[REPORTABLE]

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 7067/07

In the matter between:

YORK INTERNATIONAL (SA) INC	Applicant
and	
THE MINISTER OF PUBLIC WORKS	First Respondent
THE MINISTER OF DEFENCE	Second Respondent
WBHO CONSTRUCTION (PTY) LTD	Third Respondent

JUDGMENT

NDITA, J:

[1] In this matter the Applicant brought an urgent application seeking the following relief:

(a) That the First, alternatively the Second, further alternatively the Third Respondent is restrained and interdicted from utilizing, in any way or for any purpose, whatsoever, the two Water Cool Screw Chillers, model number YCW505635B50, with serial numbers RMNM10073 and RMNM010054 respectively;

(b) That the relief be *interim*, pending the finalisation of the action instituted by the Applicant against the First and Second

Respondents in the Transvaal Provincial Division ("TPD"), and the action instituted against the Third Respondent in the Witwatersrand Local Division ("WLD");

(c) That the costs of this application be costs in the TPD action.

[2] The Applicant is an international company, duly registered in accordance with the Laws of the Republic of South Africa and having its principal place of business at 60B Electron Avenue, Isando, Johannesburg, Gauteng. The First Respondent is the Minister of Public Works, acting in his official capacity. The Second Respondent is the Minister of Defence, acting in his official capacity. The Third Respondent is WBHO Construction, a construction company duly registered and incorporated according to the laws of the Republic of South Africa.

BACKGROUND

[3] On 18 October 2004, the Applicant concluded a written agreement of sale with a company known as *Savannah (Pty) Ltd* ("Savannah"), in terms of which the applicant sold to *Savannah* two Water Cooled Screw Chillers or air conditioners for an amount of R588 169-32. The terms of the agreement were that:

"10.1 Ownership of the goods shall remain vested in the Seller until the price in respect of such goods had been paid in full or unless satisfactory payment guarantees (see Clause 6.5) are provided by the Purchaser to the Seller.

10.2 The purchaser acknowledges that for the purpose of giving effect to 10.1 above, the goods shall be deemed to remain movable and severable property notwithstanding that they have been fixed to movable or immovable property owned by the Purchaser or by any other person whatsoever.

10.3 The Purchaser shall be obliged to inform the landlord of any premises in which the goods are installed of the provisions ofthis clause 10. The Seller reserves the right to similarly inform the landlord of these provisions".

[4] The Applicant imported the chillers and delivered them at Chempet, Cape Town during October 2004. It was common knowledge to both the Applicant and *Savannah* that the chillers were to be installed permanently at the Simons Town Naval base building, which was being constructed by the Third Respondent for the Second Respondent. The First Respondent paid the Third Respondent, who is the main contractor, in full for both the supply and installation of the chillers. It paid in *bona fide* ignorance of the reservation clause between the Applicant and *Savannah.* The Applicant does not aver that the Second and Third Respondents were advised of the reservation clause in the sale agreement. The chillers were duly installed by the Third Respondent as permanent portions of the building with the intention that they should be permanent fixtures. It is not in dispute that the Third Respondent paid the full purchase price to *Savannah*, but according to the Applicant, *Savannah* neglected to effect payment of the purchase price as a result of which it instituted action for the return of the goods in the Witwatersrand Local

Division and Transvaal Provincial Division. The main ground for the relief sought is the reservation of ownership clause in the agreement with *Savannah,* coupled with the fact that the condition of the chillers is deteriorating whilst being used by the First Respondent.

APPLICABLE LAW

[5] It must be accepted that the chillers, which were initially movable, lost their separate identity, as such, on being installed in the building, firstly, because the intention of the owner of the building, the First Respondent, was that they should remain permanently, and, secondly, the intention of the person installing them, the Third Respondent, was the same. Both the First and Third Respondents were *bona fide* of the belief that ownership would pass to the First Respondent.

[6] The law relating to fixtures attached to buildings is set out in **The Law of Things**, **Maasdorp's Institute of South African Law, Volume 11, Eighth Edition,** page 38:

> *"These as a general rule become part and parcel of the buildings themselves and, so, the property of the owner of the buildings. The legal effect of the fixing and attaching of things to a building greatly depends, however, upon the particular circumstances of each case, it being impossible to lay down any general rule applicable to all cases. The points chiefly to be considered are the nature and object of the*

structure in question, the mode of its attachment and the intention with which it was attached."

