THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 469/03
Reportable

In the matter between :

A D PELLOW NO
S WILLIAMS NO — APPELLANTS

and

CLUB REFRIGERATION CC — RESPONDENT

CORAM : SCOTT, MTHIYANE, CLOETE JJA, ERASMUS, JAFTA AJJA

HEARD : 16 SEPTEMBER 2004

DELIVERED : 29 SEPTEMBER 2004

Summary: The effect of a reservation of ownership clause in a contract of *locatio conductio operis* (lump sum building contract) in favour of the building contractor, where insolvency of the employer has supervened before the works have been completed, discussed.

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] At issue in this appeal is the effect of a reservation of ownership clause in a contract of *locatio conductio operis*, a lump sum building contract, in favour of the building contractor, where insolvency of the employer has supervened before the works have been completed (and no question of *accessio* arises). Rival contentions were advanced on behalf of the building contractor, Club Refrigeration CC ('Club Refrigeration'), who was the successful applicant in the court *a quo* and is the respondent on appeal; and on behalf of the liquidators of the employer, Fisher Foods SA (Pty) Ltd ('Fisher Foods'). The liquidators were cited jointly in the court *a quo* as the first respondent and are the appellants in the appeal. Because of the arguments advanced before this court, the facts will have to be set out in some detail.

[2] Fisher Foods intended constructing a factory in Kempton Park. To that end, it called for tenders. Club Refrigeration CC submitted such a tender dated 5 October 2001. The tender was for the construction of the factory and the supply of certain items of equipment which formed part of the factory but which remained movable. It contained the following clauses which are relevant for present purposes:

'PRICES:

Fixed price for all items as specified R10 991 000.00.

PAYMENT TERMS

Interim progress payments during the site work schedule to up to 90% of the contract price

10% on completion and before commercial use.

ACCEPTANCE

The price is fixed for a period of 28 days from the date of quotation.

All items of equipment remain the property of Club Refrigeration CC until they are paid for in full.

CONTRACT TERMS

As per JBCC principle building agreement, code 2101, July 2000.'

The reference to the 'JBCC principle building agreement' was to the July 2000 version of the Principal Building Agreement prepared by the Joint Building Contracts Committee Inc.

[3] Fisher Foods responded to the tender by sending a document to the applicant dated 15 November 2001. The document was entitled 'Order' and it contained inter alia the following provisions:

'This order is to confirm our acceptance of the Fixed Price Tender dated 15 10 2001…

A deposit of thirty per cent of the agreed price (R3,297,300.00, Three million Two Hundred and Ninety Seven Thousand Three Hundred Rand) will be paid on receipt of your confirmation of the fixed price and is also subject to the following:

- Receipt of an agreed and signed copy of the JBCC building agreement code 2101 published July 2000 and the relevant Bank guarantee pertaining to this agreement. All further payments will be in accordance with the JCBB building agreement…'

Club Refrigeration thereafter submitted a signed copy of the JBCC agreement to Fisher Foods.

[4] The building works undertaken by Fisher Foods were financed by the Industrial Development Corporation of South Africa Limited ('the IDC'). The IDC was joined as the second respondent in the court *a quo*. It registered a general notarial bond over the movable assets of Fisher Foods to secure the loan and subsequently perfected the bond shortly before Fisher Foods was liquidated.

[5] The project was completed by Club Refrigeration, who submitted a claim to Fisher Foods for the outstanding amount payable in terms of the contract. Fisher Foods was liquidated and the liquidators were appointed before any payment was made by Fisher Foods in respect of the claim. The claim comprised composite amounts for goods and labour.

[6] The present matter concerns movable goods included in the claim. Club Refrigeration and the IDC made competing claims to these goods. It is important to emphasize, for reasons which will become apparent, that

Club Refrigeration's claim was based on its ownership of the goods; it was not for payment of the claim in terms of the contract. The liquidators at no stage contended that the goods had become the property of Fisher Foods by *accessio* and expressly admitted that they were movables. A third party, Afgri Operations Limited, wished to purchase the goods. Ultimately, a tripartite contract was concluded between Club Refrigeration, the liquidators and the IDC relating to the disposal of the goods (referred to as the 'sale assets') which contained the following relevant terms:

'2. RECORDAL

2.1 The assets referred to in annex "A" hereto ("the sale assets") are in the possession of the joint provisional liquidators at the premises of FISHER FOODS SOUTH AFRICA (PTY) LIMITED (in liquidation) at 17 POMONA ROAD, AVIATION PARK, KEMPTON PARK.

2.2 A general notarial covering bond was registered by FISHER FOODS SOUTH AFRICA (PTY) LIMITED ("Fisher Foods") in favour of the IDC over the movable assets of Fisher Foods under bond number BN45130/2002 ("the GNB").

2.3 IDC contends that:

2.3.1 the sale assets fall under the GNB;

2.3.2 it has perfected its security in terms of the GNB.

2.4 Club Refrigeration contends that it has reserved rights of ownership in the sale assets pursuant to the sale thereof by Club Refrigeration to Fisher Foods.

