

Article Category: PROCUREMENT

What Does The Law Say?

CASE I

In this series of contract law articles we look at how the courts resolved some difficult disputes.

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Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and other 1996 (4) SA 19 (A)

Does a subcontractor have a claim for enrichment against the employer for work done in those instances where a subcontractor has not received payment from the main contractor because of the main contractor's insolvency? What does the law say?

The Court was asked to decide this question in **(4) SA 19 (A) Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and other 1996**

The employer¹ as the owners of a certain property in Johannesburg, had concluded an agreement with a main contractor in terms whereof the main contractor was to develop the property. The main contractor subsequently contracted with a subcontractor² to complete certain electrical work on the property as part of the former's obligations towards the employer. The electrical subcontractor carried out the work, but the main contractor was liquidated and the electrical subcontractor was unable to recover the contract price from the liquidator.

As a result of the electrical subcontractor's work, certain necessary or useful improvements had been effected on the property and the value of the property had increased to the extent of the stipulated contract price, which also represented the cost of the work that had been performed.

The electrical subcontractor had then retained possession of the property, claiming his builder's lien³ as a result of the alleged unjust enrichment of the employer.

The parties thereafter agreed that the electrical subcontractor would vacate the property on the basis that it would be compensated if the employer was indeed found to be liable. After the electrical subcontractor had vacated the property, it instituted action against the employer for the payment of R854 947,33 on the grounds of unjust enrichment.

The employer denied liability to the subcontractor saying that the electrical subcontractor's action for unjust enrichment could not succeed as the employer had not been unjustly enriched.

The employer had had an agreement with the main contractor and in terms of that agreement the employer was obliged to pay the main contractor for all work done, including the work allegedly done by the electrical subcontractor.

The employer argued further that even if it had in effect been enriched, it had not been enriched at the cost of the electrical subcontractor, but at the cost of the main contractor.

The trial Court found against the subcontractor.

Unhappy with the decision of the trial court the subcontractor appealed. In the appeal the Court discussed two types of enrichment claims for the purposes of the appeal.

The first arose where A effected improvements in accordance with a contract with B to the property of a third party ('the owner') and then alleged liability on the part of the owner on the grounds of unjust enrichment.

The second applied in a situation where the owner contracted with B to improve his property, B subcontracted with A to do the work, A did the work and later relied on the liability of the owner on the grounds of unjust enrichment.

These two claims were referred to as the first and the second types of claims. In both cases the question arose whether the owner was indeed liable: either directly by way of the enforcement of an enrichment claim, or indirectly because A, who was in possession of the property, claimed his builder's lien.

The answer depended on the further question whether the owner had been unjustly enriched. The present case was an example of the second type of enrichment claim.

The Court held that a builder's lien did not exist in a vacuum⁴, but served as reinforcement of an underlying claim; there could thus be no question of either a direct or an indirect enrichment claim if there was no unjust enrichment of the owner.

The Court held further, that the main difference between the situation which arose in the case of the first type of enrichment claim and the second type was that, in the case of the second type, the performance of the work by A could be traced back to an agreement between the owner and B in terms whereof specifically that type of work had to be performed by B. The Court was not aware of any decision where in such a case direct or indirect liability had been attributed to the owner in respect of A.

The Court held further, that neither a direct nor an indirect enrichment liability could arise in the second of the aforesaid cases. In all cases of the second type of liability the owner contracted with B on a specific basis, and it would be unfair that his counter-performance, if any, were to increase in effect or that he should incur an obligation which did not arise out of the contract with B, simply because B had engaged A to comply with his contractual obligations. There was no contractual relationship between A and the owner and, when A performed the work, he complied with his obligations towards B. At the same time, however, A also gave effect to B's obligation to the owner and thus also performed indirectly with respect to the owner. The agreement between the owner and B was the primary source of the performance

of the work and any possible enrichment of the owner; the owner received no more as a result of A's performance than that which he had contracted for with B. For that reason the enrichment was not without legal cause⁵. On the contrary, his agreement with B was the cause of his enrichment. A could enforce his contractual rights against B and, if they turned out to be illusory because B was insolvent, it was an unhappy coincidence which did not render the owner's enrichment unjustified.

The court held, accordingly, that in the case of the second type of enrichment claim, the electrical subcontractor had neither a direct nor an indirect claim against the owner, because any enrichment of the owner was not without legal cause, and thus not unjustified.

The subcontractor's appeal failed.

¹ Respondent

² Appellant

³ Right of retention

⁴ *in vacuo*

⁵ *Sine causa*

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