/true intentions to be bound by the contract.[43] Hence, it is required that the objective of the agreement and of entering the contract be to bind them and make the parties responsible for their undertaking or to hold the other responsible for a reciprocal obligation ensuing from the created agreement. It is a question of fact whether or not parties intended that their agreement be a legally binding one.[44] If this contractual intention is not present in either party, then no contract is created and subsequently no contractual obligation arises [45] since there is no consensus.[46] The only exception to this principle is where one party leads the other to reasonably believe that he or she intends to bind themselves to such an agreement.[47]

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[36] SJ Cornelius (Note 8 above; 1, 7, 28, 44). DG Cracknell (Note 8 above; 7). S Van der Merwe, et al. (Note 34 above; 17, 19, 20). G Bradfield, et al. (Note 10 above; 739-759). R Sharrock. *Business Transactions Law.* 9ed (2016) 39, 54, 84, 90, 119. J du Plessis, et al (Note 35 above; 5). M Havenga, et al (Note 33 above; 48).

[37] S Van der Merwe, et al (Note 34 above; 7, 19, 20). SJ Cornelius (Note 8 above; 1, 7). DG Cracknell (Note 8 above; 66). M Havenga, et al (Note 33 above; 48).

[38] G Bradfield, et al. (Note 10 above; 740). R Sharrock (Note 36 above; 54).

[39] *Trollip v Jordan* 1960 1 PH A25 (T). S Van der Merwe, et al (Note 34 above; 19, 20). G Bradfield, et al. (Note 10 above; 741-743).

[40] R Sharrock (Note 36 above; 54).

[41] J du Plessis, et al (Note 35 above; 14).

[42] SJ Cornelius (Note 8 above; 28, 44). S Van der Merwe, et al (Note 34 above; 20). J du Plessis, et al (Note 35 above; 4).

[43] S Van der Merwe, et al (Note 34 above; 19). M Havenga, et al (Note 33 above; 48, 51, 52). G Bradfield, et al. (Note 10 above; 752).

[44] J du Plessis, et al (Note 35 above; 4).

[45] R Sharrock (Note 36 above; 54, 84). E Peel (Note 8 above; 171).

[46] S Van der Merwe, et al (Note 34 above; 19). See also *Mondorp Eidendomsagentskap (Edms) Bpk v Kemp & De Beer* 1979 4 SA 74 (A).

[47] J du Plessis, et al (Note 35 above; 4). *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A). In terms of the i*ustus error* doctrine, if a reasonable person would find that the parties agreed on the terms of the contract and one party relied on such, they may be protected. Similarly, the reliance theory provides that the belief which one contractant has created in the mind of the other regarding their intention forms

In terms of South African contract law, the doctrine of contractual privity provides that no person who is not a party to a contract will incur any liability or derive any benefit from the terms of that contract.[48] This fundamental principle establishes the idea that the formed contract confers rights and obligations only to those who are a party to it,[49] and not to third parties.[50] In other words, where parties conclude a contract by agreement through an offer by one party and acceptance by another, capacity and intention is required from both parties. In addition, the agreement must be lawful, one which is possible to perform and that all its required formalities are met. Only such parties are responsible for any and all parts of the contract. No third party may be held to the terms of such agreement or request that they receive any advantageous value from a contract they were not a party to. Such would be acceptable only from parties to the contract. A contract is a juristic act[51] and the doctrine of contractual privity rightfully supports this by the law attaching benefits and liabilities which the parties intended to incur and preventing a third party not intended to be part of the contract from acquiring any such value or burden.

In subcontracting instances, the subcontractor usually contracts with the main contractor and not the employer. The employer contracts with the main contractor and as a result the contract between the employer and contractor, and that between the contractor and subcontractor are two separate contracts. Because of these arrangements, there is no direct contractual link between the employer and the subcontractor by virtue of the main contract.[52] Furthermore, the main contractor is not the agent[53] of the employer.[54] Therefore, the main contractor cannot enter into contracts on behalf of the employer and have the employer assume liability for such contracts entered into. And accordingly, the main contractor does not enter into a legally binding agreement on behalf of the employer when contracting with the subcontractor to do work on the employer's property. The main contractor enters into a

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the basis of the contract. PJD Jethro. *Reliance Protection as the Basis of Contractual Liability* (unpublished LLM thesis, University of South Africa, 1996) 5, 6.

[48] *Dunlop Pneumatic Tyre Co Ltd* supra at 853. *Coulls* supra at 478. SJ Cornelius (Note 8 above; 171). DG Cracknell (Note 8 above; 236). RH Christie (Note 8 above; 269, 270). E Peel (Note 8 above; 613).

[49] SJ Cornelius (Note 8 above; 171). S Van der Merwe, et al (Note 34 above; 2). J du Plessis, et al (Note 35 above; 21). *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 115. KT O'Sullivan (Note 11 above; 110).

[50] An exception to this principle is a tripartite agreement which is a contract made for the benefit of a third party.

[51] TV Mbhele. *The South African Law of Contract as Influenced by the National Credit Act 34 of 2005: An Evaluation* (unpublished LLM thesis, University of Pretoria, 2010) 8, 9.

[52] N Gould (Note 1 above; 1).

[53] A person who concludes juristic acts on behalf of another thus creating, altering or extinguishing legal relationships for the other.

[54] N Gould (Note 1 above; 1).

contract with a subcontractor in their own capacity to fulfil obligations which they owe to the employer in terms of the main contract. Conversely, the employer's rights and obligations are in respect to the main contractor only,[55] and not to or against the subcontractor. Consequently, as a result of contractual privity, a subcontractor who is not a party to the main contract between the employer and the main contractor cannot take action or enforce the terms or obligations derived from the contract. In other words, the subcontractor does not have a claim against the employer for work done for the benefit of latter. This, therefore, means that the employer also cannot bring a claim against the subcontractor in the event that the subcontractor's work is defective, lacking in quality, or delayed.[56] Conversely, the employer is only obliged to pay the main contractor, and accordingly, a subcontractor cannot sue the employer for the subcontract price even if the main contractor defaults or becomes insolvent.[57]

The case of *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n Ander*[58] reiterates the principle of contractual privity. The Appellate Division in this case dealt with enrichment in terms of a contract between a property owner and a contractor, contracting to improve the property. The main contractor engaged a subcontractor to perform certain work on the employer's property. On completion of the work, the subcontractor was however unable to recover the contract price as the contractor was subsequently liquidated. The subcontractor had purported to exercise an enrichment lien over the employer's worksite, but it vacated the premises on the basis that the employer would compensate it if it was indeed found to be liable. Thereafter, the subcontractor instituted action against the employer based on unjustified enrichment. It was held that the mere fact that a contractor has gotten a subcontractor to fulfil their contractual obligations in terms of the main contract, it does not mean and result in the employer's reciprocal obligation(s) being altered to require him to owe an obligation, in addition to that which they owe the main contractor, also to the subcontractor. This, according to the Court, would increase the employer's liability because he would now be incurring obligations not arising from his contract with the main contractor but also obligations arising from a separate contract between the main contractor and subcontractor.[59] This decision clearly indicates and reiterates the position that there is no

[55] If the main contractor were the agent of the employer, the contract which the main contractor concludes with the subcontractor would make the employer and subcontractor mutually liable to each other.
[56] N Gould (Note 1 above;1).
[57] N Gould (Note 1 above; 1-2).
[58] *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and Another* 1996 (4) SA 19 (A).
[59] Para [25H-26A].

contractual relationship between the owner and the subcontractor because the contractual obligations between the employer, main contractor and subcontractor emanate from separate contracts. The agreement between the owner and the main contractor is the primary source of performance of work and any possible enrichment of the owner, whilst the agreement between the main contractor and the subcontractor is the ancillary source of performance of work and any possible impoverishment of the subcontractor. The court concluded that as a result of the subcontractor's work, the owner had received no more than that which he contracted for with the main contractor.[60] Therefore, the subcontractor was held to have no enrichment claim against the owner, and accordingly, unable to claim the contract price for the subcontracted work. The court's conclusion illustrates the central concern of this dissertation, being; the potential injustice caused by the lack of towards contractual privity between employers and subcontractors, possibly leaving one party in a disadvantageous position.[61]

In the recent case of *MEC: Department of Police, Roads and Transport, Free State Provincial Government v Terra Graphic (Pty) Ltd t/a Terra Works and Another,*[62] the Province awarded a tender in relation to a road infrastructure program and concluded a written agreement with the main contractor, SSI/Tshepega Joint Venture, to supply engineering services and authorised the appointment of Terra Graphics (Pty) Ltd as the subcontractor to provide environmental protection. After both the main contractor and subcontractor completed the work and received some payment, the Province refused to pay the balance owing. This was notwithstanding that the Province had received and retained the benefits of the work of the two contractors.

Since SSI/Tshepega Joint Venture had not been paid, it could not pay Terra Graphics the balance due for the work done and services rendered in terms of the subcontract agreement. Consequently, Terra Graphics applied to the High Court for an order that the Province pay the outstanding amount for work done and services rendered. Alternatively, Terra Graphics sought an order that the Province be ordered to effect payment of the outstanding amount to SSI/Tshepega Joint Venture, and that the latter be ordered to immediately pay same to Terra Graphics. The Province did not dispute that the work had been done and that services had

[60] Para [26A].
[61] J Serfontein, "What is wrong with modern unjustified enrichment law in South Africa?" (2015) *De Jure* 48 (2).
[62] 2016 (3) SA 130 (SCA).

been rendered by SSI/Tshepega Joint Venture and Terra Graphics in terms of the main and subcontract agreements.

One of the defences raised by the Province was the lack of privity of contract between itself, as the employer, and the subcontractor, Terra Graphics. It contended that it was not obliged to pay Terra Graphics because there was no contractual privity between them and submitted that Terra Graphics should seek payment from the main contractor, SSI/Tshepega Joint Venture. This was despite the fact that the Province had failed to pay the main contractor.

The Supreme Court of Appeal rejected the Province's argument as diversionary and had regard to contractual provisions from which it was evident that the Province knew that environmental services could only be provided by a subcontractor, of which it had approved. According to the court, it is clear that both written agreements that are at the center of litigation were approved by the Department. In considering whether there was any merit to the defense that there was no contractual privity between the Province and Terra Graphics, the court took into account provisions of the main agreement in terms of which SSI/Tshepega Joint Venture was the Province's project manager in relation to the road rehabilitation program, including being responsible for the financial management of the project. Furthermore, the Province had undertaken to pay the main contractor whatever was due to the subcontractor. The court noted that payment due to the applicant for the sub-contracting services had to be made by the Province to SSI/Tshepega Joint Venture.

The court noted that Terra Graphics performed work for the benefit of the Province, for which the former invoiced SSI/Tshepega Joint Venture, who in turn, invoiced the Province for the same amount, in respect of the same work. At this juncture, the court reiterated that the Province knew that environmental services could only be provided by a subcontractor. It approved the appointment of that particular subcontractor and in terms of the main agreement, the Province had undertaken to SSI/Tshepega Joint Venture to pay the subcontractor's fees in addition to SSI/Tshepega Joint Venture's fees.

The court considered that it followed that Terra Graphics had proved that there was privity between itself and the Province. The court held that all the affected parties had been joined, and the Province had failed to raise any justification for its failure to pay the Terra Graphics through SSI/Tshepega Joint Venture. The Province had also failed follow the instruction by the Minister of Finance to ensure that contractors it had employed were compensated.

The decision by the court to dismiss the appeal sets new precedence in the light of subcontractors' contractual privity. The court gave regard to the subcontract and recognized privity of contract between an employer and a subcontractor where there is a contractual agreement between the two parties. Same should be sought in the provisions of the contract. Although this is a favourable approach by the court for subcontractors, the judgment in this case directly conflicts with the judgment in the *Buzzard* case. The new position laid down by the Supreme Court of Appeal in the *Terra Graphics* case causes further confusion and can be seen as unsatisfactory.

Given that there is no contractual agreement between the employer and the subcontractor discussed in this dissertation, the requirements for a valid contract do not exist between the employer and the subcontractor. Although the nature of the contract between the employer and the main contractor, and that between the main contractor and the subcontractor is similar and of integrated correspondent obligations, they are nonetheless two separate contracts.[63] No legal consequences flow from the initial contract to the ancillary one. The main contractor continues to be accountable to the employer for all aspect of the subcontract, regardless of any issues that could possibly arise between the main contractor and the employer. Furthermore, the main contractor is also still responsible for the time, quality of work and payment of the subcontractor in accordance with the contract between the main contractor and subcontractor.[64] However, this may also depend on the terms of the contract between the main contractor and a subcontractor.[65]

4. CONCLUSION

It is clear from the general principles of contract law discussed above that there is no contractual relationship between the employer and the subcontractor. The contract between the employer and the main contractor is one distinct to that between the main contractor and the subcontractor. Accordingly, where the subcontractor is not remunerated by the main contractor for the work performed on the employer's property, the subcontractor has no direct claim against the employer.

[63] Construction Industry Development Board (Note 27 above: 4). N Gould (Note 1 above; 1).
[64] Construction Industry Development Board (Note 27 above: 3). N Gould (Note 1 above; 1).
[65] Construction Industry Development Board (Note 27 above: 3). N Gould (Note 1 above; 1).

One of the objectives of the law of contract is to ensure that parties to an agreement keep their undertakings and promote fairness in contractual dealings.[66] However, it is evident from this chapter that the law of contract does not comprehensively serve this purpose in relation to the domestic construction subcontractor, and afford protection to such subcontractor's interest from potential financial detriment where the main contractor defaults in compensating the subcontractor for the work they have completed on the employer's property. It is for this reason that other legal avenues need to be sought and assessed. The next chapter will look at an alternative legal remedy, provided for in terms of the law of property, that the subcontractor may seek to utilise. The chapter will look at the right of lien and assess the adequacy of such a right in the perspective of a domestic subcontractor.

[66] J du Plessis, et al (Note 35 above; 21).

CHAPTER 3: ENRICHMENT LIABILITY AND A BUILDER'S LIEN

1. INTRODUCTION

After having considered the law of contract in relation to subcontractors, due regard must also be taken to consider security that the subcontractor may pursue in an attempt to acquire their deserved remuneration. This is necessary in order to ascertain whether an existing claim or action may assist the subcontractor. This chapter will look at the general claim of unjustified enrichment, more specifically the right to lien. An unpaid subcontractor may seek to use unjustified enrichment, under a specific action, to secure payment from the employer for the enriching amount expended on the employer's property.

Of importance in this chapter is unjustified enrichment by improvements to property as this dissertation focuses on the construction industry. This category of unjustified enrichment includes a *bona fide possessor*, *bona fide occupier*, *mala fide possessor* and *mala fide* occupier. However, only unjustified enrichment in relation to *bona fide* possessors is relevant to this dissertation and hence, this chapter will explore only such aspects.

