

# Development of the law regarding *inaedificatio*: A constitutional analysis

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## **Declaration**

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Nhlanhla Lucky Sono

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## Summary

*Inaedificatio* entails that movables that have been permanently attached to land through building cease to exist as independent things and become part of the land. Courts have adopted different approaches over time to investigate whether or not *inaedificatio* had occurred. It is sometimes said that courts have moved away from the so-called traditional approach, which focused on the objective factors, to the so-called new approach, which places more emphasis on the subjective intention of the owner of the movables.

This thesis analyses the applicable case law and concludes that there is inadequate proof of such a shift since both older cases associated with the traditional approach and later cases associated with the new approach emphasise the intention of the owner of the movables to establish whether accession had taken place. However, the case law does allow for a cautious different conclusion, namely that a certain line of both older and new cases emphasise the owner of the movable's intention for commercial policy reasons, specifically to protect ownership of the movables in cases where ownership had been reserved in a credit sale contract.

Constitutional analysis of these conclusions in view of the *FNB* methodology indicates that the courts' decision to hold that accession had in fact occurred in cases that do involve permanent attachment of movables to land will generally establish deprivation of property for purposes of section 25(1) of the Constitution, but such deprivation would generally not be arbitrary since there would be sufficient reason for it. However, in cases where the courts decide that there was no accession because ownership of the movables had been reserved subject to a credit sale agreement, there is no deprivation of property because the landowner, who is the only one who might complain about the decision, could not prove a property interest for purposes of section 25(1). Moreover, the courts' decision that accession had either occurred or not does not amount to expropriation under section 25(2) of the Constitution because there is no common law authority for expropriation.

Therefore, the principal conclusion of the thesis is that the courts' decision that accession had either occurred or not would generally be in line with the property clause of the Constitution.

## Opsomming

*Inaedificatio* behels dat roerende sake wat permanent deur bebouing aan grond vasgeheg is ophou bestaan as selfstandige sake en deel word van die grond. Die howe het in die verlede verskillende benaderings gevolg in hulle pogings om vas te stel of *inaedificatio* plaasgevind het. Daar word soms beweer dat die howe wegbeweeg het van die sogenaamde tradisionele benadering, wat op die objektiewe faktore gefokus het, na die sogenaamde nuwe benadering waarin die klem op die eienaar van die roerende goed se bedoeling val.

Hierdie verhandeling analiseer die toepaslike regspraak en kom tot die gevolgtrekking dat daar onvoldoende bewys van so 'n verskuiwing bestaan, aangesien sowel ouer sake wat met die tradisionele benadering geassosieer word en later regspraak wat die nuwe benadering sou volg klem op die eienaar van die roerende sake se bedoeling plaas. Die regspraak bied wel bewyse vir 'n versigtige gevolgtrekking op 'n ander punt, naamlik dat bepaalde ouer en later sake die eienaar van die roerende goed se bedoeling vir kommersiële beleidsredes beklemtoon, spesifiek in gevalle waar eiendomsreg in 'n kredietkoop voorbehou is.

Grondwetlike analise van hierdie gevolgtrekkings in die lig van die *FNB*-metodologie suggereer dat die howe se beslissing dat aanhegting wel plaasgevind het in gevalle waar permanente aanhegting van roerende goed aan grond ter sprake was oor die algemeen 'n ontneming van eiendom vir doeleindes van artikel 25(1) van die Grondwet sal daarstel, maar aangesien daar oor die algemeen voldoende rede vir die ontneming is sal dit nie arbitrêr wees nie. Aan die ander kant, waar die howe beslis dat daar geen aanhegting was nie omdat eiendomsreg van die roerende goed vir sekerheid onderhewig aan 'n kredietkoop voorbehou is, is daar geen ontneming van eiendom nie omdat die grondeienaar, die enigste party wat beswaar teen die beslissing mag maak, nie 'n eiendomsbelang vir doeleindes van artikel 25(1) kan bewys nie. Verder stel die howe se beslissing dat aanhegting óf plaasgevind het al dan nie in elk geval geen onteiening daar nie aangesien daar geen magtiging vir onteiening in die gemenereg bestaan nie.

