LIEN RIGHTS
IN
SOUTH AFRICA

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Introduction:

‘Lien’ originated in 1531 followed by a ‘waiver’ principle in 1628
Introduction:

After almost 400 years, the public has no clear understanding of the

- **scope** and **types** of Lien Rights, including Partial Lien
- their entrenchment in **Common Law**
- **obligations** explicit in such Rights and
- variety of spheres in which they are obligatory - publishing, employment ... commissioned projects... trade agreements... industrial relationships...
Examples of civil action regarding Lien Rights include

- Lien over books and papers (Namibia);
- Lien / construction payment guarantee (Uganda);
- Lost *detention / mandament of spoilie* (Gauteng and Western Cape, RSA);
Further examples of civil action regarding Lien Rights:

- Lien and spoliation (RSA);
- Maritime Lien / seamens’ wages (Western Cape, RSA);
Two more examples of civil action regarding Lien Rights:

- Right of retention over building works as security for payment / no payment guarantee provided (Western Cape, RSA);
- Construction guarantees in favour of sub-contractors / related liability (Gauteng, RSA).
Waivers of Lien in construction projects:

- Regarded as a 'grey area';
- Little or **no consensus** among Built Environment practitioners on
  - principles involved
  - consequences of a Contractor’s Lien having been waived
There are variations on the Lien theme:

- **Conditional**, viz: Conditional Waivers for Partial Payment and Conditional Waivers for Final Payment,
- **Unconditional**, viz. Unconditional Waiver for Partial Payment and Unconditional Waiver for Final Payment
Built Environment consultants’ lack of understanding:

- "In-depth knowledge is not necessary until a point of dispute is reached"
- “there are legal implications”
- “a waived Lien anticipates a Payment Guarantee”
Considering this:

- Why do Liens exist?
- What is the extent of a Lien?
- What is the value of a Lien?
In the South African construction industry

- a Contractor’s Lien
  - is regulated by common law
  - takes priority over loans granted to a Client
- Sub-contractors possess a Lien Right (entrenched in common law)
In the South African construction industry
Clients do not understand the strength of the Contractor’s Lien, the contrasting interrelationship between the Lien and mortgage bonds or loans granted by financial institutions, and the Payment Guarantee (Master Builders KwaZulu-Natal, 2015)
This Lien may affect the following: A

- bondholder;
- Client’s insolvent estate;
- purchaser at a sale in execution who, at the time, is also a bondholder;
- purchaser, under a judicial sale;
- third party who has acquired the Client’s property
Contractors and Sub-contractors are entitled to their Lien if they have:

- done - or caused to be done - any work on or in respect of an improvement on or to land; or

- furnished any material to be used in or in respect of an improvement on or to land.
Improvements:

- anything constructed, erected, built, placed, dug or drilled
- an intention to do any of the above on the land, except anything that is neither affixed to the land nor intended to become part of the land
- work done or materials supplied which are not permanently attached to the land, will not support a Lien.
A claimant has the right to a Lien for **supplying material** if that material is **incorporated** into an improvement of a property, or otherwise consumed in the construction or improvement (MBA KZN, 2015)
Design team members may hold a Lien right to drawings used in the completion of project construction, but drawings awaiting approval will not (MBA KZN, 2015)
A Contractor's Lien directly relates to

- the **amount owed** to the Contractor in respect of the site retained
- **expenses incurred** by the Contractor in respect of work completed on a site while that site is in the Contractor’s possession
- a **portion of a site**, in respect of the specific portion held
- Ownership of a building may not be divisible
- Occupation of a building is divisible (MBA KZN, 2015)

Contractor’s Lien: Any amount owed to the Contractor must be directly related to a defined portion of completed work (not a global sum owed over the site as a whole)
The **Contractor** must at all times remain in exclusive **possession** of a particular site or section of a site which is subject to the Lien, by
- physical control or occupation of the site and
- stated intention to hold and exercise this possession over the site in order to secure some benefit (for the Contractor) in terms of a claim against the Client.
A ‘No Trespassing’ notice board or to have employees and/or security guards, stored materials and equipment on a site or portion of that site is not sufficient. Site occupation and being under the Contractor’s control (*detentio*) at all times must be proved, as well as the intention of exercising possession (*animus possidendi*) (MBA KZN, 2015)
If possession is lost, then the Contractor’s Lien is destroyed and recovery of possession will not revive the Lien. Temporary absence will not constitute loss of possession over the site (MBA KZN, 2015)
If a Contractor is deprived of his possession by force, fraud, judicial pressure or a clandestine act on the part of the Client, the Contractor is entitled to have possession restored by an Order of the Court (MBA KZN, 2015)
Waivers of Lien provided to bondholders by Contractors do not necessarily deprive Contractors of their Lien/s in terms of contractual agreements with their Clients (MBA KZN 2015)
Banks generally require a Lien Waiver before giving a Construction Payment Guarantee.

