

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

CONSTRUCTION AND ENGINEERING: DOES A BUILDER ENJOY A LIEN OVER STATE OWNED PROPERTY?

In the construction industry it is well known that a building contractor enjoys a lien or right of retention over work which he has carried out for an employer as security for payment of any or all amounts which may be due and payable to him therefor. However, according to *Loots, Construction Law and Related Issues (1995)*, a contractor may not enjoy such security in regard to the execution of construction or engineering contacts for government departments, provincial administrations or similar public bodies in South Africa today.

CONSTRUCTION AND ENGINEERING: DOES A BUILDER ENJOY A LIEN OVER STATE OWNED PROPERTY?

A right of retention over private works lies in the protection of the contractor against the breach of faith or insolvency of a private employer, but this consideration does not find application in circumstances where the employer is the state.

Although the question of whether there exists a right of retention over state owned property has not been pertinently decided in South Africa, it has been raised in several early reported cases

In the construction industry it is well known that a building contractor enjoys a lien or right of retention over work which he has carried out for an employer as security for payment of any or all amounts which may be due and payable to him therefor. However, according to *Loots, Construction Law and Related Issues (1995)*, a contractor may not enjoy such security in regard to the execution of construction or engineering contracts for government departments, provincial administrations or similar public bodies in South Africa today.

This position is supported by several Dutch jurists including Voet, Matthaeus and Wissenbach. In particular, Matthaeus (*De Auctionibus* 2.10.21.) contends that the reasons for the absence of a contractor's right of retention with regard to state owned property, are as follows:

- A right of retention over private works lies in the protection of the contractor against the breach of faith or insolvency of a private employer, but this consideration does not find application in circumstances where the employer is the state.
- A right of retention over public works could be against public policy and cause embarrassment to the state.
- A right of retention is analogous to set-off, which cannot be raised against the state.

Although the question of whether there exists a right of retention over state owned property has not been pertinently decided in South Africa, it has been raised in several early reported cases where the above views were quoted with approval, albeit obiter, namely:

- In *Hunter & Turpin v Standard Bank, Pietermaritzburg* (1883) 4 NLR 49, the court, referencing Voet and Matthaeus, found that the builder of a new house and the repairer of an existing one enjoyed a right of retention, save for if the work was for the government which was expected to be in a position to pay for such work.
- Similarly, the above position taken by Matthaeus as well as the reasons therefor were referred to with approval in *The Colonial Government v Smith, Lawrence & Mould and Others* (1885 – 1886) 4 SC 194 and *Land Bank v Mans* 1933 CPD 17.

Best Lawyers 2017 Edition

Named "Law Firm of the Year" in the practice area of Real Estate Law.

Listed 36 of our lawyers across Cape Town and Johannesburg.

Emil Brincker listed as Lawyer of the Year for Tax Law.

Pieter Conradie listed as Lawyer of the Year for Arbitration and Mediation.

Francis Newham listed as Lawyer of the Year for M&A Law.

CONSTRUCTION AND ENGINEERING: DOES A BUILDER ENJOY A LIEN OVER STATE OWNED PROPERTY?

CONTINUED

Whether a South African court will find this exception still applicable today, is not easy to predict according to Loots, in light of the fact that a substantial amount of time has elapsed since the issue was raised in our courts.



- In *Provincial Administration (O.F.S.) v John Adams & Co* 1929 OPD 29, where the contractor relied on an alleged improvement lien in regard to a public road, McGregor J, again lending support to the old authorities, held that the case before him was one where:

“one should have regard to what is said by Matthaëus (Over de Opveilingen) where (bk. 2, c. 10, sec. 21) he points out that the right of retentie should not avail against “t gemeene Land”; he points out that the protection should not be necessary --- there should be no assumption that the State cannot pay what is due; and further there might be public prejudice.”

Whether a South African court will find this exception still applicable today, is not easy to predict according to Loots, in light of the fact that a substantial amount of time has elapsed since the issue was raised in our courts. Loots states that it could very well be argued that the

exception has been abrogated by disuse or desuetude and can no longer be used by an employer to defend a contractor’s claim to a right of retention over state owned property. However, it must be emphasised that the mere lapse of time from the last judicial application or recognition of a rule such as this is not, in itself, sufficient to prove that the rule is no longer valid and applicable.

Furthermore, despite the absence of the exception’s application in modern South African case law, the recognition of the exception by South African courts is clearly indicative of a judicial recognition and acceptance thereof (see the Smith and Mans cases above) and the fact that the exception may have been overlooked by our courts for some time, again, in itself, does not render it inapplicable and not a part of South African common law.

In modern times, the absence of the risk of insolvency of the state and the policy consideration that work done for the state be completed and made available to the public as soon as possible are two of the three reasons (as contended by

CHAMBERS GLOBAL 2011–2016 ranked us in Band 2 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2016 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2016 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2014–2016 in Band 3 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016 in Band 4 for construction.



CONSTRUCTION AND ENGINEERING: DOES A BUILDER ENJOY A LIEN OVER STATE OWNED PROPERTY?

CONTINUED

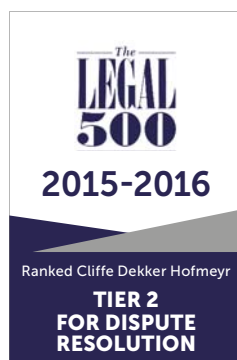
An employer which is a government department, provincial administrator or similar public body should be aware that a contractor which attempts to assert a builder's lien, may not be legally entitled to do so.

Matthaeus above) that appear to Loots to remain valid and applicable justifications for the exception to the general rule that a contractor enjoys a lien or right of retention over the works which he has carried out as security for payment of any or all amounts which may be due and payable to him therefor.

Accordingly, an employer which is a government department, provincial administrator or similar public body

should be aware that a contractor which attempts to assert a builder's lien, may not be legally entitled to do so (absent of course, the obtaining of a formal waiver of lien from the contractor at the outset of the contract).

.....
*Yasmeen Raffie, Joe Whittle
and Emilia Pabian*



OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)21 405 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2016 1412/NOV