Die gevolgtrekking van die verhandeling is dat die howe se beslissing dat aanhegting óf plaasgevind het al dan nie oor die algemeen nie in stryd met die eiendomsbepaling in die Grondwet sal wees nie.

## Acknowledgements

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# Chapter 1: Introduction

## 1 1 Introduction to the research problem

*Inaedificatio* (also referred to as “building”) takes place, for example, when building materials, pumps, equipment or other objects and structures (being movable in nature) are attached or annexed permanently to land or other immovable property.<sup>1</sup> The general principle is that, when *inaedificatio* takes place, the movable property ceases to exist as an independent thing and there can be no separate right of ownership in respect of it.<sup>2</sup> The previous owner of the movable therefore loses ownership when *inaedificatio* takes place, while the owner of the land is owner of everything permanently attached to the land.<sup>3</sup>

However, it is often difficult to ascertain whether or not a movable thing has attached to land in such a way that *inaedificatio* has occurred in fact and in law.<sup>4</sup> The court in *Olivier v Haarhof & Company*<sup>5</sup> (“*Olivier*”) held that the decision as to whether or not *inaedificatio* had taken place depends on the circumstances of each case.<sup>6</sup> In

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<sup>1</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 147.

<sup>2</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337; W Freedman “The test for *inaedificatio*: What role should the element of subjective intention play?” (2000) 117 *SALJ* 667-676 668.

<sup>3</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337.

<sup>4</sup> *Olivier v Haarhof & Company* 1906 TS 497 501. See also I Knobel “Accession of movables to movables and *inaedificatio* – South Africa and some common law countries” (2011) 74 *THRHR* 296-304 298; W Freedman “The test for *inaedificatio*: What role should the element of subjective intention play?” (2000) 117 *SALJ* 667-676 668.

<sup>5</sup> 1906 TS 497.

<sup>6</sup> *Olivier v Haarhof & Company* 1906 TS 497 500; *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A); *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 998. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 147.



this case Innes CJ stated the criteria or factors to be considered to determine whether attachment had taken place as follows:

“The points chiefly to be considered are the nature and objects of the structure[,] the way in which it is fixed, and the intention of the person who erected it.”<sup>7</sup>

From this decision it has been deduced that there are three indications that attachment had taken place, namely the nature of the movable property; the manner of attachment; and the intention of the annexor. The first two have become known as the objective factors, while the intention is described as a subjective factor.

The application of the three factors mentioned above, in particular the importance attached to the subjective factor, led to the development of three approaches for determining whether *inaedificatio* had occurred, namely the traditional approach, the omnibus approach and the new approach.<sup>8</sup> Recent case law confirms that these three approaches exist.<sup>9</sup> The court in *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd*<sup>10</sup> (“*Unimark*”) explained that the so-called traditional approach is mainly derived from *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co.*<sup>11</sup> The court in *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk*<sup>12</sup> held that the traditional approach does not take into account the subjective factor when the first two objective factors indicate that accession had occurred.<sup>13</sup> The subjective factor only becomes relevant when the

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<sup>7</sup> *Olivier v Haarhof & Company* 1906 TS 497 500.

<sup>8</sup> See 2.2 below.

<sup>9</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 281; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 998; *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd* [2007] ZAFSHC 74 (13 December 2007) para 25; *Chevron South Africa (Pty) Ltd v Awaiz at 110 Drakensburg CC* [2008] 1 All SA 557 (T) 568-569.

<sup>10</sup> 1999 (2) SA 986 (T) 998.

<sup>11</sup> 1915 AD 454.

<sup>12</sup> 1996 (3) SA 273 (A).

<sup>13</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 281.

objective factors are inconclusive of whether accession has occurred. Accordingly, early case law is said to be associated with the traditional approach. The so-called omnibus approach featured in just one decision and can generally be disregarded for analytical purposes.

