IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

(1) **REPORTABLE:** NO

(2) **INTEREST TO OTHER JUDGES:** NO

20/8/12 .....
DATE **SIGNATURE**

CASE No. 41299/12

20/8/2012

In the matter between:-

NEW GENERATION ARMS MANAGEMENT (PTY) LTD	Applicant
and	
MINISTER OF DEFENCE AND MILITARY VETERANS	First Respondent
CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	Second Respondent
HEAD : COMMANDER JOINT OPERATIONS	Third Respondent
COMMANDING OFFICER : AMMUNITION SUB DEPOT, NABOOMSPRUIT	Fourth Respondent
COMMANDING OFFICER : SOUTH AFRICAN SPECIAL FORCES SUPPLY UNIT, WALMANSTAL	Fifth Respondent
ARMAMENTS CORPORATION OF SOUTH AFRICA	Sixth Respondent

JUDGMENT

.../...

Van der Byl, AJ:-

[1] The Applicant in this matter is admittedly the supplier of defence "*matériel*" to the Sixth Respondent, being the Armaments Corporation of South Africa ("*Armsco*"), conducting business as the acquirer of such "*matériel*" for the Department of Defence.

[2] The Applicant, being the successful tenderer for the supply of such "*matériel*", and Armsco concluded an agreement in terms of which it obtained from an overseas manufacturer, and supplied to the Sixth Respondent, the "*matériel*" set out in Annexure A to the Notice of Motion, consisting of, *inter alia*, a variety of rifle grenades and ammunition valued at the time at R63 051 167,36, excluding VAT ("*the goods*").

[3] It is the Applicant's case -

(a) that, upon a proper interpretation of the agreement, read with clause 19.1 of the Sixth Respondent's General Conditions of Contract, it retained ownership of the goods until payment of all monies owed by the Sixth Respondent have been paid;

(b) that in terms of the agreement the Sixth Respondent is indebted to it, at a minimum, in the following amounts which have ,notwithstanding demand, not been paid, namely -

(i) an amount of R438 185,94 in respect of customs duty;

(ii) an amount of R 1 840 352,66 in respect of the variation in the exchange rates between the US Dollar and the South African Rand;

(iii) an amount of R5 649 336,59 in respect of the cost of advance payments that were made to the manufacturers of the goods; and

(iv) an amount of R23 861,31 in respect of increased factory prices by the manufacturers of the goods.

[4] It would appear that the Sixth Respondent denies liability to pay these amounts with the result that the Applicant is on the verge of referring, as provided in clause 37.1 of the General Conditions, the dispute to arbitration.

[5] According to the Applicant it received information that the First to the Fifth Respondents intend to use the goods delivered to the Sixth Respondent and supplied by it to the Department of Defence in an operation in Lesotho by the end of August 2012.

[6] On having received information that the goods will be so used, the Applicant, through its attorneys of record, addressed a letter (**record p. 172, Annexure Fb)** to each of the six Respondents on 12 July 2012 in which it sought an undertaking that the goods will, pending the arbitration proceedings, not be used and will be preserved.

[7] It received no response to this letter, whereupon, it, so it is contended, had no

option other than to bring this application which was eventually launched on 16 July 2012 and set down for 31 July 2012.

[8] In this application it seeks, in addition to an order of costs, an order, amongst other incidental relief, that, pending the finalization of the intended arbitration proceedings, to be instituted within 21 days as from date of this order, the First to the Fifth Respondents be -

(a) restrained and interdicted from -

(i) deploying, discharging, firing or using the goods or from permitting the goods to be deployed, discharged, fired or used;

(ii) damaging, destroying, selling, alienating or otherwise disposing of the goods;

(iii) removing the goods from the territory of the Republic of South Africa.

(b) ordered to protect, preserve and, at all times, to safely and securely store the goods.

[9] on 31 July 2012 Mothle J issued an order postponing the application to 14 August 2012 providing for the filing of answering and replying affidavits and indicating that the First to the Fifth Respondents have undertaken "*not to use, deploy or otherwise*

dispose of the goods listed in Appendix A ... before the end of the motion week commencing on 14 August 2012".

[10] As appears from the First to the Fifth Respondents' answering affidavit, deposed to by the Fifth Respondent, it is their case -

(a) *in limine* -

(i) that the Applicant failed, upon a proper interpretation of clause 19.1 of the General Conditions, to prove that it became the owner of the goods;

(ii) that, regard being had to the Applicant's claim in its statement of claim prepared in its envisaged arbitration proceedings (**record pp. 124 tot 169, Annexure E**), the Applicant has made an election to claim specific performance and not cancellation of the agreement and return of the goods and, therefore, cannot approbate and reprobate, so that the goods cannot and do not afford any security to the Applicant and that the Applicant, therefore, has no rights to ownership that are being threatened due to the risk of the goods being destroyed through the use thereof by the First to the Fifth Respondents;

(b) on the merits of the matter -

(i) that the Special Forces will indeed participate in a military exercise to be

held in Lesotho during August 2012, but that it is not correct that it is the intention to use the goods in the exercise or to transport the goods to Lesotho

(ii) that the goods to be used will be supplied by 4 Special Forces Regiment and 5 Special Forces Regiment;

(iii) that the goods in question are in store at Special Forces Supply Unit at 91 Ammunition Depot.

[11] In relation to the allegation that the Respondents failed to respond to the letter of 12 July 2012, it is contended that the Respondents were between 12 July 2012 and 16 July 2012 not afforded a reasonable opportunity to respond to that letter prior to the launching of the application.