2. UNJUSTIFIED ENRICHMENT

Unjustified Enrichment is a source of obligations.[67] The concept of unjustified enrichment is based on the Roman law maxim *nemo locupletari potest aliena iactura* or *nemo locupletari debet cum aliena iactura*, which means no one should be benefited at another person's expense.[68] The common law claim of unjustified enrichment, which developed from this maxim arises where one person unjustly or by chance receives a benefit or value from another at the expense of the latter.[69] The one person's estate is thus unduly increased at the expense of another. Consequently, where one person is enriched at the expense of another, without any legal cause for the receipt of the benefit, an obligation to make restitution arises.[70] For this reason, a person unjustly enriched at the expense of another is required to

[67] J du Plessis. The South African Law of Unjustified enrichment. 3ed (2016) 1.
[68] S Eiselen, G Pienaar. *Unjustified Enrichment: A Casebook.* 3ed (2008) 3, 21. G Bradfield, et al. (Note 10 above; 1043-1044). J du Plessis (Note 67 above; 2).
[69] S Eiselen, G Pienaar (Note 68 above; 9). N Fakude. "Redundant or relevant? The law of unjustified enrichment." (2005) *De Rebus*. 1.
[70] J du Plessis (Note 67 above; 1). This is in contrast to obligations arising from a contract and delict which are respectively by virtue of consent of the parties and to balance a loss.

make compensation to that other.[71] Hence, the aim of unjustified enrichment is to place the enriching party back to the position they were in before the enrichment occurred.[72]

In order to successfully hold another person liable in terms of unjustified enrichment, the plaintiff was traditionally required to institute an action based on an established specific enrichments action and meet its requirement.[73] There are various enrichment claims available. The main actions are namely, *condictiones*;[74] preservation or improvements to property;[75] failed contracts;[76] *quasi negotiorum gestio*;[77] and work done or service rendered.[78] If the plaintiff is unable to rely on an established specific action, they need to illustrate why the scope of these actions have to be expanded.[79] If that also cannot be done, the person needs to prove that liability should be imposed in a new situation that does not fall within the scope of the existing or extended actions.[80] Once the plaintiff has established same, they need to satisfy the general requirements of enrichment liability.

3. UNJUSTIFIED ENRICHMENT UNDER SOUTH AFRICAN LAW

South African law does not recognise 'true' general enrichment action[81] which can be resorted to when certain general requirements are met.[82] In addition, South African law also recognise a 'residual' general enrichment action[83] which arises when the specific enrichment actions or extensions of the actions do not apply.[84] However, in the *Nortje v Pool NO*[85] case, the court conceded that South Africa may in due course recognise a general enrichment action once the scope and requirements of the action were defined more clearly, not bringing about uncertainty.[86]

[71] EJ Weinrib. *Unjust Enrichment*. Corrective Justice. (2012) 185.
[72] S Eiselen, G Pienaar (Note 68 above; 3, 6, 7). D Visser. *Unjustified Enrichment*. (2008) 4. J du Plessis (Note 67 above; 1).
[73] J du Plessis (Note 67 above; 2).
[74] Cases where something is given without legal grounds to do so.
[75] Claims of the possessor and occupiers preserve or improve another's property.
[76] Failed contracts involving minors.
[77] Extended versions of the action based on management of another's affairs.
[78] Claims involving enrichment arising from doing work and providing services to another. D Visser (Note 72 above; 5-6). J du Plessis (Note 67 above; 10).
[79] J du Plessis (Note 67 above; 2).
[80] J du Plessis (Note 67 above; 2).
[81] See J du Plessis (Note 67 above; 6-8).
[82] J du Plessis (Note 67 above; 4).
[83] See J du Plessis (Note 67 above; 8-10).
[84] J du Plessis (Note 67 above; 4).
[85] *Nortje v Pool NO* 1966 (3) SA 96 (A).
[86] J du Plessis (Note 67 above; 4).

As the law stands, in terms of contemporary South African law, the plaintiff must attempt to bring their claim under an established enrichment action.[87] The plaintiff does not have to plead the specific action by name but must plead its requirements and define the issues, in order for the defendant to be aware of the case the latter has to meet.[88] It is necessary to note that pleading the requirements if a specific enrichment action does not guarantee that the general requirements of enrichment liability have been met.[89]

4. GENERAL REQUIREMENTS FOR UNJUSTIFIED ENRICHMENT LIABILITY

Although it has been held that there is no general enrichment action but an extension of existing actions,[90] a party who transfers to another, at their own expense, a benefit by which the other party is unjustifiably enriched is generally accepted to give rise to enrichment liability if four elements of enrichment liability are met.[91] It can be said that by pleading the requirements of a specific action, the plaintiff indirectly declares that the general enrichment liability requirements are met.[92] However, after pleading the requirements of a specific action, the plaintiff should be advised to ensure that the allegations meet the necessary burden of proof of each of the general requirements. The burden of proof of all the elements of enrichment liability rest with the plaintiff. To make a valid unjustified enrichment claim, the following four requirements must be satisfied:

1. The defendant must be enriched,
2. The plaintiff must be impoverished,
3. The defendant's enrichment must be at the expense of the plaintiff, and
4. There must be no legal ground for the enrichment.[93]

4.1 THE DEFENDANT MUST BE ENRICHED

The first requirement that the defendant must be enriched[94] gives rise to the question whether the defendant has gained a benefit. Such benefit may occur in various ways and a fourfold

[87] J du Plessis (Note 67 above; 2).
[88] J du Plessis (Note 67 above; 3).
[89] J du Plessis (Note 67 above; 3). The court can assess the plaintiff's claim by determining the whether the general elements are present and if not, the enrichment claim will fail.
[90] *Nortje* supra. G Bradfield, et al. (Note 10 above; 1044). J du Plessis (Note 67 above; 4-10).
[91] *Buzzard Electrical (Pty) Ltd* supra. *Glenrand MIB Financial Services (Pty) Ltd and Others v van den Heever NO and Others* (199/2012) [2012] ZASCA 195 [16].
[92] J du Plessis (Note 67 above; 2)4.
[93] G Bradfield, et al. (Note 10 above; 1046). D Visser (Note 72 above; 157). J du Plessis (Note 67 above; 2, 24).
[94] *Nortje* supra at 115. G Bradfield, et al. (Note 10 above; 1046-1047). D Visser ibid 158. K Lamb. "Unjust Enrichment and the Builder's Lien Claimant." (2008) 1 (6) *On Record Burnet, Duckworth & Palmer* 1. J du Plessis (Note 67 above; 2, 25).

test is used to determine same:[95] there may be an increase in the defendant's assets which would not have occurred;[96] a non-decrease in the defendant's assets, which would have occurred; a decrease in the liabilities of the defendant,[97] which would not have occurred and which thus saved them such expenditure(s);[98] or a non-increase in liabilities of the defendant, which would have occurred.[99] The plaintiff is not required to show that that the enrichment relates to one of these four categories but an enrichment occurred.[100] In each of these situations the defendant would be placed in a better position than they were prior to the enriching act.[101] The extent of the enrichment will be the value of the estate now compared with the value of the estate if the enriching act had not occurred.[102] A potential benefit is not enrichment clearly because no actual benefit has been received.[103] In appropriate cases invisible or intangible personal benefits may be enrichment.[104] However, the use of another's thing as a benefit is not yet settled law.[105] Evidenced by the fourfold test, which uses the terms 'assets' and 'liabilities', is the requirement that the enrichment be a financial or patrimonial benefit.[106] Further, for a successful claim, benefit must still exist in the estate of the enriched party at the time the claim is lodged.[107] That is to say that either the thing, or money received for the thing if it has been sold must still be in the possession of the defendant. Since enrichment is measured objectively, rather than taking into account the value the defendant subjectively attached to it, the true value which the defendant obtained is irrelevant.[108] The value of the enrichment is measured by the market value the enriching act has on the estate.[109]

In the case where the subcontractor performs work on the employer's property in accordance with the former's contract with the main contractor, it is clear that the employer derives a benefit from any such labour invested in either the preservation of the property or the

[95] Fourfold test in J du Plessis (Note 67 above; 25).
[96] *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 (3) SA 264 (A) 271E-F.
[97] *Buzzard Electrical (Pty) Ltd* supra at [34].
[98] B*&H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A).
[99] S Eiselen, G Pienaar (Note 68 above; 25, 29). D Visser (Note 72 above; 158-159). J du Plessis (Note 67 above; 25-26).
[100] J du Plessis (Note 67 above; 25).
[101] *Buzzard Electrical (Pty) Ltd supra at* [38].
[102] J du Plessis (Note 67 above; 28).
[103] *Besselaar v Registrar, Durban and Coast Local Division* 2002 (1) SA 191 (D). G Bradfield, et al. (Note 10 above; 1047). J du Plessis (Note 67 above; 31).
[104] J du Plessis ibid 32-36.
[105] J du Plessis ibid 32.
[106] G Bradfield, et al. (Note 10 above; 1047). D Visser (Note 72 above; 161). J du Plessis ibid 27.
[107] J du Plessis ibid 78, 382.
[108] J du Plessis ibid 29.
[109] J du Plessis ibid 29.

increase in its value, as well as any material used to do such. Furthermore, any structure built and services rendered on their property remains attached to their increased estate. Accordingly, by the labour of the subcontractor and material fixed onto the employer's property, there has been an enrichment of the employer and therefore the first requirement is satisfied.

4.2 THE PLAINTIFF MUST BE IMPOVERISHED

Since every unjustified enrichment action must enquire not only into the defendant's enrichment but also into the plaintiff's impoverishment,[110] it is required that the plaintiff must be impoverished.[111] This requires that there be a corresponding deprivation suffered by the plaintiff.[112] This would mean that the defendant's enrichment fourfold test would apply in reverse. There may be: a decrease in the plaintiff's assets;[113] a non-increase in the plaintiff's assets; an increase in the liabilities of the plaintiff; or a non-decrease in liabilities of the plaintiff.[114] Another way to phrase this requirement is to ask whether the enrichment of the defendant was at the expense of the plaintiff, which resulted in either the decrease or non-increase in the assets of the plaintiff, or the increase or non-decrease in liabilities of the plaintiff. Similar to the first requirement, it is not necessary to prove that the impoverishment falls under a particular category.[115] The plaintiff's impoverishment is determined by establishing the total effect on the plaintiff's estate.[116] Both questions would be a deprivation or at a cost to the plaintiff. Like the defendant's enrichment, the plaintiff's impoverishment must be financial or patrimonial in nature.[117]

This requirement entails that the situation be that by the subcontractor's efforts applied to the employer's property, a dispossession of some sort or value of such, should as a result be suffered by the subcontractor.[118] In the case of the construction subcontractor, such dispossession would be the time the subcontractor could have invested on another financially valuable project; the money spent on building materials; the cost of labour; and any potential interest incurred thereof. Hence, the time, labour or provided material spent on any particular

[110] *Glenrand MIB Financial Services (Pty) Ltd* supra at [38]. *Buzzard Electrical (Pty) Ltd* supra.
[111] N Fakude (Note 69 above; 1). D Visser (Note 72 above; 159).
[112] K Lamb (Note 94 above; 1).
[113] *St Helen Primary School v The MEC, Department of Education, Free State Province* [2009] 1 All SA 513 (O).
[114] *Nortje* supra at 115. D Visser (Note 72 above; 159). J du Plessis (Note 67 above; 41).
[115] J du Plessis (Note 67 above; 41).
[116] J du Plessis ibid 43.
[117] J du Plessis ibid 43.
[118] K Lamb (Note 94 above; 1).

site amounts to a value lost by the subcontractor and therefore the deprivation which the subcontractor would suffer, necessitating it being compensated for such loss. Ultimately, as a result of these losses, expenses and liabilities incurred by the subcontractor in performing work on the owner's property, the former is impoverished as required by the second requirement for unjustified enrichment liability.

With regard to the first and second requirements to establish unjustified enrichment liability, all favourable and detrimental consequences of the enriching fact should be taken into account in determining the defendant's enrichment and plaintiff's impoverishment.[119]

4.3 THE DEFENDANT'S ENRICHMENT MUST BE AT THE EXPENSE OF THE PLAINTIFF

The third requirement for liability that the defendant's enrichment must have been at the expense of the plaintiff entails establishing causality.[120] This must be a connection between the enrichment of the defendant and the impoverishment of the plaintiff[121] to show why restitution should specifically be made to the plaintiff and not to someone else.[122] The causal link between the enrichment and the impoverishment may be direct or indirect.[123] A direct link is self-explanatory as it is between two parties, in which it simply entails one party rendering services, at their own expense, to another party and that service enriches that other. Determining a causal link in such an instance is usually not difficult. A direct link is supported by the legal causality approach in what has been referred to as the 'garage case' scenario.[124] Proving this element can be difficult in more complex situations. This is because the direct link requirement rejects that there is the required causal link between a third external party's enrichment as a result of an agreement between two parties, not including the third party.[125] Conversely, an indirect enrichment may take place where one party contracts with another party and renders performance to that other but the benefit of the rendered performance accrues to another third party.[126] Unlike the direct link, an indirect

[119] J du Plessis (Note 67 above; 49).
[120] *Buzzard Electrical (Pty) Ltd* supra at [18]. D Visser (Note 72 above; 165).
[121] N Fakude (Note 69 above; 1).
[122] J du Plessis (Note 67 above; 48).
[123] *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T). D Visser (Note 72 above; 171). J du Plessis (Note 67 above; 49).
[124] For the 'garage case' illustration, see J du Plessis (Note 67 above; 49).
[125] J du Plessis ibid 49-50.
[126] J du Plessis ibid 49. As in *Gouws* supra and in the factual scenario in *Brooklyn House Furnishers (Pty) Ltd* supra.

link is supported by the factual causality approach.[127] In such an instance, though the former party renders performance to the latter, and the latter is to pay the former, the third party is found in fact to be enriched at the expense of the former, and not the latter.[128]

Du Plessis[129] further explains the difficulty of satisfying this requirement where there are three or more parties involved in the action. He provides examples of four situations that may occur, namely: the plaintiff benefit himself and only incidentally enriches the defendant; the defendant's enrichment arises from external forces; the defendant is enriched by infringement of the plaintiff's rights; and multi-pay situations. The multi-party situation is relevant to this dissertation and accordingly discussed further.

A transfer requires a transferor and a recipient and where there are more than two parties involved, it can be difficult to determine who these parties are.[130] Who is 'legally' the transferor and who is 'legally' the recipient does not have to be the person who factually made the transfer and received the benefit. [131]

In the employer, main contractor and subcontractor situation, the question that needs to be addressed is whether, where the subcontractor expends labour on the employer's property, in terms of a contract between the subcontractor and the main contractor, the employer's enrichment is the result of the subcontractor's impoverishment. Basically, the question is whether the employer is enriched at the expense of the subcontractor.

In the *Buzzard*[132] case, the court discussed two types of enrichment claims. The claims were illustrated as follows: In the first scenario; A, in terms of an agreement with B, improved the property of a third party, C. A then sought to hold C, as the owner, liable on the basis of unjustified enrichment because B had not paid him.[133] In the second scenario, C the owner of property contracted with B to improve his property. B sequentially subcontracted with A to do the work. A did the work and because B did not pay him, A consequently sought to hold C liable in terms of unjustified enrichment. In Buzzard, the court held that the main difference between the two types of claims was that performance by A in the second scenario

[127] J Du Plessis (Note 67 above; 49-50).
[128] *Gouws* supra. J Du Plessis (Note 67 above; 49).
[129] J du Plessis ibid 50-52.
[130] J du Plessis ibid 65.
[131] J du Plessis ibid 65.
[132] *Buzzard Electrical* supra at [25H-26A].
[133] This is the same as the 'garage case' illustration, in J Du Plessis (Note 67 above; 49).

ensued in consequence an agreement between the owner, C, and B in terms of which performance was agreed to be made by B. Accordingly, neither direct or indirect liability on the basis of unjustified enrichment could be established. The court held that all cases shaped by the same facts as in the second scenario it would be unfair to have owner C be faced with the possibility of having to pay more than that to which he agreed with B, as C contracted with B on a specific basis and B had on his own engaged A to comply with his contractual obligations. The court's reasoning was that when A performed the work, he complied with his obligation towards B. There was no contractual obligation between A and C. Therefore, the agreement between the owner C and B was the primary source of the performance of the work and A only performed indirectly to the owner C. The court concluded A's agreement with B was the cause of A's impoverishment.

