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CONSTRUCTION LAW BULLETIN

BUILDERS' LIENS AND SECURITY

Introduction

Can a builder's lien be substituted with security?

In other words, can an employer evict a builder who is exercising a lien over a site by providing security, say in the form of a bank guarantee, to cover the contractor's claim which is the subject matter of the lien?

The Supreme Court of Appeal (SCA) had to deal with this issue recently¹ albeit not in the context of a construction contract. Nonetheless, the Court reviewed the law and stated the relevant principles.

Liens

There are two types of lien.

Firstly there is the debtor/creditor lien which arises out of a contract between the parties and extends to cover all expenditure which the lien holder has incurred on the other party's property. The lien holder may retain the property as against the other party, but not against third parties who have rights in the property, until the lien holder has been paid the contract price. This type of lien does not exist apart from the contract.

Secondly there is the improvement lien. This lien can be maintained not only against the owner of the property but against all comers. It arises where there is no contract between the parties. As with a debtor/creditor lien, the lien holder must be in possession of the property. He must prove that he has incurred expenses in respect of the property which were necessary, either for the salvage of the

¹ [Pheiffer v Van Wyk \(267/13\) \[2014\] ZASCA 87 \(30 May 2014\)](#).

property or which comprise useful improvements to the property. It secures only the actual costs expended or the value by which the property has been enhanced by the improvements.

A builder's lien is both a debtor/creditor lien and an improvement lien, albeit that different amounts are secured, depending on which lien the builder seeks to enforce.

The Facts

Cornelius van Wyk owned a farm known as Kilimanjaro in the Alldays district.

In March 2011 he purported to sell the farm to Willem Pheiffer for R3,5m.

A written document was prepared recording the sale but it was only signed by Van Wyk.

The document gave Pheiffer the right to occupy the farm and to effect improvements to it as he deemed fit.

Pheiffer took possession of the farm, carried out some improvements, to the value of R2m, but was unable to raise the necessary funds to pay the purchase price.

Van Wyk then purported to cancel the agreement and resold the farm to a third party, Marde (Pty) Ltd.

When Marde tried to take occupation of the farm, Pheiffer resisted and claimed a right to remain in possession of the farm on the grounds that he had a lien in respect of the improvements he had effected to the farm.

The so-called agreement between Van Wyk and Pheiffer was found to be invalid for various reasons inter alia because it did not comply with the legal formalities relating to the sale of land.

As such Pheiffer's lien was treated as an improvement lien as opposed to a debtor/creditor lien.

Security for the Lien

Van Wyk arranged for Marde to put up an ABSA Bank guarantee in favour of Pheiffer for R2m payable as against Pheiffer obtaining a judgment against him for payment for the improvements allegedly made to the farm.

Pheiffer contended that he was not obliged to accept the security offered and more particularly because it was being offered by a third party and not the person against whom he had his enrichment claim relating to the improvements, namely Van Wyk.

Whilst there was no argument that a Court has a discretion to substitute security for a lien in the case of debtor/creditor liens, there were two conflicting decisions of the Johannesburg High Court, one saying that in the case of an improvement lien the Court had no such discretion and the other saying that the Court indeed has such a discretion.

The SCA held that there was no logical reason to distinguish between the two types of lien. It confirmed that both in the case of debtor/creditor liens and enrichment liens, the Court has a discretion to order that a lien be replaced with adequate security. It also found that Pheiffer's complaint about the security being put up by a third party was untenable.

An interesting comment made by the Court is that the security does not have to cover the costs to be incurred by the lien holder in any Court action to establish the value of the lien holder's claim since the intention is for the security to serve as a substitution for the lien and not as additional security.

Conclusion

It is an established principle of our law that the owner of property subject to a lien may defeat the lien by furnishing adequate security for the payment of the underlying debt.

An employer in a construction contract setting accordingly always has the option of securing a contractor's eviction from a site over which the contractor is exercising a lien by putting up adequate and appropriate security.

Although the substitution of security for a lien is dependent on the exercise by a Court of its discretion in favour of doing that, it will be a rare case indeed where a Court does not do so.

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