[12] The Respondents in any event, through the State Attorney, addressed a letter (**record p. 261, Annexure RM1**) on 3 August 2012 to the Applicant's attorneys of record in which it is indicated that the First to the Fifth Respondents never intended to use any of the goods in the exercise in Lesotho and to transfer any of the goods to Lesotho and, furthermore, furnished an undertaking to that effect.

[13] The Sixth Respondent is not opposing the application and in an affidavit filed by its attorney of record, apart from explaining why no answering affidavit is filed, it is indicated that the Sixth Respondent is in agreement with the content of the opposing

affidavit of the First to the Fifth Respondents.

[14] In its replying affidavit, the Applicant -

(a) reiterates that before the goods were delivered to it, it indeed paid the supplier for the goods in full;

(b) referring to a letter, **Annexure R2, record p. 284**), signed by the deponent to the First to Fifth Respondents during October 2008 and the Sixth Respondent's tender for the supply of goods, contends that the Respondents have no other weapons and ammunition to use in the envisaged exercise;

(c) that, relying on a transcription of submissions made by counsel who appeared on behalf of the Respondents in previous proceedings between the parties in Case No. 14561/12 (**record p. 311, Annexure R3**), it was conceded that the Applicant is the owner of the goods and from which it appears that it is not allowed for explosives to be stored at Special Forces Supply Unit, denies that the goods can be stored, as alleged, at that Unit and that the goods are in fact stored at 91 Ammunition Depot, Naboomspruit.

[15] In a supplementary replying affidavit, the Applicant submitted proof of having paid its supplier.

[16] Various submissions were made by counsel on both sides on various issues.

[17] I do not mean any disrespect to counsel if I do not deal with all the points mentioned in the very able and articulate submissions before me.

[18] I, sitting in the urgent court where I am swamped by various other urgent applications, am in any event unable to deal in particular detail with all the allegations contained in the papers and the submissions made in relation to those allegations on behalf of the parties, except to say that I have read and considered all the allegations and submissions made by and on behalf of the parties on both sides.

[19] In my view the gist of this matter lies in the question whether, as was vigorously argued on both sides, the Applicant at all relevant times retained ownership of the goods.

[20] If one assumes that the Applicant has, on the allegations made in the replying and supplementary replying affidavits, made out a case that it became the owner of the goods, the question remains whether it retained ownership on having delivered the goods to the Sixth Respondent.

[21] For its contention that it retained ownership, it relies on the provisions of clause 19.1 of Armscor's General Conditions which reads as follows:

> *"All rights in respect of material, equipment or special moulds, jigs and tools purchased by the contractor (being, in this case, the Applicant) as deliverable supplies in terms of the order/contract and paid for by*

...I...

Armscor for the purposes of and in terms of the order/contract, shall upon delivery to the contractor and payment by Armscor immediately vest in Armscor.".

[22] In my view, applying all principles relating to the interpretation of contracts, this clause deals with the circumstances under which ownership of the material referred to in the clause will vest in Armscor and is applicable to a situation where the material concerned has been delivered to the contractor by its supplier and Armscor had, before delivery to it, already paid for the material. It is under these circumstances that all rights in respect of the material will vest in Armscor despite the fact that delivery to it had not yet taken place. The purpose of the clause is clearly to safegauard Armscor's interest in the goods and not to retain ownership in favour of the Applicant.

[23] There is in my view no indication in the clause that the contractor need in the circumstances to be the owner of the material, but even if the contractor is the owner the intention is that ownership should, in the event of the goods having been delivered to the Applicant by its supplier and Armscor having paid for the material, pass to Armscor.

[24] If those are the facts there is no possibility that the Applicant can or could have retained ownership.

[25] It, however, appears, if regard is had to the dispute between the Applicant and Armscor, that Armscor had not yet paid or at least had not yet paid the Applicant in full

.../...

at the time the goods were delivered to Armscor.

[26] In these circumstances it does not appear to me that clause 19.1 can be of any assistance to the Applicant to prove that it was the owner of the goods and, if so, that it retained ownership of the goods.

[27] The question is whether, applying South African law, the Applicant in the circumstances otherwise retained ownership of the goods.

[28] As was held in ***Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973 (3) SA 685 (A) at 694A*** the general rule as regards the passing of ownership is that -

(a) in a sale for cash, ownership does not pass until the price is paid, even if delivery has meantime being given;

(b) in a sale on credit, ownership passes on delivery.

[29] In so far as the sale in questions appears to have been a sale on credit, ownership must have passed to Armscor on the delivery of the goods.

[30] In the premises I am not satisfied that the Applicant has on the probabilities shown that it retained ownership of the goods.

.../...

[31] It cannot accordingly claim, as is doen in its Notice of Motion, that the goods be preserved until such time as the arbitration proceedings to be instituted are finalized.

[32] In the result the following order is made:

The Application is dismissed with costs, including the costs attendant upon the employment of two counsel.

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P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT	**ADV D A PREIS SC** **ADV C A C KORF**
On the instructions of	**WEIDEMAN ATTORNEYS** **608 Reitz Street** **Sunnyside** **PRETORIA** **Ref: EW** **Tel : 012 343 8390**
ON BEHALF OF THE FIRST TO FIFTH RESPONDENTS	**ADV D E VAN LOGGERENBERG SC** **ADV L MMUSI**
On the instructions of	**THE STATE ATTORNEY** **SALU Building** **255 Andries Street** **PRETORIA** **Ref: 590/2012/Z79**
DATE OF HEARING	**14 August 2012**
JUDGMENT DELIVERED ON	**20 August 2012**