The *Buzzard* case provides that if the main contractor does not pay the subcontractor, and is in a position to pay, the subcontractor can still only enforce a contractual action against the main contractor. Even if the main contractor is insolvent or disappears, the subcontractor still may not be able to bring an unjustified enrichment action against the employer because they are not a party to the contract between the main contractor and subcontractor. And although the employer is enriched and the subcontractor is impoverished, such enrichment of the employer is not at the expense of subcontractor but the main contractor. The subcontractor is accordingly impoverished as a result of their contract with the main contractor. This correctly mirrors the basic principles of contract.

In contrast, Schutz JA in the *McCarthy Retail*[134] case, with reference to the reasoning adopted by the court in *Buzzard*, made a valid observation by stating that, "it may be a question of semantics whether the owner's enrichment had been at the expense of A or B." Using the garage case scenario, Schutz JA posed a hypothetical question of what happens in a case where,

> "A improves a car at the instance of B, wrongly believing him to be owner. C claims the car by virtue of his ownership. Is he to get it scot-free? Or is he to first pay A his necessary and reasonable expenses; A's claim being moderated by the increase in market value cap, by the limitation to expenses to the exclusion of the market price and by the operation in the last resort of the jus tollendi (the right to compel

[134] *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) [23].

> removal of materials)? The question whether C is enriched at the expense of A or of B in the example given is in any event a matter of semantics (I do not dispute that the manner in which the question is answered can have practical consequences). When A improves C's vehicle the ownership in the improvements passes at once to C's estate by accession and it seems to me to pass there directly from A's estate. Is it not a fiction that it passes through the estate of B, even though A owes a contractual obligation to him to effect the repairs?"[135]

Although the position in the hypothetical scenario differs slightly from that of the subcontractor, the essence of it, being the enrichment at the expense of another, is common, and the hypothetical scenario and posed question may be used analogously in relation to the subcontractor situation. Although the subcontractor knows that the property belongs to the employer and not the main contractor, if the main contractor does not pay the subcontractor and the employer also has not paid the main contractor (a scenario question which the *Buzzard* case left open), failure of an enrichment claim by the subcontractor against the employer must surely defeat the purpose of unjustified enrichment liability. As mentioned above, the aim of unjustified enrichment is recovery of an amount representing the extent of the enrichment or to restore the state of inequity caused by enrichment. This objective is not fulfilled if the subcontractor is not compensated for the work or value they have devolved in the owner's property and the owner makes no remuneration for such to anyone. This means that the owner incurs a benefit for free if the main contractor is also not paid and, if the subcontractor is not paid, the subcontractor incurs an expense without reimbursement.

4.4 THERE IS NO LEGAL GROUND FOR THE ENRICHMENT

The last requirement that the enrichment must have been *sine causa* (unjustified)[136] essentially limits the extent of liability.[137] As the label of such liability provides, there must be no legal ground for the enrichment.[138] This requires that there be no valid contract or statutory provision imposing an obligation for one to enrich the other.[139] Hence the essence of the action is that the enriched party has no justification for retaining the enriching

[135] *McCarthy Retail Ltd* supra.
[136] S Eiselen, G Pienaar (Note 68 above; 25-28). G Bradfield, et al. (Note 10 above; 1088). D Visser (Note 72 above; 4 and 171). J Du Plessis (Note 67 above; 52).
[137] J du Plessis ibid 20.
[138] J du Plessis ibid 10-11.
[139] J du Plessis ibid 20.

benefit.[140] The rationale behind this requirement is that if it is not required that the enrichment be without a legal cause, then it would result in the problem that no one would be able to make a profit at the expense of another. Accordingly, this requirement is thus the core element,[141] and, as already stated, it limits the unjustified enrichment action. Objectively, this requires that the benefit vested on the defendant must have been conferred in absence of a legal cause or reason to justify the enrichment[142] and impoverishment.[143] The question that needs to be answered is therefore, whether the enrichment was unjust. This is a question of fact. Enrichment is unjustified when there is not sufficient legal ground for the transfer of value from the plaintiff to the defendant or for the retention of such value by the defendant.[144] The academic debate around this requirement is whether no legal justification means that there is no legal ground for the enriching value to leave the plaintiff's estate[145] or no legal grounds for the value to have gone into and stayed in the defendant's estate,[146] particularly in relation to a claim involving more than two parties, such as the garage case scenario.[147]

The third and fourth requirements for liability in terms of unjustified enrichment can be troublesome where a subcontractor is involved in the enrichment giving rise to such a claim.[148] The difficulties arise from the fact that a general requirement for liability is that the defendant's enrichment must be *at the expense of the plaintiff* and it must be *unjustified*. It is questionable whether enrichment has occurred at the expense of the plaintiff where the transfer of a benefit between the plaintiff and the defendant is interceded by a third party.[149] This is because the enrichment is not transferred directly from the plaintiff to the defendant but from the plaintiff to the third party, and then subsequently from the third party to the defendant.[150] Furthermore, the precise meaning of *sine causa* in such context is not completely clear.

[140] J Du Plessis (Note 67 above; 10). *Legal explanation of possible restitution action by the South African Reserve Bank.* Annexure 3. 138.
[141] D Visser (Note 72 above; 158).
[142] S Eiselen, G Pienaar (Note 68 above; 25, 28). K Lamb (Note 94 above; 1).
[143] N Fakude (Note 69 above; 1).
[144] *McCarthy Retail Ltd* supra at [4]. *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) [24]. J du Plessis (Note 67 above; 56).
[145] *McCarthy Retail Ltd* supra at [4].
[146] *First National Bank of Southern Africa Ltd v East Coast Design CC* 2000 (4) SA 137 (D). *Perry NO* supra
[147] D Visser (Note 72 above; 174). J du Plessis (Note 67 above; 56).
[148] *Glenrand MIB Financial Services (Pty) Ltd* supra at [16]. *Buzzard Electrical (Pty) Ltd* supra. G Bradfield, et al. (Note 10 above; 1083). D Visser (Note 72 above; 165 and 193). J Du Plessis (Note 67 above; 48).
[149] *Glenrand MIB Financial Services (Pty) Ltd* supra at [16]. *Buzzard Electrical (Pty) Ltd* supra.
[150] *Glenrand MIB Financial Services (Pty) Ltd* supra at [16]. *Buzzard Electrical (Pty)* supra.

The reason an employer obtains any enrichment indirectly from the subcontractor can be said to be without any legal cause or reason. There is no legal cause because there is no contractual obligation between the employer and subcontractor or emerging situation (as would be the case in *actio negotiorum gestorum utilis*), requiring the latter to confer on the former, any benefit. However, because this requirement is a question of facts, it can be said that the legal ground for enrichment of the employer indirectly originates from the contract between the main contractor and subcontractor, emanating from the separate contract between the employer and the main contractor and the subcontractor. As required, a direct cause of action between the employer's enrichment and the subcontractor's impoverishment does not exist.

In the addition to having satisfied all the essential requirements in order to establish an unjustified enrichment claim, it would further be assessed whether there are any other remedies available to the claimant.

5. THE EXTENT OF LIABILITY

Once all the requirements for a claim based on unjustified enrichment have been met, a plaintiff will be permitted to proceed by way of an enrichment action. Such claimant will be entitled to recover the amount by which they have been impoverished or by which the defendant has been enriched, whichever is the lesser.[151] Liability is usually fixed. Hence, the amount the claimant may be entitled to is calculated and determined with reference to the time or date the action was instituted of the action.[152] Therefore, where the derived benefit has since diminished, liability is reduced,[153] and the plaintiff will be compensated for less than the amount by which that their estate was impoverished.[154] Further, it is for this reason that the defendant will not be liable for the benefits the defendant could have derived but did not obtain. However, liability may be fixed at an earlier date under certain circumstances.[155]

6. ISSUES WITH UNJUSTIFIED ENRICHMENT LIABILITY

[151] The double-ceiling or double-cap rule. D Visser (Note 72 above; 161). J Du Plessis (Note 67 above; 380).
[152] *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA) 247. *Perry NO* supra at [29]. G Bradfield, et al. (Note 10 above; 1048-1049). J Du Plessis (Note 67 above; 378).
[153] *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A). G Bradfield, et al. (Note 10 above; 1049). J Du Plessis (Note 67 above; 382).
[154] D Visser (Note 72 above; 163).
[155] G Bradfield, et al. (Note 10 above; 1050). J du Plessis (Note 67 above; 384-386).

Although there has been a judicial declaration of a willingness to recognise a general action unjustified enrichment action,[156] South African law does not yet recognise that a claimant may succeed in such an action if they are able to satisfy the general requirements for liability based on unjustified enrichment.[157] The South African legal position remains that a plaintiff must rely on and bring their claim under an established, specific enrichment action.[158] In proving the elements of a specific enrichment action, the plaintiff usually also meets those of general unjustified enrichment liability, but this is not invariably the case.[159] Hence, at present, the unjustified enrichment action cannot stand on its own, but the plaintiff is required to institute one of the specific actions. This has the following consequences:

a. The action is an unclear and uncertain one.[160] Until the scope of the enrichment action and the requirements of said action are clearly and decisively defined, it would be a discretionary claim, giving rise to uncertainty.[161] This is against the rule that the law must be clear, unambiguous and applied equally. The authority supporting recognition of a general unjustified enrichment action does not explain how an action would operate and impact on existing unjustified enrichment liability.[162] This omission is detrimental to the use of the action, and it is likely that such a general action will not be recognised in the future,[163] even in cases where its scope should potentially be necessary. In the result, until a general unjustified enrichment action can be presented more clearly and in a logical manner,[164] it does not exist and is not available for a subcontractor to institute as a substantive action. The subcontractor must seek to bring their claim under the existing, specific actions recognised in South African law.

b. Recognition of a general action of unjustified enrichment, which could potentially allow a subcontractor to claim payment from an employer, is an undesired expedition.[165] It is therefore argued that, even if a general unjustified enrichment action were to be recognised in South African law, this would not ameliorate the position of a subcontractor facing such a predicament. Furthermore, and most importantly, even if

[156] *Nortje* supra at 139-140. *McCarthy Retail Ltd* supra at [9, 15-25]. J Du Plessis (Note 67 above; 4).
[157] J du Plessis ibid 4.
[158] J du Plessis ibid 2.
[159] J du Plessis ibid 3.
[160] J du Plessis ibid 8.
[161] *Nortje* supra at 139-140. J du Plessis ibid 4.
[162] J du Plessis ibid 6.
[163] J du Plessis ibid 9.
[164] J du Plessis ibid 11.
[165] See absence of a defined content and scope of a general action, and the value judgment determination of 'unjustifiedness' in J du Plessis ibid 2-3, 6-10, 20, 30, 56, 301. See also the issue of uncertainty in D Visser (Note 72 above; 1044).

such a general action could be recognised and used by the subcontractor, its claim would still fail. Given that the subcontractor would not be able to meet the third and fourth requirements for unjustified enrichment liability, namely, that the defendant's enrichment must be at the expense of the plaintiff and that there is no legal ground for the enrichment, the subcontractor's claim would not succeed. As noted above, in a claim involving more than two parties, specifically in relation to a subcontractor, the issues are more complex and satisfaction of all the requirements fails, thus, the subcontractor's claim fails.

7. SPECIFIC ACTIONS IN TERMS OF UNJUSTIFIED ENRICHMENT LIABILITY

Cases in which one person enriches another by preserving, repairing or improving the latter's property without being authorised to do so falls under the scope of unauthorized improvements. The Roman law generally did not approve restitution claims arising from improvements. However, the Roman-Dutch law was sympathetic to the improver and modern South African law recognised same.

In all cases involving enrichment liability, the improver must bring their claim under a specific action or indicate that liability should be imposed in a new situation. The improver must meet all the general requirements for enrichment. Having considered enrichment liability, it is fitting to turn our attention to the right of lien.

8. THE RIGHT OF LIEN

As already stated in the previous chapter, in terms of the doctrine of contractual privity, no person who is not a party to a contract will incur any liability or derive any benefit from the terms of that contract. However, the right of lien may serve as an alternative remedy[166] to the above predicament faced by the subcontractor.

9. A HISTORICAL OVERVIEW OF A LIEN

Many people in the trade or business industry often rely on the right of lien as a means of security for the services rendered on the property of another.[167] For example, a lien could be

[166] DG Cracknell (Note 8 above; 237, 239-240).

[167] R Morson, A Meinesz and A Forman. *Construction and Projects: South Africa.* Bowman Gilfillan. (2009) http://www.bowman.co.za/FileBrowser/ArticleDocuments/PLCCross-boarderconstruction_1.pdf. (Accessed: 15 September 2015) 7. S Srinivasan. "Negative Lien on Shares of Companies - How Effective In Practice" (2015)

used by a warehouse owner for unpaid storage rent, a motor vehicle mechanic for repairs done on one's motor vehicle, as well as attorney's retention of client files for their fees.[168]

Lien is a French word meaning "knot or binding"[169] brought to Britain with the French language during the Norman Conquest in 1066.[170] "The statement that someone's property is "tied up" describes the effect of a lien on the property."[171] Different legal systems view liens in different ways. However, the common problem with each is the lack of theoretical foundations in the law of lien.[172]

According to Wiese, in Roman law, a lien was not an independent legal institution.[173] The maxim *in omnibus quidem, maxime tamen in iure, aequitas spectanda est*[174] was used in reference to the concept of a lien as it is founded on equality.[175] The concept of *Retention* was the appropriate measure to secure one's due compensation. Retention in Roman law refers to "holding back of a thing in order to legally institute compensation."[176] The applicable maxim in such an instance would be *minus est actionem habere quam rem*[177] as control over one's property while waiting for them to institute a claim to regain possession of it would be better than yourself instituting a restitution claim against them as a creditor.[178] What would then follow is that by *rei vindicatio*,[179] the debtor would be in a position of resistance against the holder's possession of the property by applying the *exceptio doli*[180] defence, and the creditor could retain the thing until their claim was settled.[181] A court could

34(1). *NIRC–ICSI Insight Newsletter*. 8. https://www.icsi.edu/portals/70/nljan2015.pdf. (Accessed: 28 September 2015).

[168] PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 414-415).

[169] Encyclopedia.com. *West's Encyclopedia of American Law* (2005). http://www.encyclopedia.com/topic/lien.aspx. (Accessed: 21 August 2015).

[170] Farlex. *The Free Dictionary* (2003). http://legal-dictionary.thefreedictionary.com/lien. (Accessed: 21 August 2015).

[171] BG Brazil. *Non-Traditional Remedies to Demolish-By-Neglect: Private Sector Incentive, Public Sector Municipal Abatement and Other Approaches*. University of Georgia (2003) 21.

[172] M Wiese. *Liens: a closer look at some conceptual foundations.* Paper presented at the International Property Law Conference. (27-29 October 2010). UNISA, Pretoria. 88.

[173] M Wiese (Note 172 above; 82).

[174] Translated, the maxim means, "In all affairs, and principally in those which concern the administration of justice, the rules of equity ought to be followed."

[175] Paul in M Wiese. (Note 172 above; 82).

[176] M Wiese. "The Legal Nature of a Lien in South African Law." (2014) 17 (6) *PER* 2528.