2.5 AFGRI OPERATIONS LIMITED ("Afgri") wishes to purchase the sale assets from the joint provisional liquidators for a purchase price of R1,280,000.00 (one million two hundred and eighty thousand rands) plus VAT ("the purchase price").

3. THE SALE ASSETS

3.1 IDC and Club Refrigeration hereby agree that the joint provisional liquidators are entitled to sell the sale assets to Afgri for the purchase price which shall be held by the joint provisional liquidators in an interest bearing account and paid to IDC and/or Club Refrigeration depending on which of them is found to be entitled thereto (whether in whole or in part) having regard to the contentions of each of them respectively as set out in 2.3 and 2.4 above.

3.2 The determination as to which of IDC or Club Refrigeration is entitled to the whole or portion of the purchase price shall be determined by a court of competent jurisdiction unless the method of determination is otherwise agreed in writing by IDC and Club Refrigeration.

…

3.5 The joint provisional liquidators give no acknowledgement or undertaking to either IDC or Club Refrigeration with regard to their claims as set out in 2.3 and 2.4 above and will deal with the proceeds of the purchase price in terms of the liquidation and distribution account relating to Fisher Foods South Africa (Pty) Limited (in liquidation) in due course, unless otherwise determined in accordance with clause 3.2 above.'

[7] The goods were then sold to Afgri for R1,28 million. Club Refrigeration commenced motion proceedings in the court *a quo* in which

it claimed a declaratory order that on the date of the commencement of the winding up of Fisher Foods, it was the owner of the goods; and it further sought an order that the liquidators be directed to pay the proceeds of the sale of the goods, i.e. R1,28 million, to it. The basis of Club Refrigeration's claim as set out in the founding affidavit was that it had sold the goods to Fisher Foods in terms of a contract in which it reserved ownership in them until paid. The liquidators opposed the application on the basis that there was no reservation of ownership clause but that if there were, s 84(1) of the Insolvency Act had the effect of transferring the ownership in the goods to them, subject to a hypothec in favour of Club Refrigeration. The IDC did not participate in the proceedings. In argument before the court *a quo*, counsel for Club Refrigeration changed tack and submitted that the goods had not been sold to Fisher Foods, but had been supplied in terms of a contract of *locatio conductio operis*; and that s 84(1) was accordingly not applicable. The court *a quo* (Botha J) granted the relief sought by Club Refrigeration and the present appeal is with the leave of that court.

[8] Before dealing with the four submissions made by counsel for the liquidators, it would be desirable to record that in argument before this court it was common cause that the contract between the appellant and

Fisher Foods was indeed a contract of *locatio conductio operis*, and that s 84(1) of the Insolvency Act — limited, as it is, to instalment sale transactions — was accordingly not applicable.

[9] The first submission made by counsel for the liquidators was that the contract between Club Refrigeration and Fisher Foods contained no reservation of ownership clause inasmuch as, said counsel, the order placed by Fisher Foods constituted a counter offer which was accepted by Club Refrigeration. That meant, said counsel, that the terms of the JBCC agreement alone governed the contract between parties. Counsel relied in particular on clause 1.8 of the JBCC agreement, which reads:

'This agreement is the entire contract between the parties regarding the matters addressed in this agreement. No representations, terms, conditions or warranties not contained in this agreement shall be binding on the parties. No agreement or addendum varying, adding to, deleting or cancelling this agreement shall be effective unless reduced to writing and signed by the parties.'

[10] The argument is untenable. The tender was incorporated in the JBCC agreement signed on behalf of Club Refrigeration and sent to Fisher Foods, as required in the order placed by Fisher Foods on Club Refrigeration. Clause 2 of that agreement provides:

'2.0 OFFER ACCEPTANCE AND PERFORMANCE

2.1 The objective of this agreement is the execution of and payment for the works for which there has been an offer by the contractor and an acceptance thereof by the employer.

2.2 In pursuance of such an objective the parties undertake to carry out their reciprocal obligations in terms of this agreement.'

'Agreement' is defined as meaning 'this JBCC Principal Building Agreement and other contract documents which together form the contract between the employer and contractor'; and 'contract documents' are, in turn, defined as meaning 'this document, the contract drawings, the … lump sum document and such other documents as are identified in the schedule'. In the schedule, under the heading 'Contract documents marked and annexed hereto' the word 'yes' has been filled in opposite 'lump sum document'. The relevant part of the definition of 'lump sum document' in clause 1 is 'the document providing the lump sum amount priced by the contractor to reflect the contract sum'. That document must have been Club Refrigeration's tender, as counsel representing the liquidators was constrained to concede.

[11] The second argument advanced by counsel representing the liquidators was that because the contract between Club Refrigeration and Fisher Foods was a lump sum contract, unless there is a mechanism for ascertaining which portion of the contract price pertained to particular

movable assets to be delivered in terms of the agreement, it will be impossible to determine whether payment for individual items had been made; and there is no such mechanism. In my view, there is.