The Lien holder, in some situations, will be given ‘priority’ over the bank in the event of a property being sold to enforce the Lien.
If the property is sold, the **Lien holder** will be **entitled to first payment** from the sale proceeds, and the bank would only receive the remaining proceeds (if any).

Banks are wary of Lien rights, and will ask Contractors, Sub-contractors and material suppliers to waive their Lien Rights over a project. (Loffredo, 2015)
Of four Contractual Agreements endorsed by the Construction Industry Development Board (cidb)

- FIDIC (Internationale des Ingénieurs - Conseils i.e. International Federation of Consulting Engineers)
- GCC (General Conditions of Contract for Construction Works)
- JBCC Series 2000 (Joint Building Contracts Committee)
- NEC3 suite of contracts (New Engineering Contract)
Only the **FIDIC Redbook** and the **JBCC** Principal Building Agreement (PBA) expressly provide for the use of payment guarantees and also contain *pro forma* Construction Payment Guarantee documents.
In the Nominated / Selected Subcontract Agreements within the JBCC N/SA Codes 2102, 2007b, the quantum of the Guarantee is given: A Payment Guarantee should be provided by the Contractor for an amount equivalent to 10% of the Subcontract sum (M J Maritz, 2011).
According to the FNB, relative to the Payment Guarantee, Contractors must:

- notify the financial institution of any deviations from the tender, plans and specifications submitted initially, as any such *changes* can *affect* the *loan amount* approved and ultimately, the assessed market value of the property.
According to the FNB, relative to the Payment Guarantee, Contractors must:

- be **registered** with the **NHBRC** (National Home Builders Registration Council).

- **build according to** the **approved plans** and specifications and at all times comply with the requirements of the National Building Regulations.

- prior to construction, **enrol** the **property** being built **with** the **NHBRC**.
According to the FNB, relative to the Payment Guarantee, Contractors must:

- **sign a Waiver of Lien** as required by the financial institution.
- **provide proof** of a *Contractor’s All Risk Insurance Policy* for the duration of the project process, when requested to do so by the financial institution.
Factors negatively affecting the effectiveness and purpose of the Construction Payment Guarantee:

- A bondholder’s insistence on amending the wording or adding special conditions to the *pro forma* JBCC Guarantee
Factors negatively affecting the effectiveness and purpose of the Construction Payment Guarantee:

- Acceptance of any changes to the pro forma JBCC Guarantee which will diminish the Contractor's protection when work completed equates to the guaranteed sum, as Contractor’s exposure to risk of payment default by the Client increases towards the close-out and final account stages of a contract.
Factors negatively affecting the effectiveness and purpose of the Construction Payment Guarantee:

- A Contractor's requirement that the Construction Payment Guarantee be extended to the exact date of project completion. This date is very difficult to predict and banks insist on a definite date on which the Guarantee will expire.
Factors negatively affecting the effectiveness and purpose of the Construction Payment Guarantee:

- Agreement by the Client and Contractor, without notifying the bondholder, to implement variation orders which substantially increase the original contract sum. Banks resist situations which exclude their participation in discussions and prevent protection of their own interests.
According to Maritz (2011) the JBCC Payment Guarantee is a "stand alone" document in which the conditions are set by the bank or issuing institution, and these conditions are not affected by a change in the wording of the signed Building Agreement.
A Waiver as an act of intentionally relinquishing or abandoning a known right, claim, or privilege (MBA KZN 2015)
Wolfe (2013) states that a **Lien Waiver** is a document from a contractor, sub-contractor, materials supplier, equipment lessor or other participant in a construction project (a claimant) stating that they have **received payment** and waive any **future Lien Rights** to the property (of the owner).
A Waiver is not a common place document with standard wording

The contents are extremely important

TRUST IS GREAT, CHECKING IS BEST - intentions must be correctly recorded within a Waiver
Wolfe (2013): “A lien Waiver is like a receipt for a payment a contractor is receiving. An employer will pay the contractor R100k, and the contractor will waive R100k in Lien rights”
Before a Client can require a Contractor to waive his Lien, the Client must provide the Contractor with a Payment Guarantee which could be a Demand Guarantee or a Performance-based Guarantee.
If the **Client defaults on payments** to the bondholder and the project is halted, the **bondholder** will take over the Lien Right, **may sell off** the **project** and use the proceeds of the sale to **pay** what is due to the **Contractor**
If a contract has not been managed properly, the bondholder may not pay / will not honour the Payment Guarantee (Unpublished opinion, 2015).
Some Clients demand their Lien without providing them with a Payment Guarantee. This is not recommended (MBA KZN, 2015).