[177] The maxim means, "It is less satisfying to have an action than to be in control of a thing." VG Hiemstra & HL Gonin. *Drietalige Regswoordeboek.* (1992) 230.

[178] M Wiese (Note 176 above; 2528).

[179] A legal action by which the plaintiff demands that the defendant return a thing that belongs to the plaintiff. The action may only be used if the plaintiff owns the thing and the defendant's withhold obstructs the plaintiff's possession of their thing.

[180] An exception a defendant can raise whereby they raise the defence that the plaintiff has not acted in good faith.

[181] M Wiese (Note 176 above; 2528).

then make an order to either provisionally dismiss the *rei vindicatio* and therefore the debtor would be required to first perform their obligation(s), which in such an instance would be payment of the outstanding amount, before they may reinstitute the *rei vindicatio*, or alternatively, the court may allow the *rei vindicatio* to succeed on condition that the thing, in the creditor's possession, is returned once the debtor fulfils their obligations.[182]

It is therefore apparent that in Roman law, the purpose of a lien was to serve as security by retention of the thing, to consequently ensure that performance by the debtor is satisfied against the creditor's claim.[183]

According to Wiese,[184] French law also recognised liens. This was in relation to both movable and immovable property, in specifically defined circumstances.[185] Under such law, a lien arose either as a matter of law or out of an agreement between parties to the agreement.[186] The French legal system initially did not accord a lien the right of preference but later, all liens were granted preference if a direct connection between the claim and the thing retained was established.[187]

In Dutch Law, a *retentierecht* used to be described as the capacity merely to retain the thing.[188] The Burgerlijk Wetboek[189] categorised a lien under proprietary rights[190] and has recently been described as a "hybrid legal institution with characteristics of both real and personal rights as a species of the kind of opschortingsrechten."[191] The old Burgerlijk Wetboek separated liens into two categories, namely; the *verbintenisrechtelijke retentierechten*, the debtor-creditor lien, and the *zakenrechtelijke retentierechten*, a real lien.[192] Conversely, in terms of the current Burgerlijk Wetboek, Dutch law no longer distinguishes between two types of liens.[193] Ultimately, the lien, under Dutch law also refers

[182] M Wiese (Note 172 above; 2528-2529.
[183] M Wiese (Note 172 above; 82).
[184] M Wiese ibid. 83.
[185] M Wiese ibid 83.
[186] M Wiese ibid 83.
[187] M Wiese ibid 83.
[188] M Wiese ibid 81.
[189] The Civil Code of the Netherlands of which its early versions were largely based on the Napoleonic Code and the Dutch Civil Code fundamentally reformed in 1992, dealing with the rights of natural persons, legal persons, patrimony and succession.
[190] The right of ownership in relation to real property or a business.
[191] *Opschortingsrechten* is the indiscriminate classification of all liens with real operation. M Wiese (Note 172 above; 83).
[192] M Wiese ibid 83).
[193] M Wiese ibid 81.

to the right to withhold a thing until compensation is paid for the work done or money spent on that thing.[194]

Frequently, the legislation of a particular state contains provisions on liens. Most, if not all, of the various liens accepted and endorsed by that specific state are listed under such provisions.[195] Where no lien in terms of a statute is applicable within a particular area of law or matter, common law rights of lien may be applicable.

10. THE RIGHT OF LIEN IN TERMS OF SOUTH AFRICAN LAW

South African law in relation to liens is mainly based on Roman Dutch law and is similar to the Dutch legal position before the current Burgerlijk Wetboek.[196] Apart from common law liens, to be discussed below in this chapter, there are also other statutory liens recognised in South African law which are also of importance to their particular trade of business. However, such liens are not within the scope of this dissertation and will, therefore, not be discussed any further. In discussing the lien with regard to the employer, main contractor and subcontractor construction work relationship, such a lien will be referred to as the builder's lien. This specific term will be used for the reason that the lien is discussed specifically in relation to construction work performed within the employer, contractor and subcontractor relationship context. Accordingly, the term builder's lien is the term used in the relevant Canadian legislation with regard to a lien in the construction context.

11. THE LEGAL NATURE AND SCOPE OF A BUILDER'S LIEN

In South African law, a lien is defined as a right of retention available to a person who has increased the value of another's movable or immovable property.[197] Hence, it is a right enforced by retention of property or funds for payment of a debt or an amount owed for services rendered. It enables the person in possession of an object belonging to another, to remain in possession thereof until the former is compensated for expenses incurred in relation to the thing. A lien applies mainly where improvements are made to another's property or expenses are incurred in dealing with the property, allowing such lien holder a

[194] M Wiese ibid 81.
[195] JD Fullerton (Note 11 above; 514).
[196] M Wiese (Note 172 above; 81 and 84).
[197] *United Building Society v Smookler's Trustees and Golombick's Trustees* 1906 TS 626-627. *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 264 (AD) 270. *ABSA Bank Limited t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 (1) SA 939 (C). KM Kritzinger. *Principles of the Law of Mortgage, Pledge Lien* (1999) 62. PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 412). G Bradfield, et al. (Note 10 above; 661). AJ Van der Walt and G Pienaar. *Introduction to the Law of Property.* 7ed (2009) 279. J du Plessis 289.

right to retain possession of the property.[198] It is thus a form of security to ensure counter performance for enhancement of the value of another's property.[199] For instance, where one person does work on another person's property and he is not remunerated for such work done, the former is entitled to a lien over the latter's property, which allows them to withhold such property until restitution is made to the former.

The right of lien generally arises by operation of law,[200] but in some cases it is created by an express contract.[201] In both instances, a lien operates as a means of security for the lien-holder, for the 'money or money's worth' expended in the property of another.[202] This right attaches to a specific property to secure payment of a debt owed to one by the owner of such property. The existence of a lien is therefore dependent on the existence of a debt.[203] Consequently, the lien is discharged only once the lien-holder's claimed restitution is settled,[204] and once paid, the lien-holder would no longer have a right to be in possession of the property.

South African law distinguishes between two common law categories of lien, namely a debtor-and-creditor lien and an enrichment lien.[205] A debtor-and-creditor lien is occasionally referred to as a personal right.[206] This lien secures a claim arising from a contract[207] between the parties to the contract.[208] It therefore arises through express or implied consent of the owner, by contract, for an expense to be incurred in relation to the property.[209] In such instance, the property owner is the debtor and the lien-holder is the creditor. Because

[198] M Havenga, et al (Note 33 above; 364).
[199] *Pheiffer v Van Wyk* (267/13) [2014] ZASCA 87 (30 May 2014) [11]. KM Kritzinger. (Note 197 above; 69).
[200] M Havenga, et al (Note 33 above; 364). KM Kritzinger. (Note 197 above; 62). PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 413). G Bradfield, et al. (Note 10 above; 661). M Wiese (Note 2 above; 490).
[201] *ABSA Bank Limited t/a Bankfin* supra. PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 412). M Wiese (Note 2 above; 490).
[202] *United Building Society* supra at 627-628. *Glaser and Sons (Pty) Ltd v The Master and Another NO* 1979 (4) SA 780 (C) 781. PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 412).
[203] AJ Van der Walt and G Pienaar (Note 197 above; 316).
[204] PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 418). *United Building Society* supra at 631. *Brooklyn House Furnishers (Pty) Ltd* supra at 271.
[205] *Bombay Properties (Pty) Ltd* v *Ferrox Construction* 1996 (2) SA 853 (W). *Sandton Square Finance (Pty) Ltd and another* v *Vigliotti & others* 1997 (1) SA 826 (W). *ABSA Bank Limited t/a Bankfin* supra. *Pheiffer* supra at [17]. G Bradfield, et al. (Note 10 above; 662). PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 412). AJ Van der Walt and G Pienaar (Note 197 above; 316, 317). M Wiese (Note 176 above; 2527).
[206] KM Kritzinger. (Note 197 above; 62, 63). P Millin and G Wille. *Wille and Millin's Mercantile Law of South Africa*. 17ed (1975) 329. M Wiese (Note 2 above; 488).
[207] Express or implied by a general or particular usage of trade.
[208] *Scholtz v Faifer* 1910 TPD 243. *Glaser and Sons (Pty) Ltd* supra at 789. *Pheiffer* supra at [11]. PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 412-413). G Bradfield, et al. (Note 10 above; 663). *Glaser and Sons (Pty) Ltd* supra at 789.
[209] P Millin and G Wille (Note 206 above; 329).

personal rights establish a legal relationship between two parties,[210] a debtor-and-creditor lien by its nature, attaches to the person's capacity when an agreement by contract is established between contracting parties[211] for work to be done, to perform their required obligations in terms of the contract.[212] The right of lien is a personal right which the creditor holds to enforce against the debtor is the duty which the debtor owes to the creditor to pay the contract price. Moreover, such a category of rights is limited as it is enforceable only against a specific individual person, the debtor to a contract.[213] This is because it secures a claim arising from a contract which one enters into and binds themselves to as a party to the contract. It is consequently clear that when a person seeks to exercise a right to retain property by means of a debtor-and-creditor lien for labour expended on a particular property, there must have been an existent contractual legal relationship between the parties. Accordingly, the debtor-and-creditor lien falls outside the ambit of this dissertation and no further discussion of same shall be explored further.

In contrast, the enrichment lien is considered a real right.[214] It is conferred on a person regardless of a contractual relationship between the parties.[215] It is based on the equitable principle of unjustified enrichment.[216] This lien is not created by a contract.[217] A person, who is not a party to a contract but enhances the value of an owner's property, will nevertheless be entitled to an enrichment claim over that property, for the improvements made to the property. This would be the case, irrespective of any prior contractual relationship between such persons. Consequently, the right to a lien would, nonetheless, be effective. This type of lien is a real right in the sense that a title vests with a person over property.[218] Since a real right establishes a legal relationship between a person and property, a relationship between two persons, the property owner and the enhancer, is established in relation to the enriched property. Furthermore, a real right is an absolute one which can be enforced against anyone

[210] S Van der Merwe, et al (Note 34 above; 3). G Bradfield, et al. (Note 10 above; 429). H Mostert, A Pope and PJ Badenhorst. *The Principles of the Law of Property in South Africa*. (2010) 45.
[211] H Mostert, A Pope and PJ Badenhorst ibid 44.
[212] PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 415). AJ Van der Walt and G Pienaar (Note 197 above; 317).
[213] M Havenga, et al (Note 33 above; 364-365). PJ Badenhorst, JM Pienaar and H Mostert ibid 51-53).
[214] *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 3 642 (A).
[215] PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 412).
[216] That nobody should become enriched at the expense of another. That is to say one should not become wealthier through the loss and injury of another. *United Building Society* supra at 623-631. *Brooklyn House Furnishers (Pty) Ltd* supra at 271B-C. *Glaser and Sons (Pty) Ltd* supra at 781. *Singh v Santam Insurance CO. Ltd* [1997] 1 All SA 525 (A). PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 413).
[217] *Glaser and Sons (Pty) Ltd* supra at 789. *Pheiffer* supra at [12].
[218] G Bradfield, et al. (Note 10 above; 429). H Mostert, A Pope and PJ Badenhorst (Note 210 above; 45).

in the whole world.[219] This means that the holder of an enrichment lien is entitled to exercise such a right not only against a particular employer, owning the property, but also against any person who holds or makes claim to that property. Essentially, to secure payment by exercising an enrichment lien in the event where one has done work on another person's property, success in the defence against the *rei vindicatio*, the right of lien is enforced.

In light of the distinction between the two categories of lien, although the subcontractor is excluded from the debtor-and-creditor lien, he may still be entitled to the enrichment lien. The enrichment lien could be available to the subcontractor as it does not require a prior contractual relationship between themselves and the employer at the time they labour on the property, in terms of their contract with the main contractor. In effect, the subcontractor would be entitled to invoke the enrichment lien as a security right against the employer in protection of their financial interests for work done on the employer's property.

The enrichment lien is further divided into an improvement lien and a salvage lien.[220] This categorisation is dependent on what has been done to the property, resulting in unjustified enrichment.[221] The improvement lien ensures payment for useful expenses incurred in improving the property[222] but not essential for the maintenance thereof.[223] This means that the conducted work which gave rise to the lien was not necessary for the preservation of the property thus not essential to its continued existence, but rather an improvement that increases the property's market value.[224] The salvage lien, on the contrary, ensures payment for necessary expenses incurred for ensuring the continued existence of the property[225] in its present form.[226] Such expenses are that which the property requires to be incurred to preserve, protect or restore it, and without such improvements, it may be destroyed, become damaged or useless.[227] Therefore, to constitute an enrichment lien, the improvement or salvage, must be to the owner's benefit as it is either necessary or useful.[228] And accordingly,

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[219] *Glaser and Sons (Pty) Ltd* supra at 787. PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 51-53). G Bradfield, et al. (Note 10 above; 428).
[220] P Millin and G Wille (Note 206 above; 332).
[221] AJ Van der Walt and G Pienaar (Note 197 above; 318).
[222] G Bradfield, et al. (Note 10 above; 662).
[223] PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 414).
[224] *Brooklyn House Furnishers (Pty) Ltd* supra at 270-271. P Millin and G Wille (Note 206 above; 334). AJ Van der Walt and G Pienaar (Note 197 above; 318).
[225] Whether the expense(s) incurred is necessary is a dependant on the circumstances of the case. G Bradfield, et al. (Note 10 above; 662).
[226] P Millin and G Wille (Note 206 above; 334). PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 413).
[227] P Millin and G Wille ibid 334. PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 613). AJ Van der Walt and G Pienaar (Note 197 above; 318).
[228] P Millin and G Wille (Note 206 above; 334).

luxurious expenses[229] incurred in improvement to the property in order to lavish it[230] are not essential but merely desired. Therefore, such an expense will not fall within the scope of an enrichment lien,[231] and thus no claim will be established.

For a subcontractor to exercise an enrichment lien over the property of the employer, it is essential that the work done on the employer's property falls in either of the two categories of enrichment lien. It means that the work that the subcontractor engages in, regarding the property, must either be useful in terms of maintenance of the property or be necessary for the continued existence of the property. Therefore, where the enrichment to the property is a mere luxury, an enrichment lien cannot be exercised.

The lien attaches only to the specific property or part of the property on which the expense(s) was incurred on,[232] and covers the amount due to the lien holder.[233] Therefore, it does not exist over other properties owned by the debtor.[234] This is the case even if the creditor has such other property in their possession.[235] Only the specific property which the subcontractor works on may be used as a means of securing payment for work done on that particular property.

12. THE ESTABLISHMENT, EXISTENCE AND EXTINCTION OF A LIEN

Having explained the right to lien, it is then necessary to briefly discuss how this right is acquired and terminated. It is essential to take note of the following foundations as they are significant to ensuring a valid lien that will result in the desired consequence of being reimbursed the enrichment amount. In addition, the explanation of these basic principles will further reveal the limitations of the right as far as it relates to the subcontractor.