[12] The order placed by Fisher Foods made specific provision for payment in terms of the JBCC agreement. Clause 31 of the JBCC agreement provides for interim payments to be made to the contractor. Clause 31.4 provides that the value certified in an interim payment certificate shall separately include:

'31.4.1 A reasonable estimate of the value of the work executed …

31.4.2 A reasonable estimate of the value of materials and goods in terms of 31.6…'

(It is not necessary for present purposes to have regard to clause 31.6 or to consider the submission by counsel representing the liquidators that the court *a quo* was incorrect in considering that the movable goods at issue in these proceedings would fall to be certified under clause 31.4.2.) Clause 31.9 provides that the employer shall pay to the contractor the amount certified within seven calendar days of the date of issue of the payment certificate. Clause 31.7 provides that materials and goods paid for in terms of clause 31.9 shall become the property of the employer. This is the mechanism by which it can be determined which part of the price

has been allocated for specific goods and whether particular goods have been paid for. Clause 31.7 dovetails easily with the reservation of ownership provisions in Club Refrigeration's tender: The latter provides that until goods are paid for, ownership remains vested in Club Refrigeration; and the former provides that once payment has been made for goods (whether they have been incorporated in the works or not and therefore irrespective of whether *accessio* applies), ownership in them will pass to the employer i.e. Fisher Foods.

[13] The liquidators have at no stage suggested that Club Refrigeration has been paid for the goods. They bear the onus of proof on this point. The specific allegation in the founding affidavit that Club Refrigeration has not been paid, has not been contradicted. Furthermore, the tripartite agreement can only have been entered into on the basis that Club Refrigeration had not been paid for the goods in question; for otherwise the provisions of Clause 31.7 of the JBCC agreement would have provided a complete answer to Club Refrigeration's claim that it was the owner of the goods.

[14] The third submission by counsel for the liquidators was that because the value of the goods was not specified in any payment certificate, whether interim or final, Club Refrigeration was not entitled to

payment in respect of those goods in terms of the JBCC agreement forming part of its contract with Fisher Foods. But that is irrelevant. Club Refrigeration does not seek payment for the goods in terms of the JBCC agreement. It seeks to enforce its right to payment of the proceeds of the sale of the goods in terms of the tripartite agreement because it was the owner of the goods when insolvency supervened.

[15] Counsel representing the liquidators submitted that the tripartite agreement does not mean that if Club Refrigeration succeeded in proving that its contract with Fisher Foods contained a reservation of ownership clause in its favour, it would be entitled to the proceeds of the sale of the goods. In my view, that is precisely what the tripartite agreement means. In terms of clause 3.1, the liquidators undertook to pay the proceeds of the sale of the goods to IDC and/or Club Refrigeration 'depending on which of them is found to be entitled thereto (whether in whole or in part) having regard to the contentions of each of them'. The contention of Club Refrigeration set out in clause 2.4 was that it had reserved the right of ownership in the goods. It is true that Club Refrigeration contended that it had sold the goods to Fisher Foods, whereas it had not; but that makes no difference. The essence of Club Refrigeration's claim was that it had retained ownership of the goods because of its contract with Fisher Foods.

In clause 3.5, the liquidators undertook to deal with the proceeds of the purchase price in terms of the liquidation and distribution account in due course 'unless otherwise determined in accordance with clause 3.2'. Clause 3.2 envisaged a determination between the competing claims of the IDC and Club Refrigeration by a court. The determination has been made in favour of Club Refrigeration and it will be confirmed on appeal.

[16] Counsel representing the liquidators, in submitting that the tripartite agreement should not be given its plain meaning, pointed out that when liquidation supervened the contract between Club Refrigeration and Fisher Foods was executory or incomplete; and submitted that it cannot be established whether the liquidators decided not to carry on with the execution of the contract, and thereby repudiated it, much less whether Club Refrigeration accepted any such repudiation and cancelled the contract. But all of this is irrelevant. Club Refrigeration's claim to the proceeds of the sale of the goods is based on the fact that it owned them. It has made no claim in these proceedings to participate in the proceeds of the liquidation of Fisher Foods. In entering into the tripartite agreement the liquidators correctly recognised that if Club Refrigeration was the owner of the goods, the proceeds of the sale of the goods could never form part of the assets of Fisher Foods and would have to be paid over to Club

Refrigeration.

[17] To sum up: Club Refrigeration reserved ownership in the goods supplied by it to Fisher Foods until it was paid. The agreement between Club Refrigeration and Fisher Foods was a lump sum agreement but because of the interim certificate provisions it contained, it can be determined that Club Refrigeration was not paid for certain movable goods supplied by it. Club Refrigeration agreed with the liquidators of Fisher Foods that these goods could be sold to a third party and the liquidators undertook that if Club Refrigeration proved in a court of law that it had been the owner of the goods, they would pay the proceeds of the sale to Club Refrigeration. Club Refrigeration has proved this and is accordingly entitled to payment.

[18] The appeal is dismissed, with costs.

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T D CLOETE
JUDGE OF APPEAL

Concur: Scott JA
Mthiyane JA
Erasmus AJA
Jafta AJA