

Subcontractors have remedies over a site

WHAT happens when a main contractor enters into business rescue proceedings or liquidation and a subcontractor finds itself not being paid despite having carried out work?

The Johannesburg High Court followed by the Supreme Court of Appeal had to deal with the issue a little while back.

Buzzard Electrical had carried out work for a main contractor, but was not paid because the main contractor went into liquidation.

The subcontractor sued the owner for payment on the basis that the employer had benefited from his work, and had been unjustly enriched at his expense. The Supreme Court of Appeal ruled that in cir-



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cumstances where contracts existed between the owner and the main contractor as well as the main contractor and subcontractor respectively, then the subcontractor had to enforce his contractual rights against the main contractor. The court declined to order the employer to make payment.

Can a subcontractor maintain possession of the site until it re-

ceives payment?

The Johannesburg High Court had to deal with the issue in the Sandton Square Finance case. The judge held that where there was no valid claim for unjust enrichment, no right of retention of the site arose.

Despite the fact that our courts adopt the approach that a subcontractor generally does not have a claim against the owner or is able to exercise a lien against it, a subcontractor does have a remedy if an owner forces its way on to site and unlawfully dispossesses the subcontractor of its possession of the site. Such a scenario occurred in Port Elizabeth recently. The judge in that case ordered the employer to return

possession of the site to the subcontractor, regardless of whether the subcontractor was entitled to exercise a lien or not.

It means that even if a subcontractor is not entitled to exercise a lien, there is still an obligation on the owner to go to court and obtain an order confirming that it can retake possession of the site. The owner may not take the law into its own hands and forcibly remove a subcontractor from site.

In summary, subcontractors may find themselves in a particularly vulnerable position when main contractors enter into business rescue proceedings or are liquidated, and may not be successful when asking a court to force an employer to make

payment. Steps should be taken by a subcontractor before starting work to ensure that their payment is secured.

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