To create a valid and enforceable lien, it is essential that five requirements are satisfied:

First, the person claiming a lien and withholding the property (creditor) must retain the property with the purpose of securing payment of the principal debt owed to them by the

[229] *Impensae voluptuariae*.
[230] *Glaser and Sons (Pty) Ltd* supra.
[231] AJ Van der Walt and G Pienaar (Note 197 above; 318). PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 414).
[232] P Millin and G Wille (Note 206 above; 331). G Bradfield, et al. (Note 10 above; 664).
[233] Whichever is the lesser between the owner's actual enrichment and the lien-holder's expenditure. P Millin and G Wille ibid 339. PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above).
[234] P Millin and G Wille (Note 206 above; 331).
[235] P Millin and G Wille ibid 331. G Bradfield, et al. (Note 10 above; 664).

owner of the property (debtor).[236] The reason for the creditor refusing to return the debtor's property must be to make the debtor pay the outstanding principal debt owed to the creditor and not for another limited or specific inconsistent purpose.[237] Therefore, to have a valid builder's lien, the subcontractor must retain the property with the sole purpose of thereby securing payment by the owner of the expense of bringing about useful or necessary improvements to the property or the extent to which the value of the property was enhanced

Secondly, the debt giving rise to the right of lien should arise from a contract between the parties or unjustified enrichment which resulted in a benefit for the debtor and incurred the creditor an expense.[238] Therefore, it is required that the creditor must have expended money or labour on the creditor's property,[239] and consequently, the owner of the property must be enriched. As a result of such dealings, the outstanding amount must be due to the creditor, not merely owing or accrued, as a result of necessary and useful improvements that maintain or that enhanced the market value of the property.[240] In order for the subcontractor to correctly hold a builder's lien the enrichment must be the result of a direct enriching act between the employer and subcontractor, or from improvements to the employer's property resulting in the benefit being conferred on the employer to the subcontractor's detriment.

Thirdly, the owner of the property must be claiming back the property from the person withholding their property.[241] Enforcement of the lien must be created by the factual situation that the creditor refuses to return the property to the debtor and the debtor uses the *rei vindicatio* for the return of their property.[242] In this regard, to enforce a builder's lien, the employer must be seeking to regain control over their property which a subcontractor is holding.

Fourthly, the creditor must retain possession of the debtor's property which has been improved or the value of which has been enhanced.[243] It is necessary that the party claiming the lien should have continuous control of the property in question.[244] This is because the

[236] AJ Van der Walt and G Pienaar (Note 197 above; 321). PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 41-418).
[237] M Muller. "Liens over property: Construction law." (2007) 7 (10) *Without Prejudice* 32.
[238] AJ Van der Walt and G Pienaar (Note 197 above; 321).
[239] G Bradfield, et al. (Note 10 above; 664).
[240] *FHP Management (Pty) Ltd v Theron and Another* 2004 (3) SA 392 (C).
[241] AJ Van der Walt and G Pienaar (Note 197 above; 321).
[242] PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 417).
[243] G Bradfield, et al. (Note 10 above; 664).
[244] AJ Van der Walt and G Pienaar (Note 197 above; 321). PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 416).

right to exercise a lien comes into existence when the debtor takes possession of the property.[245] It is therefore not possible to exercise a valid lien if possession of the property remains with the debtor.[246] Such possession may be actual possession or constructive possession of the property. If the creditor at any time relinquishes possession of the property then the lien terminates.[247] Hence, the lien-holder must at all times have possession of the property. For the subcontractor to hold and enforce a valid builder's lien, they must hold uninterrupted physical possession or control of the employer's property and at no point return or abandon their holdership.

Lastly, the court must be convinced that it would be justified, in the circumstances, that it should recognise the lien.[248] It is therefore necessary for a lien to be justified, namely, indebtedness by contract, alternatively, useful or necessary improvements made to the property of another.[249] In addition, for a court to grant a lien over the property, the court must find it fair to require the debtor to fulfil their payment obligation.[250]

Like any other real security right, a right of lien may be terminated in various ways.[251] If the creditor loses possession of the property then the right of lien ceases to exist.[252] This is unless the deprivation is caused by undue means of the debtor, such as force, threat or fraud.[253] In such an instance, the debtor's inappropriate conduct would result in spoliation and would accordingly require the court to order that they return possession of the property to the creditor.[254] The lien may also be terminated by waiver or be lost by any act or agreement between the parties, by which it is surrendered, or becomes inapplicable. The lien does not automatically revive if the contractor relinquishes its possession and subsequently regains it. However, possession is not lost where a contractor exercising a lien over a property allows the owner of the property access for limited purposes.[255] Furthermore, if the debtor pays and satisfies a lien, or provides adequate security for payment of the debt, the creditor no longer has a right to possess the debtor's property and therefore the lien is terminated.[256]

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[245] *Glaser and Sons (Pty) Ltd v The Master* supra at 788.
[246] P Millin and G Wille (Note 206 above; 329). Van Niekerk v Van den Berg 1965 (2) SA 525 (AD) 539-541.
[247] P Millin and G Wille ibid 336. PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 416).
[248] *United Building Society* supra at 631. G Bradfield, et al. (Note 10 above; 662). AJ Van der Walt and G Pienaar (Note 197 above; 321).
[249] PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 418).
[250] PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 418).
[251] G Bradfield, et al. (Note 10 above; 665).
[252] P Millin and G Wille (Note 206 above; 336).
[253] P Millin and G Wille ibid 336.
[254] P Millin and G Wille ibid 336.
[255] *Wightman v Headfour* (Pty) Ltd 2008 (3) SA 371 (SCA).
[256] G Bradfield, et al. (Note 10 above; 665).

Once the subcontractor has satisfied all the requirements for a valid builder's lien, to secure their claim, such a subcontractor must take care not to lose possession over the property, waive or surrender their right to the lien. Furthermore, the subcontractor must make certain that their builder's lien remains applicable until they have been paid. And consequently, on satisfaction of the enrichment, the subcontractor's lien over the property will terminate, and possession will return to the employer.

13. OBSERVATION OF THE RIGHT OF LIEN

It is evident from the above that a builder's lien involving a subcontractor is more complex and may consequently become a more vigorous, complicated and burdensome process for the subcontractor.

With regards to the five requirements of establishing a valid lien, where a subcontractor is able to satisfy them, the process of doing so creates a burden on the subcontractor after the work has been done. This is a fundamental issue as time and money are very crucial features in the construction industry. From the onset, it is the sole duty of the subcontractor to ensure that they know every aspect of how to acquire a legally valid builder's lien. It should be the employer and main contractor's shared responsibility to ensure that the main contractor fulfils their contractual obligations of paying the subcontractor. When a person has been enriched, it would be apparent to a reasonable person that some reciprocal compensation should be made. This is irrespective of fact that the benefit did not emanate directly from the direct / initial contract but incidentally related to the initial contract. This therefore means the employer, as the owner of the property receiving an enriching benefit, should also have a burden of ensuring that their part of the enrichment, including indirect ones, are protected from malice subcontractors. Given the current legal position, practically, under the common law lien the employer may be enriched, and such may be at the expense of the subcontractor. The effect of the current, common law position is that the employer may be unduly enriched at the expense of the subcontractor if the subcontractor is unwilling or unable to exercise the lien.

Even if a subcontractor was able to establish a lien against the employer's property, the subcontractor may also be unwilling to enforce same. There are different reasons why a subcontractor may be unwilling or unable to establish and enforce a lien, as touched on in Chapter 1. In theory, subcontractors may have this protective remedy to assist them in the

event of non-payment, however, in reality it is not always practically feasible.[257] The effect of the weak bargaining powers of a subcontractor should not be taken lightly. It plays a very vital role in the subcontractor's long-term financial position and inevitably, their continued existence. As previously stated, the subcontractor typically has to play by the terms and conditions between the main contractor and employer[258] as most of the lucrative work in the construction industry may at times be limited or hard for them to secure on their own, with a direct contract with the employer. Therefore, when an opportunity presents itself to take on a project, even if it is by subcontracting, the subcontractor will accept almost any profitable construction contract that they are offered, for financial sustenance of their business. This may therefore, at most times, mean that the only contract that they enter into is that between themselves and the main contractor. Hence, there is no contractual relationship between the employer and the subcontractor. Ultimately, it is unavoidable that in all its transactions, the subcontractor relies on the fairness of the employer and main contractor for its long-term success. This is a very undesirable position that the subcontractor is faced with and placed in. Failure to maintain a good relationship with one another may be to the subcontractor's financial detriment. As a result, the subcontractor may then have to exercise a builder's lien and get involved in a legal action against the employer and main contractor. Where the subcontractor is faced with numerous disputes requiring them to hold several liens, over a period of time, this could lead to them being labelled as serial lienholders in the industry. Although this is not the subcontractor's fault, but that of the breaching parties' wrongdoing, it may consequentially result in various other construction companies avoiding working with them. This is an even more unfavourable situation as businesses in the construction industry are very much interdependent on each other. It is for such a reason that a subcontractor may be unwilling to exercise a lien over the employer's property.

The subcontractor may further be unwilling or unable to exercise a lien over an employer's property because in order for the lien to be enforced, it requires the employer, as owner of the property, to claim the *rei vindicatio* to regain possession of their property. This would mean that if the employer takes the matter to court, the subcontractor would have to go before the court in order to defend themselves and justify their hold over the property. Holding possession of the debtor's property on its own may be costly to the subcontractor, and then in addition, the subcontractor is still further required to enter court proceedings which can also be very costly. The reason a subcontractor holds the lien against the employer's

[257] M Furmston (Note 7 above; 29).
[258] Construction Industry Development Board (Note 27 above: 2). M Wiese (Note 2 above; 11).

property, is to attempt to resolve their potentially detrimental financial position expediently out of court. However, the more they seek to hold onto their lien to secure their compensation and avoid financial loss, the more costs they incur.

The common law builder's lien may also not be an appropriate remedy for the protection of a subcontractor's financial interests if security has been tendered by the employer[259] to the main contractor. It is subject to the court's determination to find it fair to grant the lien.[260] This means that, having satisfied the requirements of a valid lien, a court may still, on the basis of fairness most likely, find that it is not justified in the circumstances that it recognise the lien. In accordance with the fourth requirement for an enrichment lien, the subcontractor cannot insist on exercising a lien against such employer's property because as the *Buzzard* case[261] rightfully found, it would not be fair and cannot be justified that the employer be required to pay more than they contracted for and in excess with the main contractor. Therefore, a court would have good reason not to recognise and uphold a lien by a subcontractor to secure payment from an employer. Unless specifically included as a contractual term between the employer and main contractor, which is not the case with the domestic subcontractor relationship which this dissertation's focus, the subcontractor is not entitled to any lien. The outcome of such an exclusion could in certain circumstances yield unfair and injurious results for the subcontractor and present financial challenges to the subcontractor's continued existence. As the right of lien would be inapplicable to the subcontractor, they would have to return possession of the property to the employer even though they have not been compensated. Ultimately, the subcontractor suffers an even greater loss.

Of further concern is that a construction contract may contain a clause waiving the right to hold a lien over the employer's property in order to secure payment. Although a contractor would normally only waive such a right if an alternative security has been provided, it needs to be borne in one's mind, and as already stated, that the subcontractor will take almost any contract just to obtain an income. Therefore, they may still be influenced by the fear of not obtaining the contract if they object to such terms. A party must carefully read and accept

[259] *Sandton Square Finance (Pty) Ltd v Vigliotti* 1997 (1) SA 826 (W) in M Muller. "Liens: Marketplace" (2007) 51 (11) *Construction world* 4.
[260] Based on various factors such as the owner's financial position, whether the owner intends to personally use the property or to sell it and whether the enriching factor can be removed without damage. *United Building Society* supra at 631. G Bradfield, et al. (Note 10 above; 662).
[261] *Buzzard Electrical (Pty) Ltd* supra.

the terms of a contract with understanding of consequences and potential risks associated with the transaction and that may befall them. However, such a clause is protective of the dominant parties in the construction transaction. Given the vulnerable position of the subcontractor, such an exemption to recourse is unfair. Ultimately, this exemption could lead to a subcontractor having no remedy at all against a defaulting counterparty. The subcontract is therefore left destitute and without appropriate protection and a remedy to secure payment for their expended work, causing them a loss.

14. CONCLUSION

The notion of exercising a lien over another's property in order to secure payment of a debt is long-established. A lien can also function as a substitute for security for payment of a debt. However, the subcontractor cannot exercise a lien over the property pending payment by the employer. The employer has no duty to pay money to the subcontractor because no contractual nexus exists between them. In light of the limits that still exist for the subcontractor attempting to use the builder's lien to deal with their predicament, it is clear that there may be in fact no remedy for the subcontractor in ascertaining compensation for the work they have done on the employer's property, pursuant to its contract with the main contractor. The need for an intervention relating to the builder's lien in the South African legal context is supported by the above conclusions. Since this dissertation aims to illustrate that an alternative measure is possible, it is important that it looks at and assesses the position and remedies in other jurisdictions, in this situation. The following chapter will deal with examples of foreign legislation affording protection to subcontractors in the construction industry.

CHAPTER 4: OVERVIEW OF THE LEGISLATED BUILDER'S LIEN IN OTHER JURISDICTIONS

1. INTRODUCTION

As stated in the first chapter, no person who is not a party to a contract will incur any liability or derive any benefit from the terms of that contract. As has emerged from the previous chapters, South African law does not provide protection for the construction subcontractor in the event of its non-payment by the main contractor of the contract price. In this context, the subcontractor will not have an unjustified enrichment action against the owner of the property on which he worked and, consequently neither may it exercise an enrichment lien over the work site in order to secure payment by the owner. This makes it clear that an alternative, perhaps statutory, intervention should be sought.

Having regard to the construction subcontractor's difficulty in acquiring a lien over an owner's property without having had a contract with the owner, this chapter now seeks to consider the protection afforded, if any, in other jurisdictions to deal with the subcontractor's position.

Different jurisdictions apply various statutory measures to approach the matter of a construction subcontractor's lien by protecting them and assisting them to acquire their deserved remuneration. In this chapter, legislation applicable in British Columbia and in Quebec will be discussed. These serve as good examples of foreign statutory measures that may provide pointers for possible, appropriate legislative provisions to be introduced into South African law. The two sets of statutory provisions, which will be discussed below, are relatively similar and serve the same purpose. Therefore, they will be evaluated together. Discussion of any individual aspects of each will be conducted only if these are substantially different to what is contained in the other. A brief summary of the Acts' essential provisions, which are limited to what are relevant to this dissertation, will be provided.

Of the numerous Canadian provincial legislative enactments, the Builder's Lien Act of British Columbia[262] is of the most relevance to this dissertation. Therefore, the main focus will be on its provisions. It arguably reflects the best model legislation for South Africa in the current context. Once more sophisticated legislative provisions are developed by other

[262] Builder's Lien Act SBC 1997 c45.

states, these may then possibly also be considered, in future, with a view to further developing the statutory regulation of the position. The British Columbian and Quebec jurisdictions' legislation have been chosen for the reason that they are somewhat unique in the manner in which they address the construction subcontractor's difficulty, which is different to most other jurisdictions. In particular, they are similar to the British Columbian Builder's Lien Act measure and support it being an ideal legislative measure. This illustrates a variety of choice for the proposed statutory regulation, of which certain features of it may be taken and adopted accordingly, alongside the British Columbia desired legislative influence. More so, these comparative states' legal systems are similar to that of South Africa,[263] making the adoption of certain similar laws more systematically logical.

In each of the states to be discussed, the builder's lien is a powerful compensatory measure, particularly in relation to the focus of this dissertation being to ascertain protection for the subcontractor in the construction industry, with regards to the issue of non-payment. Such a legislative provision creates a departure from common law that provides that in the absence of security for a debt obtained by subcontract, no compensation may be obtained by the subcontractor. Such a departure is established in an attempt to protect participants in the construction industry, seen to lack the bargaining power to obtain appropriate and sufficient security for their debts. In each of the states, the builder's lien ranks above almost all other creditors, with the exception, typically, of claims for payment of taxes.