The prevailing view is that case law, in particular post-1978 case law, is generally associated with the so-called new approach, which places greater emphasis on the subjective factor than the objective factors.<sup>14</sup> The supposed shift from the traditional to the new approach has been the subject of debate and criticism by academic authors.<sup>15</sup> The central issue in the debate is the priority that the new approach gives to the intention of the owner of the movable. For instance, it appears in case law that is associated with the new approach that the owner's declared intention to retain ownership of the movable property is of paramount importance to determine whether accession had occurred, particularly in cases of instalment sale agreements.<sup>16</sup> The owner's professed intention that he or she withholds ownership of the movable property as a security interest in the event of failure by the purchaser to pay the full purchase price, plays the most important role. It has been argued that the new approach is contrary to the fundamental principles of the common law rule of *inaedificatio* as an original mode of acquiring ownership.<sup>17</sup>

Recent case law<sup>18</sup> and academic literature<sup>19</sup> indicate that post-1978<sup>20</sup> case law shifted away from the traditional approach, which considers the objective factors as

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<sup>14</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 999. See also CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 338.

<sup>15</sup> See 3 1 and 4 3 below.

<sup>16</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W).

<sup>17</sup> DL Carey Miller "Fixtures and auxiliary items: Are recent decisions blurring real rights and personal rights?" (1984) 101 *SALJ* 205-211 211.

<sup>18</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 281; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 998.

determinative, towards the so-called new approach, which emphasises the subjective factor when determining *inaedificatio*. This thesis analyses case law that is associated with the so-called traditional approach as well as the so-called new approach in an effort to determine whether such a shift had in fact taken place and, if it had, whether it would be justifiable.

## 1 2 Research aims and hypotheses

The aim of this study is to analyse and discuss case law that is associated with the traditional approach and the new approach to determine whether there really is a shift in case law from the traditional approach towards the so-called new approach when determining the occurrence of accession of movables to immovables. The hypothesis is that there possibly was a shift in case law from an approach that mostly considered the objective factors towards an approach where the role of the intention of the owner of the movable is elevated above the objective factors to protect the interests of the owner of the movable property, but that the existence of such a shift is clear only in the limited set of cases where the owner of the movables withholds ownership as a form of security pending payment of the full purchase price for the movables.

This study also aims to discuss and analyse academic criticism against the so-called new approach for the emphasis that it places on the subjective intention of the

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<sup>19</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 149; CG van der Merwe "The law of property (including mortgage and pledge)" 1980 ASSAL 230-233 232-233.

<sup>20</sup> *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* 1978 (3) SA 682 (A); *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W); *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A); *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T); *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd* [2007] ZAFSHC 74 (13 December 2007); *Chevron South Africa (Pty) Ltd v Awaiz at 110 Drakensburg CC* [2008] 1 All SA 557 (T).

owner of the movable. The hypothesis is that the new approach is criticised because it may be contrary to the publicity principle in that it focuses on the subjective intention of the owner of the movable.<sup>21</sup> Moreover, the emphasis on the subjective intention of the owner of the movable could also confuse the rules of property law with those of contract law and may cloud the distinction between original and derivative modes of acquisition of ownership.<sup>22</sup>

Finally, this study aims to discuss and assess the constitutional implications for a decision by the courts that accession had either taken place or that it had not taken place (the latter especially to protect ownership of the movable the ownership of which had been reserved for security reasons). The hypothesis is that a decision that accession had either taken place or that it had not taken place to protect ownership of the movable the ownership of which had been reserved for security reasons could constitute a deprivation of property. It is clear that if the court decides that accession had in fact taken place, the owner loses ownership of the movables because these objects cease to exist as independent objects if they become permanently attached to land. Moreover, where the court decides that accession has not occurred because the movable is subject to a credit sale with reservation of ownership, it might arguably amount to deprivation of a property interest of the landowner, who now “loses” the movables that were supposed to have become part of the land by accession.

Accordingly, this study will subject the courts’ decision to decide either that accession had occurred or had not occurred to constitutional scrutiny. Therefore,

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<sup>21</sup> A Breitenbach “Reflection on *inaedificatio*” (1985) 48 *THRHR* 462-465 464; DL Carey Miller “Fixtures and auxiliary items: Are recent decisions blurring real rights and personal rights?” (1984) 101 *SALJ* 205-211 207.