NB: A Waiver of a Contractor’s Lien must be coupled with an acceptable cession by the Client in favour of the Contractor, of the proceeds of any mortgage bond pertaining to the construction project, because this cession will serve to reinstate the Contractor for his potential loss of security in having signed the Waiver (MBA KZN, 2015)
If a Contractor is engaged in **several projects** at the same time with a particular **Client**, any **Waiver of Lien** signed by the Contractor **must be specific** in defining the exact project to which each Waiver applies, and the specific parties who are involved in that project. Inadvertently signing an overly broadened Lien Waiver may end up having serious consequences, costing the contractor a great deal of money.
What initially appeared as a simple mechanism to achieve payment can turn into a means of depriving Contractors of their rights, as Clients and upper-tier Contractors may use the Lien Waiver to release, indemnify, insure, warrant and/or support other unforeseen actions, which emphasises the importance of carefully checking the wording of the Lien Waiver (Callahan, 2011).
Waivers of Lien may cover much more than just a Contractor's Lien, for example, statutory or contractual payment bond rights, breach of contract rights, and even extra-contractual claims such as unjust enrichment (Callahan, 2011)
Sub-contractors encounter difficulties in collecting payment for work performed on construction projects but they are not left without recourse if payments due are not forthcoming. Any unpaid sub-contractors who supplied labour and / or material for the improvement of real property are entitled to a Lien against funds or the improved real property (Debnam, 2004)
Lien Rights are additional to contractual rights. Clients who are not aware of this entrenchment in common law and have not properly protected their interests may be required to make a direct payment to the supplier of the labour and materials, even if the Client has previously paid the principal Contractor for the same labour and materials.
Any subcontractor or supplier seeking to enforce a Lien must be sure that all legal requirements are met because if the Lien is **not properly filed**, it will be **declared invalid** (Puccini, 2015).
What is the legal status of a Sub-contractor’s Lien, whether imposed by a Domestic, Nominated or Selected Sub-contractor?

Confirmed by Arbitrators: “All Sub-contractors have a Common Law right to Lien due to the fact that you cannot bind a third party to a two-party contract (Domestic and / or Selected). A Subcontractor’s Lien is NOT waived by the Principal Contractor having waived his Lien...
Confirmed by Arbitrators: “Sub-contractors **must sign** their own **Waiver of Lien**. Even if he has not been paid, the Principal Contractor is to pay the Sub-contractors what is due to them. The Principal Contractor’s Waiver of his Lien does **NOT affect** the Sub-contractors...There is **no difference amongst different types of Subcontractors**”.
Confirmed by Arbitrators: “In the JBCC, the Guarantee system does not work. The Guarantee expires on the date stated in the Guarantee. What about an extension? What if there is a labour strike? Can the Principal Contractor apply for an extension of the Guarantee cover? The answer is ‘no’. The extended period is NOT covered by the Guarantee and the Contractor is exposed to risk arising from having waived his Lien’
Confirmed by Arbitrators: “A Lump Sum Guarantee is not used very often - it does include a form of Retention - and then there is also the Variable Sum Guarantee. **Guarantees do not have great value, they are there to protect another Agreement**”
Confirmed by Arbitrators: “There are multiple problems with Guarantees, they cannot be extended, banks can default, they are ‘theoretical’ i.e. they are not ‘real money’, while the general principles of Lien are entrenched in common law”.
Confirmed by Arbitrators: “If there is ‘lock-out’ due to labour unrest, there will be an extension of time on the Contract, but no adjustment to the Preliminaries. An extension can be requested, yes, but will not necessarily be granted. There is a statutory limit to the period of a Payment Guarantee. Guarantees are prone to lapse. Because the Lien has been waived, the Contractor is exposed to risk of non-payment by the Client, and it is here that TRUST is the most important factor”
In Conclusion

Payment Guarantees are time bound, whereas Waivers of Lien are not. When Payment Guarantees reach their expiry date, Contractors are devoid of their Lien and any guarantee of payment due to them.
In Conclusion

With particular reference to **Waiver of the Contractors’ Lien** and **Construction Payment Guarantees**, Regrettably, amongst Built Environment Practitioners in South Africa, uncertainty outweighs confidence.
Recommendations

- A document dealing with Subcontractors’ Waiver of Lien, which could provide a positive contribution to this aspect of contract administration, should be introduced to ‘clear the air’ in the often adversarial relationship which exists between members of the construction contracting fraternity
Recommendations

Emerging Contractors’ opinions and knowledge of the Waiver of a Contractor’s or a Sub-contractor’s Lien and Lien Rights generally must be investigated with a view to further education and training within the South African construction fraternity
THIS CASE IS ADJOURNED! Thank you!