2. HISTORICAL OVERVIEW OF THE BUILDER'S LIEN

The first builder's lien was established in North America.[264] A study of the law applicable in Canadian jurisdictions,[265] reveals that several states provide a statutory solution for the subcontractor's difficulty, which is the focus of this dissertation. All common law provinces

[263] South Africa is a mixed legal system of common law and civil law. Canada (except for the province of Quebec) follows the legal system of common law like South Africa. Similarly, Quebec, like the South African legal system includes a civil law system. This is especially when dealing with private law matters, like that featured in this dissertation of the construction subcontractor. WTQ Tetley. "Mixed jurisdictions: common law vs civil law (codified and uncodified) (Part I)." Rev. dr. unif. 1999 (3). Available at http://www.unidroit.org/english/publications/review/articles/1999-3-tetley1-e.pdf (Accessed 20 September 2016). 592. JPJ Van Vuuren. *Legal Comparison between South African, Canadian and Australian Workmen's Compensation Law* (unpublished LLM thesis, University of South Africa, 2013).

[264] A Mortimore, S Sidhu. *Clark Wilson LLP*. "Overview of the Builder's Lien Act." Available at http://www.cwilson.com/publications/construction/overview-of-the-builders-lien-act.pdf (Accessed: 7 October 2015) 1. Law Reform Commission of British Columbia. "Backgrounder – Report on the Mechanics' Lien Act: Improvements on Land." Available at http://www.bcli.org/wordpress/wp-content/uploads/2009/12/LRC_7-Mechanics_Lien_Act-Backgrounder.pdf (Accessed: 17 October 2015) 2.

[265] Alberta, British Columbia, Manitoba and Saskatchewan.

in Canada now have legislation relating to a builder's lien,[266] extending its protection to subcontractors. Each province has its own Builder's Lien Act, or a similar Act, or one that is an equivalent, but which is named differently.[267] Such legislation is also referred to as the Mechanic's Lien Act or the Construction Lien Act in certain states/provinces.[268] These legislative enactments are aimed at providing a form of financial security for the payment of monies owed to contractors, subcontractors, workers and/or material suppliers who supply labour and/or materials to a construction project.[269]

3. THE BUILDER'S LIEN ACT OF BRITISH COLUMBIA

The British Columbian Builder's Lien Act[270] was enacted in 1997 and became enforceable in February 1998. It is a different, revised and improved form of the previous Mechanics' Lien Act.[271] The Act applies to employers as owners or non-owners, contractors, subcontractors, workers and material suppliers as defined in the Act.[272] In the event of non-payment, it entitles a contractor, subcontractor, worker and material supplier who has expended work and/or services for improvements on the owner's property to claim a lien.[273] Certain Acts exclude architects, engineers and other consultants from making a claim in terms of the Act,[274] however, British Columbia's Act permits claims by them and entitles them to make a claim of lien if they act as a contractor, subcontractor or worker who performs or provides work for the improvement of the property.[275]

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[266] A Mortimore, S Sidhu (Note 264 above; 1).
[267] Builder's Lien Act of Alberta (2000) B-7, Builder's Lien Act of British Columbia [SBC 1997], Builder's Lien Act of Manitoba (1987) C.C.S.M. c. B91, Mechanics Lien Act of Saskatchewan (1986) R.S.S. 1920, c.206 and Construction Lien Act of Ontario (1990) RSO c.C.30.
[268] An example of a few is the Builder's Lien Act of Alberta supra, Builder's Lien Act of British Columbia supra, Builder's Lien Act of Manitoba supra, Mechanics Lien Act of Saskatchewan supra and Construction Lien Act of Ontario supra.
[269] Pushor Mitchell. "Builder's Lien Guide." (2000). Available at http://www.pushormitchell.com (Accessed: 15 April 2015) 1. L Ricchetti, G Rogakos. *McMillan Construction Law.* "Construction Lien Act." (2008). Available at http://www.mcmillan.ca/Files/112339_Construction_Liens.pdf (Accessed: 16 September 2015) 4. A Mortimore, S Sidhu (Note 264 above; 1). Law Reform Commission of British Columbia (Note 264 above; 1).
[270] Builder's Lien Act SBC supra.
[271] Mechanics' Lien Act: Improvements on Land (1972).
[272] Section 1 of the British Columbian Builder's Lien Act SBC supra.
[273] Pushor Mitchell (Note 269 above; 4. EJ Sidnell, R Hird. "Builders' Liens - Lesa Construction Law Seminar." (2009). Available at http://www.lexology.com/(F(BEw2FJy5rTK4kdbQLu71_El9j82pfWQW7df6w5waS66nM9FmtD1Is23iPbbXG6ktmTFrgb-vUthCVqvJp7OiTVaqzQxfk-aRC9GEoWHWPiFgGp3-C2AkMDRei1aG4lQsIXRvC6nQjZnAjqHs7SOt-2KChKyYo0kezBGdQFfB6Ro0MY85MdwoGZo8oiFVSSyNIdKw1_zw8qQ-mG_BYWy-CyOUGkU1))/library/document.ashx?g=7c8d8378-7c5b-4382-b6ff-d2481a1612c1&b=6d62d2f6-d5e2-4231-8f82-8e9ae816688d&noredirect=1 (Accessed: 4 September 2015) 2.
[274] For example, the Builder's Lien Act of Manitoba supra.
[275] Subject to section 2(2). A Mortimore, S Sidhu (Note 264 above; 3).

Guidelines on the Builder's Lien Act illustrate its main purposes.[276] The first purpose of the Act is to provide creditors, as construction project participants, with security for the work done and/or services rendered in relation to the property.[277] In this instance, the contractors, subcontractors, workers and material suppliers who have expended improvements on the property constitute creditors of the employer. Such parties typically lack or have weak bargaining powers in construction contractual undertakings but the Act creates security for their debts[278] by establishing a hierarchy of creditor,[279] with the builder's lien ranking above almost all other creditors.[280] A builder's lien secures a claim for payment of work done on a construction project[281] and therefore this means that the claimant has security for their debt and will most likely receive reimbursement for their work and/or services. Hence, this purpose reflects the precise reason why a claimant seeks to exercise a lien over another's property. The second purpose is that of equity: by ensuring that the property owner does not unjustifiably benefit from work done and/or services rendered on their property without reimbursing such party with their deserved remuneration.[282] This draws back to the point that a lien is based on unjustified enrichment which discourages enrichment of one person at the expense of another. This purpose attempts to maintain fairness between parties in the construction industry. A third purpose, which follows from the first two, is that the Act seeks to create "a pool of funds which will be available to those parties involved in the construction project should any of them not be paid for their work or material."[283] This purpose, if successfully achieved, inevitably fulfils the two latter objectives.

3.1 THE BUILDER'S LIEN ACT HOLDBACK PROVISION

In most instances, the owner will pay its contractors. However, the contractors may not pay the subcontractors, workers and suppliers. If all the unpaid subcontractors file a claim, this would mean that the employer would have to pay them too. Requiring the employer to pay twice would not be fair. Therefore, a system called a "holdback" is created in the *Act.* The holdback does not only provide funds for the subcontractors, but also protects the employer from double payment as a result of contractors' defaults.

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[276] Pushor Mitchell (Note 269 above). L Ricchetti, G Rogakos (Note 269 above). B Allard. *Homeowner Protection Office.* "Builders Liens Obligations and Protections." (2011). Available at http://saltspringrealestateagent.com/wp-content/uploads/2013/01/Liens.pdf (Accessed: 7 October 2015).
[277] Pushor Mitchell (Note 269 above; 1). A Mortimore, S Sidhu (Note 264 above; 1).
[278] Law Reform Commission of British Columbia (Note 264 above; 1).
[279] A Mortimore, S Sidhu (Note 264 above; 1).
[280] The statutory builder's lien ranks above almost all debts, except for tax related debts.
[281] The Canadian Bar Association, *Builder's Liens*. British Columbia Branch. Available at http://www.cbabc.org/For-The-Public/Dial-A-Law/Scripts/Housing/268 (Accessed: 31 April 2017).
[282] A Mortimore, S Sidhu (Note 264 above; 1).
[283] B Allard (Note 276 above; 1).

The most important and repetitively emphasised part of the Act is the mandatory holdback provisions.[284] Under the Act, in order to create additional security to the land for persons engaged in a particular construction project, a statutory obligation is created for owners to open a holdback account at a bank or savings institute[285] and to retain separate holdbacks of amounts paid to a contractor or to a subcontractor.[286] Except for instances or contracts specifically excluded by the Act,[287] this is a general obligation arising in all construction contracts.[288] The provision requires that, upon every contracted payment made by an employer to their known contractor, a holdback amount, which is generally ten percent of the amount paid out,[289] must be withheld and retained in a holdback account set up by the employer. Therefore, these multiple holdbacks are formed whenever a payment is made to the contractor, as the payer must retain ten percent of that amount. The separately retained amounts shall be administered jointly by the owner and respective contractor,[290] and used in the event when a higher ranking party in the contractual sequence/series fails to pay those below them[291] on completion of their contract, even if the entire construction project itself is not yet completed.[292] Consequently, the holdback provision creates an obligation on owners to protect persons engaged in improving their property,[293] although it limits the liability of the owner to the amount of the holdback or the amount owing on the contractor or subcontractor's account.[294] Often, the total of the liens filed by claimants is greater than the amount in the holdback amount. In this instance, the employer is not required to pay more than the amount available in the account,[295] correctly held back. This means that the claimant's claim is limited to the amount available in the holdback account, *pro rata* to other claims. Therefore, the claimant will receive only part of their lien. In the event of the subcontractor claiming a lien against the improved property, the employer is not then expected to pay more than the amount for which they contracted with the main contractor.

[284] Pushor Mitchell (Note 269 above; 1). L Ricchetti, G Rogakos (Note 269 above; 4). B Allard ibid 2.
[285] An exception to this rule is certain government projects and construction projects valued at less than $100000. Pushor Mitchell (Note 269 above; 1). The Canadian Bar Association (Note 281 above).
[286] Section 4(1) and 5(1). No holdback is required for workers and material suppliers because they are at the end of the construction chain, therefore they don't owe anyone who is entitled to a right to lien. A Mortimore, S Sidhu (Note 264 above; 1).
[287] In terms of section 5(8).
[288] B Allard (Note 276 above; 2).
[289] Pushor Mitchell (Note 269 above; 1). B Allard ibid 2. A Mortimore, S Sidhu (Note 264 above; 1).
[290] Pushor Mitchell ibid 1.
[291] A Mortimore, S Sidhu (Note 264 above; 1).
[292] Pushor Mitchell (Note 269 above; 2). L Ricchetti, G Rogakos (Note 269 above; 10-11).
[293] Pushor Mitchell ibid 1.
[294] Pushor Mitchell ibid 1. B Allard (Note 276 above; 1). A Mortimore, S Sidhu (Note 264 above; 1). The Canadian Bar Association (Note 281 above).
[295] The Canadian Bar Association ibid.

This means that having perhaps already paid the main contractor in accordance with their contract, the employer is then still required to pay the subcontractor whom they did not contract with, in order to regain possess and control of their property. The employer will therefore not be in a less favourable financial position than they would have been in had the subcontractor been paid by the main contractor as required. This is an agreeable measure because, while providing a recovery mechanism for the subcontractor, the property owner's financial interests are also still protected. Therefore, owners are not prejudiced by having to pay lien claimants, towards whom they have no contractual obligations, any amounts in excess of the holdback account funds of a particular contract.[296]

The holdback funds must be held in the account for a specified period of time after the particular contract is either terminated or completed.[297] Such period is generally at least a week longer than the stipulated timeframe within which a claimant must have brought their claim.[298] In addition, a contractor or subcontractor is entitled to information regarding the balance of the holdback account in order to ensure that sufficient funds are being deposited into it.[299] Accordingly, it is a statutory default for an owner not to create and retain a holdback account.[300] In such an instance, the contractor may stop their work or services on the property on ten days' notice.[301]

For a claimant to seek and obtain release of the holdback under the Act, the claimant is required to have registered a lien over it in the Land Title Office,[302] either before the project commences or during the progress of the work project or within a particular period after the work contract, subcontract or supply of materials is completed, terminated or abandoned.[303] When the lien is registered in the Land Title Office, it becomes a charge against the title to the land or property involved.[304] If no liens are registered within the specified period, the

[296] B Allard (Note 276 above; 3).
[297] Section 8(2). B Allard ibid 3.
[298] See section 8(2) alongside section 20 to calculate the general lapse of time allowed between completion, claim frame and holdback funds retention.
[299] Section 41(1).
[300] Section 5(7).
[301] Section 5(7). A Mortimore, S Sidhu (Note 264 above; 1).
[302] The Canadian Bar Association (Note 281 above).
[303] North West Territories Public Works and Services: Contract Administration. "Mechanic's Lien Act – Procurement Guidelines." (2009). Available at http://www.pws.gov.nt.ca/pdf/publications/ProcurementGuidelines09/6.5%20Mechanic%20Lien.pdf (Accessed: 20 November 2015) 3-4.
[304] The Canadian Bar Association (Note 281 above).

owner may release the holdback. This will discharge the owner of all liability in relation to the holdback provisions.[305]

In addition to the mandatory provisions requiring the setting up of a holdback account, to assist with a lien claim, the Act provides for the issuing of a certificate of completion.[306] Such a certificate is issued by the Land Title Office at the completion of the construction project and, once this is done, lien claimants are required to bring their claims within a specified period after completion of the work.[307] The certificate of completion makes determination of the time of completion, required to determine whether the claim was brought in time, easier to ascertain. This is therefore a formal way of giving potential claimants notice of the commencement of the time period within which they must bring their claim and sets the time limit within which to bring their claims.[308] Ultimately, the certificate follows from the holdback provisions and assists procedurally in making the builder's lien claim accessible.

3.2 REMEDIES IN TERMS OF THE BUILDER'S LIEN ACT

In terms of the Act, a claimant is afforded three alternative remedies, namely, a lien against the land and improvements; a lien against the holdback account; and a claim for breach of trust.[309] The first and the third remedies initially existed in the Mechanics Lien Act.[310] Of particular relevance to this dissertation is the right of lien against the land and the holdback account, as these relate to the subcontractor. The builder's lien claims under the Act may be discharged: by invalidation of the claim by a court; payment of the claim amount; or payment of sufficient security to the satisfaction of the court.[311] Depending on the category of contract, the remedies may be claimed in the alternative, in the relevant offices, within a specific period of time after completion or, at least, substantial completion of the construction project.[312]

[305] North West Territories Public Works and Services (Note 303 above; 3-4).
[306] Section 7. Pushor Mitchell (Note 269 above; 2).
[307] Section 20. Pushor Mitchell ibid 2.
[308] Pushor Mitchell ibid 2.
[309] L Ricchetti, G Rogakos (Note 269 above; 4). A Mortimore, S Sidhu (Note 264 above; 2).
[310] Law Reform Commission of British Columbia (Note 264 above; 1).
[311] Section 22, 23 and 24. L Ricchetti, G Rogakos (Note 269 above; 14-15). B Allard (Note 276 above; 3). Pushor Mitchell (Note 269 above; 4).
[312] Section 7. Pushor Mitchell ibid 3, 4. A Mortimore, S Sidhu (Note 264 above; 5-6).

