

REPORTABLE

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 19539/2008

DATE: 09/12/2010

IN THE MATTER BETWEEN:

JACOBUS JOHANNES OPPERMAN

PLAINTIFF

AND

GAVIN LLEWELYN STANLEY

FIRST DEFENDANT

LIBRA MEASURING INSTRUMENTS (PTY) LTD

SECOND DEFENDANT

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JUDGMENT

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MAKGOBA, J

[1] The plaintiff instituted an action against the first and second defendants seeking a declaratory order that certain fixtures, namely a weighbridge and two

augers (“the improvements”) installed by the first defendant on the plaintiff’s farm, permanently form part of the plaintiff’s immovable property.

- [2] The second defendant had no interest in the litigation and did not defend the action.

In his plea the first defendant denies that the weighbridge and augers constitute “fixed improvements” or that he ever had the intention of permanently affixing these assets to the immovable property of the plaintiff.

- [3] The plaintiff is the owner of the Farm Witpoort, Delmas. During October 2006 the plaintiff and first defendant entered into a written lease agreement in terms whereof the first defendant became the lessee of a specific portion of the plaintiff’s farm for an agreed period of 7 (seven) years with an option to renew the lease agreement. The main purpose for the lease was for the first defendant to develop that specific portion of the property into a grain storage facility. The plaintiff was given an option to, during the term of the lease agreement, purchase shares in the business.

- [4] The written lease agreement contained *inter alia*, the following clause which is relevant to the present case:

“3. VERBETERINGE:

- 3.1 Die partye kom ooreen dat die Huurder sekere vaste verbeteringe op die Eiendom sal aanbring tydens die huurperiode, welke verbeteringe aangebring sal word ten einde die besigheid te help vestig en te bedryf.
- 3.2 Toestemming tot enige verbeteringe sal eers vanaf die Verhuurder verkry word.
- 3.3 Alle vaste verbeteringe sal deel vorm van die Eiendom en die Huurder sal nie geregtig wees om op enige kompensasie daarvoor na afloop van die huurooreenkoms nie."

- [5] The first defendant effected various improvements to the specific portion of the leased property by *inter alia* fencing it off, installing a weighbridge and two augers and building two small offices on the said property.
- [6] Unfortunately the business of the grain storage facility was never realised. The first defendant then tried to remove the weighbridge from the property without the knowledge of the plaintiff.
- [7] The issue before me is whether the improvements had become part of the plaintiff's property through *accessio*.

If so, then clause 3.3 of the lease agreement as set out in paragraph [4] above is applicable and the first defendant is not entitled to the removal thereof or to compensation thereon.

- [8] The law regarding acquisition of property and the subsequent ownership thereof remains widely debated (among legal academics) and a much litigated topic spanning over a long period in our courts. Through the years the courts and academics attempted to formulate and reformulate “ tests or guidelines” in an attempt to provide clarity as to how to determine whether a movable thing that is fixed to an immovable thing loses its identity and therefore becomes part of the property of the owner of the immovable thing.
- [9] In *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie* (WP) Bpk 1996 (3) SA 273 (A) it was held that as to the issue of *accessio*, that whether a movable became a fixture by attachment depended on the circumstances. The “new” approach was that the subjective intention with which the attachment was made (with the emphasis on whether the intention had been that the attachment should be permanent) was decisive – the nature of the movable attached and the manner of its attachment were as a matter of degree merely indicative of the intention with which it was attached.
- [10] Nienaber JA in the *Konstanz Properties* case (*supra*) at page 281 said:

“Of los goed deur aanhegting vas word, hang van omstandighede af. Geen enkele maatstaf kan vir alle gevalle voorsiening maak nie. Vandaar dat Innes HR in die toonaangewende beslissing, *McDonald Ltd v Radin NO and the Potchefstroom Dairies and Industires Co Ltd* 1915 AD 454 te 466 eers beklemtoon dat “each case must depend on its own facts”.

- [11] The learned judge summarized the “traditional” approach, (with reference to the McDonald case) as follows:

“... die verskillende omstandighede ... wat normaalweg in ag geneem word, te wete:

- (a) Die gesteldheid van die roerende saak wat aangeheg word- met die nadruk op sy assimileerbaarheid met die onroerende saak;
- (b) Die wyse van aanhegting- met die nadruk op die integrasie van die roerende saak met die onroerende saak en die verwyderbaarheid van die roerende saak sonder beskadiging van die en of die ander;

- (c) Die bedoeling waarmee die aanhegting geskied- met die nadruk daarop of die aanhegting beoog was om blywend te wees ...”

[12] In the light of the above exposition the legal principle can therefore be laid down as follows: That the question whether an article originally movable has become immovable through annexation by human agency to realty depends upon the circumstances of each case. The elements chiefly to be considered are the nature of the particular article, the degree and manner of its annexation, and the intention of the person annexing it.

*See: McDonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454

*Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (WLD).

*Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (TPD).

Compare with: *Theatre Investments (Pty) Ltd and Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A).

[13] In the present case there is evidence on record as to the nature of the improvements in question.

The weighbridge consists of three parts, namely (i) the top platform, (ii) the load cells with bearings, electronics and software and (iii) the concrete floor and ramps on both sides of the platform.

The augers are two huge steel contraptions, next to two loading/offloading platforms that are affixed to the property (land) in a brick dungeon approximately 1,5 metres deep.

- [14] During the trial I had the opportunity of looking at the photos of the improvements in question and have satisfied myself as to the nature of the improvements as well as the manner of their annexation to the immovable property.

It is significant to note that in answer to the questions by the court the plaintiff conceded that the weighbridge and the augers are capable of being removed and that they can be removed and installed at another place. That they can be removed without any damage to them to an extent that they can still be utilised at another place.

The plaintiff's worry seems to be that it will cause him some expenses to rehabilitate the portion of the land where the improvements happened to have been installed.

[15] The present case is the one to be decided on its own facts, with a liberal sprinkling of common sense, fairness and practicality. The first defendant paid for all the improvements including the fencing and office buildings for which he does not lay any claim. The principle of simple justice between man and man should also come into play.

[16] My observation of the weighbridge is that it consists of a metal pressure plate laid on concrete pillars which sunk into the ground. The pressure plate and all of the other related items can be removed without damaging or disturbing the property, that is the land.

There is no reason to believe that it cannot be removed without causing irreparable damage to the property. It is a simple matter of unscrewing bolts, lifting metal structures and the filling of possible holes where the foundation has been set. The removal of the two augers would also not cause any irreparable damage to the property.

[17] I come to the conclusion that the weighbridge and the two augers cannot be described as immovable or fixed improvements as envisaged by the written lease agreement between the plaintiff and the first defendant. In the circumstances the plaintiff is not entitled to the declarator he seeks in this matter.

[18] The plaintiff's action is accordingly dismissed with costs.

**EM MAKGOBA**

**JUDGE OF THE HIGH COURT**

FOR THE PLAINTIFF: ADV. A WILKINS

INSTRUCTED BY: BOSHOFF SMUTS INC

FOR THE FIRST DEFENDANT: ADV. C VAN DER MERWE

INSTRUCTED BY: CORNE BOTHA ATTORNEYS