[7] Similarly, Van der Merwe in **Sakereg**, **Second Edition** page 247 reiterates the principle as follows:

"Indien die aanhegting sodanig is dat die grond en die aangehegte saak 'n geheel vorm, verloor die aangehegte saak sy selfstandige karakter en word dit deur accessio *die eiendom van die eienaar van die grond. Veral in gevalle waar die aanhegting deur iemand anders as die eienaar van die grond aangebring is, is dit belangrik om te weet wanneer die aanhegting geag word deel van die grond te word en wanneer nie. Indien dit wil geag word deel van die grond te word, word aangehegte saak deur* accessio *die eiendom van die eienaar van grond; indien nie, bly die roerende saak steeds die eiendom van die oorspronklike eienaar."*

[8] In **Cape Town Municipality v Table Mountain Aerial Cableway CO LTD** 1996 (1) SA 917 (C) Van Zyl J, in considering whether the claim relating to property excluded the land or premises on which the facilities in question had been erected, came to the conclusion that:

"By the principle of inaedificatio *they become part of such land or premises and likewise constitute immovable property. See* Gaius Institutes 2.73 (superficies solo cedit: 'that which is erected on the ground becomes part of it'*). This principle still applies in South African law."*

[9] In **Unimark Distributors (PTY) LTD v Erf 94 Silvertondale (PTY) LTD** 1999 (2) SA 986 (T) at 1996, the court held that firstly, the nature of the thing and the manner of affixation may determine whether it is at all possible to affix it to an immovable property in a way to preserve its identity, but reiterated that the intention is particularly important, because it is the determining factor where the first two do not produce a conclusive answer.

[10] In the present case, this principle operates in favour of the Respondents, because it is not in dispute that the chillers were permanently attached to the newly constructed building. Nowhere in the founding affidavit does the Applicant make an averment that the chillers are not permanently attached to the building, or that they were fixed in such a manner as to restore their separate identities. The Respondents aver that it was its intention that the chillers should be permanently affixed to the Naval Base building. Again, the Applicant did not dispute the averment. Instead it alleges that the Respondents were aware that *Savannah* had not effected the payment as agreed. Whether the Respondents were aware that *Savannah* had not effected payment to the Applicant is not relevant, because there is no contractual nexus between *Savannah* and the First and Second Respondents. The fact is if the Applicant intended to reserve ownership of the chillers, it could not do so without communicating its intention to the First Respondent, who is the owner of the building. In my view, as in all contracts, if the owner of movable property, which is to be attached to immovable property, wishes to denounce the application of the principle of *accessio*, such intention should be

unequivocally imparted to the owner of the immovable property who will then decide whether to accept or reject such terms.

[11] I now turn to consider whether the balance of convenience favours the Applicant.

[12] It is trite that to succeed in an application for an *interim* interdict, the applicant must establish a *prima facie* right, even if open to some doubt. The *prima facie* right of ownership is based on a contract between the Applicant and *Savannah.* Bearing in mind the aforegoing finding regarding fixtures on immovable property, it seems to me that any claim that the Applicant may have against the Respondents can only be a *rei vindicatio*. It follows that even the claim to ownership of the chillers must be open to some doubt. There is, in my view, considerable doubt as to whether the Applicant has a *prima facie* right to possession of the chillers. This leads to the inescapable conclusion that the Applicant's prospects of success in the main action are not good.

[13] In considering whether the balance of convenience favours the appellant, the approach set out by Ettlinger AJ in **Ndauti v Kgami and Others** 1948 (3) SA 27 (W) at 36 is relevant:

> *"In my opinion the Court has, in every case of an application for an interdict* pendente lite*, a discretion whether or not to grant the application and it should exercise this discretion upon a consideration of all the circumstances and particularly upon a consideration of the*

probabilities of success of the applicant in the action, and the nature of the injury which the respondent, on the one hand, will suffer if the application is granted and he should ultimately turn out to be right, and that which the applicant, on the other hand, might sustain if the application is refused and he should ultimately turn out to be right. For though there may be no balance of probability that the applicant will succeed in the action it may be proper to grant an interim interdict where the balance of convenience is strongly in favour of doing so, just as it may be proper to refuse the application even where the probabilities are in favour of the applicant if the balance of convenience is against the grant of interim relief".

[14] It may be well to remember that the granting of relief of this nature is discretionary. The chillers in question have been installed since 2004, and were used by the First and Second Respondents as air conditioners. The First Respondent has paid the full purchase and installation price. The Applicant does not deny that the building in which the chillers have been installed, accommodates approximately 600 personnel members, strategic equipment as well as computers. Furthermore, according to the First and Second Respondents, the air conditioning is essential for the proper functioning of the staff and equipment. If the interdict is granted, the First and Second Respondents would be obliged to evacuate the personnel and equipment into alternative accommodation, which it does not have. When one has regard to the Applicant's limited prospects of success in the main action and the harm the respondents are likely to suffer. It becomes clear that the balance of

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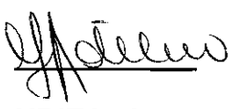
[15] In the circumstances, the application is refused with costs.



NDITA, J