<sup>22</sup> W Freedman “The test for *inaedificatio*: What role should the element of subjective intention play?” (2000) 117 *SALJ* 667-676 674.

deciding whether or not accession had in fact taken place (in the latter case to protect ownership of the movable the ownership of which had been reserved for security reasons) needs to comply with section 25 of the Constitution.<sup>23</sup> Section 25 of the Constitution provides that “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,<sup>24</sup> (“FNB”) the Constitutional Court held that a deprivation of property is arbitrary when there is insufficient reason for it or if it is procedurally unfair.<sup>25</sup> Therefore, in the context of accession the question is whether there are sufficient reasons that justify the deprivation of the property concerned as a result of the court’s decision either that accession had taken place or that it had not taken place. Moreover, the court’s decision for holding that accession had or had not occurred may create an impression that an expropriation of property had taken place. This study will determine whether the court’s decision in accession cases can amount to expropriation, because if it does the expropriation would have to comply with section 25(2) and (3) of the Constitution.<sup>26</sup>

### **1 3 Overview of the chapters and methodology**

This thesis consists of four chapters. Chapter one is the current introductory chapter. Chapter two provides an analysis of case law that is associated with the so-called

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<sup>23</sup> The Constitution of the Republic of South Africa, 1996.

<sup>24</sup> 2002 (4) SA 768 (CC).

<sup>25</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>26</sup> The Constitution of the Republic of South Africa, section 25(2) and (3).

traditional approach. As a point of departure, the chapter outlines a brief historical background of the general principles of the law regarding *inaedificatio*. The chapter also sets out the manner in which early case law determined whether accession had taken place in terms of the so-called traditional approach. Lastly, chapter two analyses the meaning and role of the three factors set out in *Olivier*.<sup>27</sup> To achieve this purpose the chapter mainly relies on case law and academic literature.

Chapter three provides an analysis of case law that is associated with what is known as the new approach to *inaedificatio*, with the aim of identifying whether there really has been a shift towards a new approach to *inaedificatio*. Accordingly, the chapter analyses post-1978 and post-1990 case law. The chapter also sets out the role of the three factors that are relied on to determine whether a movable had been attached to an immovable permanently in terms of the so-called new approach. To achieve this purpose the chapter mainly relies on case law and academic literature.

Chapter four discusses and assesses the implications of the perceived shift towards the so-called new approach. As a point of departure, this chapter summarises conclusions from chapters two and three, particularly with regard to the question whether there is sufficient evidence of a shift from the traditional to the new approach. Based on the conclusions in this regard, the chapter proposes an alternative reading of the case law to describe the change that can in fact be discerned. Chapter four also considers the justifications that have been forwarded in defence of the so-called new approach as well as criticisms against the new approach. Finally, the chapter examines whether the court's decision that accession had taken place or had not taken place (in the latter case to protect ownership of the movable the ownership of which had been reserved for security reasons) constitutes

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<sup>27</sup> *Olivier v Haarhof & Company* 1906 TS 497 500.

deprivation of property. In light of section 25(1) of the Constitution, which protects property owners against arbitrary deprivation of property, together with the methodology laid down by the Constitutional Court in *FNB*,<sup>28</sup> this chapter investigates whether a decision that accession had taken place, or that it had not taken place because of commercial policy considerations, constitutes a deprivation of property in view of section 25 of the Constitution of the Republic of South Africa, 1996. To achieve this purpose I rely mainly on case law, most importantly the methodology laid down by the Constitutional Court in *FNB* and academic literature. The chapter also considers whether such a deprivation, if there was one, would be arbitrary in terms of section 25(1) and the *FNB* test. Finally, the chapter raises the question whether a deprivation arising from accession could constitute expropriation of property.

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<sup>28</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

## Chapter 2: Case law associated with the traditional approach

### 2 1 Introduction

The main purpose of the chapter is to discuss case law that is associated with the so-called traditional approach. As a point of departure, the chapter sets out a brief overview of the meaning and the historical background of the principles of *inaedificatio*. This is because *inaedificatio* originated in Roman law<sup>1</sup> and was developed further in Roman-Dutch law.<sup>2</sup> Therefore, a brief overview of the meaning and historical background will enable an understanding of how Roman law and Roman-Dutch law treated attachment of movables to land before *inaedificatio* was adopted in South African law. Accordingly, section two of this chapter defines *inaedificatio* and briefly provides its historical background. Section three provides an overview of case law that is associated with the so-called traditional approach. The section also sets out the manner in which early case law determined *inaedificatio* in terms of the traditional approach. Section four analyses the meaning and role of the three factors set out in *Olivier v Haarhof & Company*.<sup>3</sup>

