

Ownership Of Unfixed Materials In A Building Contract (continued)

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contractor and a subcontractor (NSSA), both contain a vesting clause which alter the common law position of the parties regarding the transfer of ownership from one party to the other

The vesting clause is found in subclause 25.6 of both the agreements and provides that the materials and goods paid for by the employer in terms of subclause 25.3.2 shall become the property of the employer and shall not be removed without the written authority of the principal agent

Purpose of a vesting clause

Loots (1995, p 457 – 458) and McKenzie (2014, p 39) both point out that the objective of a vesting clause, such as the one above, seems to serve two purposes. That is:

To secure money advanced to the contractor
To secure due performance of the contract

Ownership

Although the JBCC agreements clearly state that ownership of material will pass from the contractor to the employer when the latter has paid for these, the situation is far more complex. Considering the common law principles discussed above, the following might provide clarity as to the practical situation regarding the transfer of ownership of unfixed material, ie despite the express terms contained in the JBCC agreements

Even though a contract might constitute a person the owner of an object, South African law requires that some form of delivery must have taken place to transfer ownership. Delivery, however, might be symbolic or fictitious depending on the circumstances in each case.

For example, a vehicle can be delivered by a symbolic act such as handing over the keys. Fictitious delivery, on the other hand, is performed through a legal process known as *constitutum possessorium*. (Finsen (2018, p 205) and McKenzie (2014, pp 39 – 41))

Lawful ownership

As stated above only the lawful owner of an object can transfer ownership to another party. If the original seller, such as the manufacturer and/or supplier of the materials, retains ownership of the materials in terms of a credit arrangement between himself and the buyer (such as a contractor), the latter cannot possibly transfer ownership until the full purchase price has been paid as he remains the lawful owner of the materials. Such an arrangement is called a suspensive condition and until the condition is fulfilled, ie the full

purchase price has been paid, there is no sale and the original seller stays the lawful owner of the goods.

However, such an agreement must be clearly expressed and if not, ownership will pass to the buyer once a credit sale is made and goods are delivered to him. (*Laing v South African Milling Co Ltd* 1921 AD 387 at 394, referred to by Loots (1995, p 461)

Prejudice to the employer

If the employer, in terms of the JBCC agreements, has forwarded payment to the contractor for unfixed material, the employer might be prejudiced because real ownership might still vest in a supplier, which the contractor has not paid.

However, prejudice can easily be avoided by the employer if the value of these materials were to be excluded from subsequent payment certificates. Because the value of the work done by a contractor is calculated by subtracting previous payments made against the total value of all work done and unfixed materials stored on and off site, this measure is quite effective. (Finsen, 2018, p 205)

Materials stored off the site

In previous editions the JBCC provided a standard form to be completed by the contractor should he require payment for materials stored off the site (*Transfer of Ownership* form). Because of the problems already discussed in connection with ownership JBCC has introduced in later editions the “advance payment” provision that is in line with other modern international forms of contract.

The contractor must provide details at tender stage of his requirements for advance payments together with an acceptable “advance payment guarantee” from an approved financial institution. All advance payment transactions are dealt with in the recovery statement. No “direct payments” should need to be made between the parties. This ensures that all financial transactions related to the contract are accounted for in the payment provisions of the agreement

RELEVANT COURT CASES

To conclude, the following discussion highlights the most important court cases on the matter

Jack Frost (Cape Town) (Pty) Ltd v Minister of Public Works & another 1980 (3) SA 20 (C) **Question of law**

In this case the issue was whether a clause dealing with the ownership of unfixed material in the main

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contract, between the employer and the main contractor, also applied to a subcontractor

Facts of the case

The subcontractor (Jack Frost) reserved the ownership of material brought onto site until payment received in respect thereof by the employer. These conditions were clearly stated in its tender

The main contract contained no subsequent conditions with regards to the ownership of materials brought onto site by a subcontractor. The main contract only referred to materials brought onto site by the main contractor

The subcontractor was employed under and accepted the conditions of contract in terms of the main contract

The main contractor was in financial difficulties and did not pay the subcontractor

An employee of the main contractor signed a document specifically identifying the materials, plant and equipment brought onto site by the subcontractor

Findings of the court

The contractor is bound by the conditions on the subcontractor's tender documents since the main contract contained no subsequent conditions with regards thereto. The subcontractor was therefore granted the declaratory order sought with costs and was entitled to remove the specified materials. (Loots, 1995, p 456 – 457)

Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Transvaal) 1980 (2) SA 214 (W)

Question of law

This case dealt with the question of ownership in mechanical equipment installed in a building and the right of the supplier to remove such equipment if not paid for

Facts of the case

Melcorp, the agent in South Africa for Mitsubishi Lifts, supplied and installed two ten-passenger lifts in a building