The first remedy of a lien against the land and improvements[313] is afforded to contractors, subcontractors and workers who have worked on and/or supplied material for improvements to the property.[314] In the event of non-payment by their above ranking party, the former parties may, for the unpaid work or material, claim a lien valued at such amount(s) due.[315] Such a measure would be best suited for a main contractor claimant against the owner with whom they contracted or a nominated subcontractor claimant who contracted with the main contractor but who was chosen by the owner and thus the owner retained some liability towards the subcontractor.

The alternative remedy is to claim a lien against the funds in the holdback account.[316] This claim is also known as a *Shimco lien*.[317] This remedy is a separate claim from the first but can be argued in the alternative where the first claim, a lien on the land, fails.[318]The statutory holdback required by the Act and retained from any person who does work and/or services on the property is subject to a lien for improvements by any such persons.[319] Such a lien is claimed against the pool of funds set aside in the holdback account.[320] Where a claim succeeds alongside the claims of other claimants, each will be entitled to a pro-rata share of the holdback funds.[321] However, success, entitlement and pay-out is further dependant not only on the validity of the lien, but also on whether a holdback was initially established as required or whether a prior claim as such has been paid-out.[322] Conversely, if the owner fails to establish a holdback account, retain a holdback and make such funds available in respect of any particular contract, they may be ordered by a court to pay out such funds in excess.[323] Therefore, where the owner had already paid out the full contract price including such funds, they will pay out ten percent more than they initially contracted on.[324] This punitive response discourages non-compliance with the Act and encourages owners to protect other participants engaged in improving the owner's property, as required by the Act.

[313] Section 2.
[314] A Mortimore, S Sidhu (Note 264 above; 2).
[315] A Mortimore, S Sidhu ibid 2.
[316] Section 4(9).
[317] *Shimco Metal Erectors Ltd Metal Design Steel Constructors* 2002 BCSC 238. A Mortimore, S Sidhu (Note 264 above; 4).
[318] A Mortimore, S Sidhu ibid.
[319] A Mortimore, S Sidhu ibid 4).
[320] B Allard (Note 276 above; 2).
[321] A Mortimore, S Sidhu (Note 264 above; 4).
[322] A Mortimore, S Sidhu ibid 5.
[323] B Allard (Note 276 above; 3).
[324] B Allard ibid 3.

Lastly, an alternative remedy is that of breach of trust.[325] This is a statutorily created trust system. In terms of the Act, monies received by the main contractor or the subcontractor pursuant their contract to perform work and/or services, are trust funds to be held in a trust for the benefit of any party engaged in improving the property.[326] The terms of the trust under the Act are strictly construed for both the trustee and the beneficiaries of this trust because the purpose is to keep the funds within the structure.[327] Use of such money is to be authorised by the trust in relation to the abovementioned beneficiaries.[328] Therefore, any person who pays out funds elsewhere will be personally liable for restoration and proper payment of such amounts.[329] Misuse of trust funds constitutes an offence - breach of the trust provisions - and may be penalised by a fine and/or imprisonment.[330] Furthermore and very importantly, where a party engaged in the construction project becomes insolvent, the funds in the trust are safeguarded from their creditors' claims.[331] Such remedial provisions require that the lien be filed in the appropriate Land Title Office, within the stipulated time period and in the correct procedural manner.[332]

3.3 ATTEMPTS TO WAIVE THE PROVISIONS OF THE ACT

A commendable section of the Act is the provision that invalidates a waiver of the Act's application.[333] In terms of the Act, an attempt to waive the applicability of the Act is invalid.[334] In this way, the Act ensures that the employer and main contractor cannot therefore use their greater bargaining powers against the subcontractor to the latter's potential detriment. Should there be non-payment of the subcontractor, they are not left destitute because they attempted to secure work by all means, including waiving their right to hold a lien in the event of non-payment by the main contractor. Consequently, the subcontractor's position, in the construction project relationship, under the Builder's Lien Act is not as potentially harmful as it is under the common law position.

3.4 REQUIREMENTS OF A VALID BUILDER'S LIEN CLAIM

[325] Section 10(1).
[326] L Ricchetti, G Rogakos (Note 269 above; 22). A Mortimore, S Sidhu (Note 264 above; 5).
[327] L Ricchetti, G Rogakos ibid.
[328] A Mortimore, S Sidhu (Note 264 above; 5).
[329] L Ricchetti, G Rogakos (Note 269 above; 22).
[330] Section 11. A Mortimore, S Sidhu (Note 264 above; 5).
[331] L Ricchetti, G Rogakos (Note 269 above; 22).
[332] Pushor Mitchell (Note 269 above; 3, 4).
[333] Section 42.
[334] Section 42. L Ricchetti, G Rogakos (Note 269 above; 4).

The Builder's Lien Act has several prerequisites that need to be met in order for a claimant to succeed and to be afforded the statutory.[335] Once the claimant has filed the lien, they must sue in the British Columbia Supreme Court in order to prove that their lien and to enforce it.[336] The lawsuit must be instituted in the Supreme Court Registry within the jurisdiction in which the property is situated.[337] After filing the lien in the Supreme Court, the claimant needs to file a certificate of pending litigation against the property in the Land Title Office.[338] For the lien to be valid, both the institution of a lawsuit and filing the certificate must be done within a year of filing the lien.[339] In terms of the Act workers and subcontractors are conferred rights immediately upon providing the material or services. However, they do not have an immediate right to enforce the lien.[340] Only after registration of the lien can they enforce it.

It is important to note that where a party fails to comply with the legislative requirements of a builder's lien, a court has no discretion to correct or rectify any such failure.[341] Filing a lien accurately is critical.[342] This emphasises the need for strict compliance with the Act. Nonetheless, the Act admirably departs from the undesired effect of the common law right to lien, existent in South Africa. The Act provides that in the absence of security which parties bargain for at the beginning by creation of the contract to such an effect, no security exists for the creditor to rely on, should their attempt to exercise the right of lien be unsuccessful. The Act is thus ideal in its spread of liability, creating shared responsibility between the parties who generally have greater bargaining power in the construction project relationships, and the lower ranking parties, occasionally the claimants. The Act achieves this by increasing the owner's accountability by making them responsible to ensure that those that perform work and/or services on their property are protected.[343] It also extends such obligations to the contractors, subcontractor and material suppliers who must fulfil the Act's prerequisites for bringing claims before they resort to seeking to obtain the lien as a remedy. This inevitably encourages payment of deserving persons[344] and thus makes the construction industry a bit more peaceful and smooth flowing. This ultimately affects the subcontractor

[335] A Mortimore, S Sidhu (Note 264 above; 7).
[336] The Canadian Bar Association (Note 281 above).
[337] The Canadian Bar Association ibid.
[338] The Canadian Bar Association ibid.
[339] The Canadian Bar Association ibid.
[340] The Canadian Bar Association ibid.
[341] A Mortimore, S Sidhu (Note 264 above; 1).
[342] The Canadian Bar Association (Note 281 above).
[343] Pushor Mitchell (Note 269 above; 1).
[344] Pushor Mitchell ibid 1.

positively by improving their potentially detrimental position as such a statutory intervention affords them some assistance in the undesired event of non-payment.

3.5 CONSEQUENCES OF THE BUILDER'S LIEN

Registration of a builder's lien in the Land Title Office interferes with the owner's ability to sell the property or obtain mortgage financing for the project.[345] This may encourage the owner to take active steps to clear the lien by either paying the amount owing or providing other security for its future payment. Ultimately, if the owner does not pay the amount of the claim and the court decides that the lien is valid, it may order the sale of the property and that the proceeds should satisfy the lien.[346] Effectively, a builder's lien in terms of the Act is an effective tool to recover unpaid debts owed to subcontractors and suppliers of materials.

4. THE QUEBEC CONSTRUCTION HYPOTHEC

Like Quebec, South African has a mixed legal system of common law and civil law. The applicable civil law codifies the core principles that serve as the primary source of law.[347] For this reason and that the legal measure applied in Quebec is similar to the two previous statutory regulations of the builder's lien, it is an appropriate legal system to assess with regard to the topic of this dissertation.[348]

The Canadian province of Quebec addresses the issue by providing for a statutory 'construction hypothec.'[349] In its principal code, the Civil Code of Quebec,[350] under the rules governing contracts of enterprise and services, the code includes construction contracts and contracts with professionals.[351] In addition, Quebec has a Building Act[352] which is a statute specifically focused on the construction industry.[353]

The construction hypothec of Quebec is equivalent to the other states' statutory builder's lien and mechanic's lien.[354] The construction hypothec is a legal hypothec which affords a

[345] The Canadian Bar Association (Note 281 above).
[346] The Canadian Bar Association ibid.
[347] DH Kaufffman. De Grandpre` Chait LLP Interlawyers. *"Construction Projects in Quebec*." Available at http://www.arch.mcgill.ca/prof/covo/arch674/winter2009/docs/Construction%20law%20in%20Quebec,%20Kauffman-Interlaw-juillet06.pdf (Accessed: 7 October 2015) 2.
[348] JPJ Van Vuuren (Note 263 above; 19 and 35).
[349] A hypothec is a right established by law over a debtor's property whilst the property remains in the debtor's possession. DH Kaufffman (Note 347 above).
[350] The Civil Code of Quebec 1866, reformed in 1994.
[351] DH Kaufffman (Note 347 above; 2).
[352] Quebec Building Act c.B-1.1.
[353] DH Kaufffman (Note 347 above; 3).
[354] DH Kaufffman ibid 4.

person who has engaged in work, services or supplying material or equipment resulting in an increase of the immovable property's value by constructing or renovating it, the right to hold the owner's property as security.[355] The construction hypothec is a dominant tool as it ranks first amongst creditors' claims, after municipal and school board taxes, but above 'conventional security', which is similar to a mortgage.[356] However, although this hypothec is created without a requirement of registration, unlike the British Columbia equivalent of a builder's lien, certain important prerequisite procedures need to be noted by a potential claimant.[357] The most significant constraint is that the construction hypothec applies on condition that the claimant as a contractor or subcontractor is licensed to act as a construction contractor and if they are an architect or an engineer, they are licensed as such in Quebec.[358] Furthermore, in order to be afforded payment protection through a construction hypothec, as a subcontractor, a materials or equipment supplier, who has no contract with the property owner, they are required to notify the owner that they have obtained a contract to do work or provide services on the owner's property, on account of the main contractor.[359]

The requirement of licensing guarantees to the public the competence of such persons and benefits citizens by removing or decreasing the potential infrastructural dangers that come with having informal contractors. However, it has the effect that the construction hypothec is available only to contractors, subcontractors and architects and engineers who are licensed in Quebec. Therefore, those licensed outside of Quebec, or not licensed at all, will be prejudiced as they are not protected. The requirement of notifying the owner when one has contracted with a main contractor in relation to that owner's property, also places great responsibility on a subcontractor or materials or equipment supplier to protect themselves. This detracts from, or lessens the level of, protection that a subcontractor deserves, as argued in this dissertation. Even more, practically this process of notification defeats the purpose of subcontracting because now the subcontractor, although a minimal requirement of mere notification, is required to engage with the owner. This in a way practically emulates the

[355] S Lal. Shapiro Hankinson & Knutson Law Corporation. "Live Weibinar: Builder's Liens Across Canada." *Credit Institute of Canada.* Available at http://creditedu.org/knowledgecentre/files/Credit%20Insitute%20of%20Canada%20Webinar%20April%2018%202013%20-%20Builders%20Liens%20in%20Canada.pdf (Accessed 14 October 2015). DH Kaufffman (Note 347 above; 4).
[356] DH Kaufffman ibid 4.
[357] Langlois Kronstrom Desjardins Lawyers. "The Legal Construction Hypothec: A Security Whose Validity Depends on Both Formality and Substance." (2015) Available at http://www.lkd.ca/the-legal-construction-hypothec-a-security-whose-validity-depends-on-both-formality-and-substance/ (Accessed: 25 November 2015). DH Kaufffman ibid 5.
[358] Section 2 read with section 46 and 48, except for the exceptions specified under s49(2). DH Kaufffman ibid 1 and 4.
[359] DH Kaufffman ibid 5.

position similar to that of a nominated subcontractor. In such an instance, to avoid complications, it would be easier to just have the subcontractor contract with the employer directly as this makes the non-dealing between the employer and subcontractor no longer applicable, or just require all subcontractors to be nominated subcontractors.

Aside from the main restrictions in the Quebec construction hypothec, the principle of protection encompassed in this legislation can be said to be a good legal measure for an unpaid subcontractor seeking compensation for the work they have done on the owner's property. As a result of such law, notwithstanding its limitations, Quebec has for a long time enjoyed harmony and stability in its construction industry. If the Quebec approach is to be embraced, its scope would need to be extended to cover a wider category of persons.

5. ADVANTAGES OF THE ACT

One of the most important advantages of the Act is that it extends the right to a lien to subcontractors which otherwise does not exist under common law. This provides effective legal recourse and accountability for all parties involved in construction. Regulation of conduct of all participants encourages fair dealings with subcontractors and secure development for subcontractors. Inevitably, this fosters an enabling construction environment with legal and ethical conduct.

6. DISADVANTAGES OF THE ACT

On the other hand, one can also anticipate disadvantages of the Act. Because statutory laws are general rules and decrees that by their nature cannot take into account the particular, unusual or unforeseen circumstances of a case, as well as changing situations, the law may lack flexibility to carry out justice in all situations. The Act may prevent examination of individual circumstances and inevitably be detrimental to the very parties it seeks to protect. In addition, the Act may lessen the burden of the main contractor to ensure payment of the subcontractor. This may encourage ill-intentioned main contractors to evade paying the subcontractor in terms of the subcontract in hopes that the subcontractor may seek restitution from the employer using funds from the holdback provision.

7. CONCLUSION

Legislation on the builder's lien is remedial in nature[360] therefore it seeks to assist participants in the construction industry to receive their deserved payment, or at the very least, a part of justified imbursement for the work they have expended in a project of another person's property. This an ideal corrective measure in dealing with, and possibly preventing, the construction subcontractors undesired situation where they are not paid by the main contractor, as required. The construction business remains a risky business, but an intervention makes it a bit more secure and not dreaded for those engaged in providing labour, services and material to other's property improvements. Although legislation relating to the builder's lien is somewhat complicated, all parties involved in the construction industry, be it the owner, employer, contractor, subcontractor, worker or material supplier, are protected. In addition, all parties have an indiscriminate obligation to be aware of the rights and protections afforded and the obligations placed on them by the Act for their own benefit.

The South African legal framework does not have any similar or better solution to the subcontractor's difficult position, as Canadian and Quebec law does. A comparison of these legal positions shows the need for a change in the South African common law position as there is a legal gap in providing adequate protection to the construction subcontractor in South Africa.

[360] B Allard (Note 276 above; 1).

CHAPTER 5: CONCLUSION

1. INTRODUCTION

> "South Africa's ever-growing construction industry continues to reflect a significant rise in the growth levels of construction, infrastructure development and renovation. In the context of such a dynamic and demanding market, the builder's lien represents an affordable, common sense approach to providing the contractor with an effective means of securing monies due to it by the employer."[361]

As already explained in the earlier chapters, a lien is divided into two categories, namely, a debtor-and-creditor lien and an enrichment lien. The debtor-and-creditor lien arises *ex lege* to secure an outstanding debt arising from a contract between the employer and contractor. Therefore, it is usually not complicated as it is stems from long standing principles of contract. On the other hand, the enrichment lien which is relevant to the subcontractor, falls under property law and is conferred on a person regardless of a contractual relationship.[362] The latter is therefore a more complex remedy particularly with regard to a situation consisting of more than two parties of which obligations derive from separate contracts.

Having considered the applicable principles of the law of contract, then unsuccessfully seeking adequate assistance from the law of property and that of enrichment law, the legislative protection afforded in other relevant jurisdictions to deal with the subcontractor's position has been the most appropriate remedy recommended by this dissertation. The protection and remedies afforded by the British Columbia Builder's Lien Act, supported by the Quebec legal position, are the protection necessary to address the issue discussed in this dissertation.

Throughout this dissertation the focus has been shown to be the predicament faced by our legal system to provide construction subcontractors with an appropriate legal remedy in which the employer could be held directly accountable to the subcontractor, in the event of the subcontractor not being paid in terms of its subcontract with the main contractor. It is a surprise to find that this age-old predicament which subcontractors occasionally face has not

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[361] A Forman. "Builder's liens: A Practical Legal Review." (2006). Available at http://www.bowmanslaw.com/insights/builder-s-liens-a-practical-legal-review/ (Accessed: 2 May 2015).
[362] PJ Badenhorst, JM Pienaar and H Mostert (Note 10 above; 412).

yet been dealt with in South Africa, especially given that other jurisdictions that have statutorily addressed the issue, did so a long time ago. It is therefore questionable why the South African legal system has been so slow to come to the party and address this prevalent issue which affects construction businesses, being a profitable part of the economy, and hence any adversity to it may likely negatively affect the economy as whole. On review of the present law, the South African legal framework does not have any similar or better solution to the subcontractor's difficult position like the legal systems reviewed in the previous chapters.

The statutory lien recommended in this chapter focuses mainly on dealing with the predicaments arising from an enrichment lien. The dissertation suggests an approach of avoiding the common law right of lien as a remedy as it is accompanied by various restrictive and detrimental difficulties for certain parties, including the subcontractor who is the focus of this dissertation and of particular concern to it. It is primarily notable that the following proposed statute will establish advanced rules governing the relationship of the employer, contractor and subcontractor in construction projects.

The discussion of this proposed South African statute is only of a general nature, therefore, the main provisions recommended are especially in relation only to non-payment of the subcontractor in the construction industry. This means that this chapter's content will include a proposition and explanation of only the core provisions of the advocated legislation that the dissertation contains and illustrate the core objective(s) of the proposed statute which if the legislator wishes to may accordingly extend on. Consequently, the chapter will not provide or discuss every provision which the legislation should entail. In light of this, the chapter is not a complete statement of the recommended legislation and this point should be kept in mind at all times by the reader. Furthermore, the chapter will not provide the exact structure or order of what the legislation should be, but rather what it should resemble in accordance to how the legislator conclusively decides to have it be. This dissertation is thus an outline of the proposed legislation, to be used simply as a starting point guideline for the legislator in creating the appropriate legislation in light of the rationalised recommendations in this chapter and the previous chapters. Lastly, the proposed legislation provisions scope, in the context of this dissertation, focuses on the subcontractor because as seen throughout the dissertation, it is concerned particularly with this party. However, if the legislator is to enact such a resembling statute, it may accordingly extend the ambit of such recommendations to other appropriate parties in the construction project.

2. LEGISLATIVE RECOMMENDATION

From here on, in this chapter, the proposed statute will be referred to for convenience as the *statute*. Conversely, the British Columbia Builder's Lien Act will be referred to as the *Act*.

2.1 THE INTENTION / PURPOSE OF THE STATUTE

In creating any legislation, the legislator should at all times have regard to the intention, objectives and consequences of the particular prospective legislation. The intention of this dissertation is to establish a statutory regulation of the construction industry participant's relationship in relation to payment of parties. More specifically, the dissertation aims to create a statutory legal measure which can afford the construction subcontractor protection and a remedy in the event of non-payment by the main contractor. Hence, like the Builder's Lien Act of British Columbia which the statute will be modelled on, the intention of the statute must be to provide security for persons who expend their money, work or services into improving an owner's property, to prevent owner's unjustifiably being benefited by such person's efforts and enable compensation of such persons in the event of non-payment. Ultimately, the overall objective of the statute must be to protect construction project participants. This would include various parties within the project, including as the focus of this dissertation's advocacy, but not limited to the subcontractor. In addition, such parties must include the main contractor and owner/employer as construction project participant. It is required that at all times when creating the provisions of this statute, these intentions must be born in the mind of the legislator. Furthermore, application, interpretation and enforcement of all its provisions must be in accordance to such objectives. A failure to do such would render the statute useless and redundant.

2.2 APPLICATION OF THE STATUTE

Because the statute is intended to protect participants in the construction industry engaged in a construction project, the provisions must apply accordingly to various, if not all, parties involved in certain construction projects. The statute is to apply mainly to the employer/owner, main contractor and subcontractor parties in particular construction projects. If the legislator wishes to extend the scope of the statute's application, for or against any party, it may accordingly do so in a way that does not adversely affect the party of focus to this dissertation, the subcontractor. However, though protection is sought mainly with focus on the subcontractor, the legislator must not unjustifiably confer on subcontractors more protection than they need, to the other parties' detriment.

Application of the statute includes property of a commercial and residential nature. However, it is important to note that, as with the common law enrichment lien, the scope of the statutory builder's lien must be limited to parties covered by this lien. This means that the recovery provisions of the statue will apply only to an improvement lien and a salvage lien. Therefore, only a claim of this nature will be established and succeed in terms of the statute.

On the contrary, provision must be made for two exceptions to the application of the statute, namely, construction projects with a contractual price of less than a particular stipulated amount, and tender or government construction projects.

Contracts stemming from tender biding and where the government is the employer are excluded from the ambit of the statute because the rules applicable to them are governed by different rules of payment.

A monetary cap is to be applied to the application of the statute depending on the particular project. For example, a residential construction project with a contractual price of less than R200 000.00 and a commercial construction project with a contractual price of less than R500 000.00 should be exempt from the provisions of the statute. The rationale for these monetary limits is a result of various social and economic factors persistent in South Africa. A certain level of ability to make and earn money free from the burdensome constraints and provisions of the statute is necessary to accommodate these features of our society. These monetary restrictions mean that businesses that have a contractual price of work valued less than these respective amounts, can exercise their entrepreneurship ability without the constraint of the statute. Such a provision is purposively included in order to prevent the statute being a factor discouraging persons from becoming capitalists in order to advance their financial position and hence, the economy as a whole. These monetary caps must be reasonable and take into account that a contract above the monetary cap will result in a greater financial hindrance to the subcontractor(s), in the event of non-payment by the main contractor. It is for this reason that parties to such projects need to be protected. However, where the legislator finds it fit, it may incorporate provisions relating to such construction projects and have its provisions applicable to a certain extent and with the primary objective being to provide security for construction industry participants and provide a compensatory measure in the event of non-payment.

2.3 THE HOLDBACK PROVISIONS

An important feature of the *Act* which the statute would be incomplete without is the holdback system provisions. The statute is to place an obligation on owners as employers and contractors as employers of subcontractors to open separate holdback accounts for each contract they enter into with a contractor. They would be required to retain a holdback, being an amount of a particular percentage, from every payment made to a contractor as per their contract. Such amount(s) is to be deposited into a holdback account. This account is for the subsistence of the project work to be jointly administered with the relevant contractor. As intended by the *Act*, in the event that a person involved in the construction project is not paid and seeks to enforce payment against the owner. In terms of the statute, such persons may be remunerated from the amount in the holdback account.

As is the case in the *Act*, the claimants claim is limited to the amount in the holdback account. This ensures fairness, especially, because it does not require the owner to pay any amounts in excess to what their initial contract price payment would be. Consequently, the owner is not financially prejudiced by the holdback provisions.

Claims stemming from a particular contractor will share the holdback amount available in the respective contractor's account. What is within their respective holdback account will be shared pro rata amongst the claimants. A claim deriving from a separate contractor is not related to another and a claim of one does not affect the other. If separate holdback accounts are not held but one is required by the proposed statute, there is the potential unfavourable result of having one holdback account for all contractors. Each time a payment is made out of the holdback account, there is the potentially detrimental effect that the holdback amount gets reduced. Hence, later claimants of another contractor may have little or no pro rata share left to distribute amongst themselves. Even more detrimental is the adverse effect that if all claims on the holdback account need to be left till the completion of the entire project, subcontractors whose work contract is completed long before completion of the entire project are extensively delayed their payment. This is of great importance to note, bearing in mind that in the construction industry time is of the very essence. Therefore, once a subcontractor has completed their portion of the work project, their right to claim payment thereof is created and should be enforceable.

Although the Act provides for 10% to be held back from every payment made to a contractor, the statute should in departure require a somewhat higher percentage. For a fraudulent

contractor with a high contract price, a 10% loss, having received the bulk of their payment, being 90%, would be of little concern. Therefore, to prevent such contractors from evading paying their subcontractor(s), with the knowledge that they still profit more from their 90% balance, a greater percentage should be held back from every payment. This will thus deter potential dishonest contractors from acting in contravention of the statute as they will be aware that they stand to lose a substantial amount of money should they abscond paying their subcontractor(s). This dissertation proposes that the holdback amount be 18% of every payment. The remainder 82% payment made will leave sufficient money to enable a contractor to buy more material if they need to, pay subcontractors, remunerate themselves and also cover any other cost or expense that may arise. Essentially, a sufficient amount is to be held back by the employer to protect themselves and subcontractors in the event of non-payment of a subcontractor, but the contractor is not prejudiced and still ensures their liquidity as they can still cover all their costs.

A further important right which should be given to participants of the relevant construction project is that of enquiry as to information relating to the holdback account, deposits and the balances in the account. Such enquiry helps ensure that a holdback account has in fact been established and that sufficient amounts according to the 18% allocation is made on each payment made to the relevant contractor(s).

In addition, the holdback account is to be held for about six weeks after completion of the particular contractor's work. The main contractor will be afforded a period of six weeks from the time of completion of the work/performance to make payment of the monies due to the subcontractor. Failing which the subcontractor will be entitled to lodge a claim with the employer for the money that is due, owing and payable to them. If no claims are made within this time, the amounts may be paid over to the respective contractor(s). Six weeks is sufficient time for a contractor, after completion of the project part of the work a subcontractor was engaged in, to have made payment to them or provided them with alternative security for such. It is also enough time for an unpaid subcontractor to notify the employer of their claim a to request payment then exercise a right of lien against the owner of the property for such deserved compensation.

To further prevent fraudulent undertakings between parties in order to avoid the provisions of the statute applying, where a matter is brought before the court, application of the holdback provisions must be calculated on the actual value of the work done as opposed to

just the contract price. This is because where the owner and main contractor wish to evade the 18% holdback, they may intentionally and fraudulently fix the contract price lower than the minimum monetary caps and hence the provisions of the statute become inapplicable or the amount to be held back and available to claimants is lower. Therefore, to deter such misconduct, parties must be aware that the court has power to scrutinise and find the variation between the fixed contract price and the actual value of the work done. Where the court finds that such misconduct has taken place, it may make an order which it finds justified, taking into account the provisions of failure to comply and penalisation.

2.4 ENFORCEMENT OF THE STATUTE

For a claimant to successfully enforce payment in terms of the statute, they are required to strictly observe certain procedures to be contained in the statute. These procedures would relate to the time, place and manner in which one is to enforce their right to hold either a lien against the owner's property or the lien against the holdback account. Because six weeks is afforded to a claimant under the lien against the holdback account, a closely similar time frame to bring their claim should be reasonably also be afforded to the claimant in terms of the lien against the owner's land. The lien claimant must bring their claim in the relevant offices or court which the legislation must make provision for to be established, and further grant it authority to deal with and enforce the statute's provisions.

The need for strict compliance with *Act's* provisions was stated in the previous chapter and therefore, in order to maintain fairness in the statute as well, the same should be required in it. However, that being the general principle, flexibility is required in every rule of law in order to cater for exceptional or necessary circumstances. Depending on the party and the nature of the failure to adhere to the provisions of the statute, different rules must be applied. Provisions should be made to penalise improper conduct which includes failure to conform to the statute where one is required to do so. Where an employer or a main contractor fails to comply with the substantive provisions of the statute, relating to their obligations, a punitive measure should be taken. The reason for this is that, bearing in mind the intention of the statute, to protect participants in the construction industry, in order to ensure the force and effect of the statute, deterrence against attempting to circumvent or simply not comply with the statute provisions should be created. A failure to do so means that certain persons involved in that particular construction site will not be protected in the event of a failure by another party. For example, in the *Act*, a punitive provision to deter non-compliance is that where an owner fails to establish an account, retain a holdback and make such funds available

for any particular contract, they may be ordered by a court to pay out such funds in excess of the initial contractual price with the main contractor.[363] Likewise, under the statute, where the owner has failed to observe the holdback provisions, resulting in insufficient or no funds being available to claimants and already paid out the full contract price including such funds, they should be required to further pay the 18% to the claimant.. Ultimately, where the employer, the contractor or the subcontractor, fails to adhere to the procedural provisions of the statute, it should be enquired as to the reason of the failure. Only a failure caused by either no fault of the party putting forward such a defence, fault of the other party or an act or event beyond their control may be satisfactory reason to necessitate leniency and allowance to amend the failure. However, such an exception if successful will apply only with regard to that particular respondent and does not affect the claims of other potential claimants.

Moreover, in enforcing the law, the court or any person given authority must be cautious as to not over protecting certain parties especially to the detriment of any other party. The provisions of this statute are to be clear and simple, therefore each party seeking safeguard under the statute must adhere to its provisions as required. Hence, a potential claimant party bears their own risk of having an unsuccessful claim if they fail to observe and follow the procedural provisions of the statute

3. CONCLUSION

As illustrated above, much of the same underlying principles found applicable in terms of the enrichment lien remain in the statutory arrangement of the builder's lien. Such existing principles are accompanied by more sophisticated rules which allow accessibility, order and better enforcement of such a rule of law. The enactment of a statute such as the British Columbia Builder's Lien Act, is a contemporary development and modernisation of the required regulation to align with the present demands in the construction industry.

In addition, enactment of a statute would admirably place increased responsibility on property owners to protect those working on their property. The foundational issue of the imbalance of bargaining powers between the employer, main contractor and subcontractor, leading to the core issue of non-payment, is addressed. As the statute equally confers certain

[363] B Allard (Note 276 above; 3).

burdens also on the employer, a balance of powers between parties is established and may be maintained through.

Ultimately, the enactment of a statute of this nature will inevitably address the financial issues prevalently faced in the construction industry in South Africa. This would ultimately benefit the construction industry, in particular construction companies and even more, our economy as a whole. There would therefore be the required uniformity within the South African construction industry between the common law and the statutory interventions created by the statute.

If the Canadian law, the Builder's Lien Act, is anything to go by, its provisions should be used to change the South African common law and provide a South African statutory regulated builder's lien that extensively protects subcontractors. The recommended statute would establish advanced rules governing the relationship of the employer, contractor and subcontractor in construction projects. This will inevitably affect certain principles of the law of contract and the law of property. Should the legislator create legislation to this effect, the scope of modification should be limited only to the construction industry, with force and effect only to the extent determined by the legislator, in context to its aims and objectives. The intention of the statute, like the Act it would be modelled on, must be to provide security for persons who expend their money, work or services into improving an owner's property, to prevent owner's unjustifiably being benefited by such person's efforts. It should therefore, enable compensation of such persons in the event of non-payment. Ultimately, the overall objective of the statute must be to protect construction project participants.

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