Because the developer defaulted in his bond payments, the bondholder caused the property to be sold in execution and purchased the property at the sale

The agreement between Melcorp and the developer expressly stated that Melcorp retained ownership of the goods, with the right to remove the goods if default was made in respect of any payments. It furthermore stated that this provision applied irrespective of certain conditions, which related to, among other things, a further mortgage or a subsequent lease of the premises, as well as the manner of attachment of the goods

Melcorp presented the bondholder with a copy of the agreement before the sale of the property

Findings of the court

The court held that a lift installation forms an integral part of a multi-storey flat and that it is a proper inference that installer of the lifts intended them to form a permanent part of the structure, unless expressly stated otherwise as was done in the contract between Melcorp and the developer. Melcorp was therefore entitled* to the relief claimed by it (Loots, 1995, p 458 – 459)

**The Court might have come to a different conclusion had it found that the installation was not readily removable without "substantial injury either to the immovable or its accessory". However, evidence showed that the removal could be effected with "more or less ease"*

Saflec Security Systems (Pty) Ltd v Group Five Building (East Cape) (Pty) 1990 (4) SA 626 (E)

Question of law

The issue dealt with in this case is the same as that in the case of *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Transvaal) 1980 (2) SA 214 (W)* and concerned the question of ownership of mechanical equipment installed in a building and the right of the supplier to remove such equipment if not paid for

Facts of the case

Group Five carried on business as a building contractor. It was contracted to build a prison for which two metal detectors were required

Group Five appointed B & J Electrical (Ciskei) (Pty) Ltd to install the metal detectors

Doculum, a closed corporation, had an exclusive marketing franchise for the sale of Saflec's products (the metal detectors) in the Eastern Cape. Doculum had an agent for the Eastern Cape, Wellsafe (Pty) Ltd

According to Saflec the following agreement existed between itself, Doculum and B & J Electrical (Ciskei) (Pty) Ltd:

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The detectors would be sold by Saflec to Doculum and by Doculum to B & J Electrical (Ciskei) (Pty) Ltd

The detectors would be installed by Wellsafe (Pty) Ltd B & J Electrical (Ciskei) (Pty) Ltd were to pay the price of the detectors to Doculum

Saflec would physically deliver one detector to Wellsafe (Pty) Ltd and the other to site

Saflec's terms and conditions of the sale were expressly printed on the reverse side of the invoices issued to Doculum. These conditions held that Saflec remained owner of the goods until the full purchase price thereof was paid

B & J Electrical (Ciskei) (Pty) Ltd had been placed under liquidation; Saflec had not been paid and therefore claimed return of the detectors

Group Five denied B & J Electrical (Ciskei) (Pty) Ltd to be its subcontractor, but agreed that B & J Electrical Division (Pty) Ltd was its subcontractor

Group Five paid for the detectors and denied any knowledge of the arrangement between Saflec and the various other firms

Group Five submitted that even if Saflec retained ownership in the sale of the detectors to Doculum it was estopped from claiming return of the detectors

Findings of the court

It was immaterial whether the subcontractor was B & J Electrical (Ciskei) (Pty) Ltd or B & J Electrical Division (Pty) Ltd because there was obviously an inter-relationship between these companies. (Hereafter reference will be made to B & J Electrical)

The ownership in the detectors remained with Saflec and Doculum did not become owner because Saflec retained ownership of the goods until paid.

Doculum could therefore not have transferred ownership of the goods to B & J Electrical

For estoppel to operate there must be, among other things, proof of a representation made by the party against whom estoppel is alleged. The representation relied upon in this case was that made in the affidavit of Mr Robertson, quantity surveyor, of Group Five.

According to the court the facts in this case were not different to those in *B & B Hardware Distributors (Pty) Ltd v Administrator, Cape & another* 1989 (1) SA 957 (A).

In that case the representation relied upon was the delivery of the goods by the appellant at a building site without advising the first respondent of its reservation of ownership.

The court held that in that case the alleged representation was equivocal, which the court also held to be the case in the present instance.

The court furthermore held that if the above finding was wrong there, was another ground upon which the plea for estoppel could not succeed.

Because this was a vindicatory application, the authorities show that in such applications, fault in the form of *dolus* or *culpa*, on the part of the party seeking to vindicate its property must be proved. Group Five's plea of estoppel failed

Saflec was granted the return of its detectors (Loots, 1995, p 459 – 464)

CONCLUSION

Now, the question posed at the start can be answered. It seems that the owner is not presumed to know that the supplier might have reserved ownership in the goods until the full purchase price has been paid.

However, it would be sensible to obtain a guarantee as insurance that all unfixed materials have been fully paid for, since employers, who have paid suppliers, who have, reserved their ownership in the goods, might find their defence against claims from such suppliers unsuccessful. Even a plea of estoppel might not be enough grounds to successfully defend a claim

REFERENCE

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