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<sup>1</sup> CG van der Merwe "Original acquisition of ownership" in R Zimmermann and D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 701-702. See also DL Carey Miller *The acquisition and protection of ownership* (1986) 23 (this passage is not included in DL Carey Miller & A Pope *Land title in South Africa* (2<sup>nd</sup> ed 2007)); D 41.1.7.10 (the English translation of the Digest referred to in this quote and in all further references to the Digest is from T Mommsen, P Kruger & A Watson *The Digest of Justinian* vols I, II, IV (1985)); C Lewis "Superficies solo cedit - sed quid est superficies?" (1979) 96 SALJ 94-107 94; FDCL de Zulueta *The institutes of Gaius part II commentary* (1953) (hereinafter referred to as Gaius) 2.73.

<sup>2</sup> J Voet *Commentarius ad Pandectas* (1829 translated by P Gane *Commentary on the Pandect* 1958, hereafter referred to as Voet) 41.1.24; H Grotius *Inleidinge tot de Hollandsche rechtsgeleertheid* (1631 translated by RW Lee *The jurisprudence of Holland* vol 1 1953, hereafter referred to as Grotius) 3.8.1. See also CG van der Merwe "Original acquisition of ownership" in R Zimmermann and D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 701-702.

<sup>3</sup> 1906 TS 497.



## 2 2 Meaning of *inaedificatio* and historical background

*Inaedificatio* (sometimes referred to as “building”) denotes that building materials, pumps, equipment or other objects and structures (being movable in nature) are attached permanently to land or other immovable property and thereby become part of that land.<sup>4</sup> In terms of the principle *omne quod inaedificatio solo cedit*, shortly formulated as *superficies solo cedit*,<sup>5</sup> buildings or movable structures that have been permanently attached to land cease to exist as independent things and become part of the immovable object to which they are attached.<sup>6</sup> Ownership of the land and buildings on the land cannot be separated and, therefore, the owner of the land owns everything permanently attached to it.<sup>7</sup> Practically speaking, the previous owner of the attached movables loses ownership because the object no longer exists as an independent thing and accordingly is no longer susceptible to ownership independent of ownership of the land. Similarly, the owner of the land becomes the owner of everything permanently attached to it, including the formerly independent movables.

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<sup>4</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 147.

<sup>5</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 147 fn 107 translate *superficies solo cedit* as “buildings erected form part of the land”.

<sup>6</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA 1<sup>st</sup> reissue vol 27* (2002) para 337. See also DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re postestas* (1984) 58; CG Hall *Maasdorp's institutes of South African law vol 2 The law of property* (1976) 47-48.

<sup>7</sup> RW Lee *The elements of Roman law with a translation of the institutes of Justinian* (4<sup>th</sup> ed 1956) 133. See also CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA 1<sup>st</sup> reissue vol 27* (2002) para 337; A Borkowski & P du Plessis *Textbook on Roman law* (4<sup>th</sup> ed 2010) 193; W Freedman “The test for inaedificatio: What role should the element of subjective intention play?” (2000) 117 *SALJ* 667-676 668; DL Carey Miller *The acquisition and protection of ownership* (1986) 24.

Accession through *inaedificatio* is categorised as a form of original acquisition of ownership.<sup>8</sup> Therefore, ownership of everything that is attached to the land is often said to be acquired by the landowner through attachment, without the co-operation of the owner of the movable.<sup>9</sup> The owner of the movable cannot base his claim of ownership on the fact that he did not intend to transfer his movable property to the owner of the immovable because the loss of ownership does not depend on voluntary transfer because the structures become part of the land and the property of the owner of the land by operation of law.

In Roman law two hypotheses were used to illustrate accession by building (*inaedificatio*). Gaius explained the first hypothesis as follows: if A builds a house on his land using B's materials, the legal position is that A becomes the owner of the house, since it is built on his land regardless of the fact that the materials belonged to B.<sup>10</sup> The second hypothesis provides that, where A uses his own materials to build a house on B's land, notwithstanding the fact that the materials used for construction belong to A, B becomes the owner of the house built on his land. Therefore, the *superficies solo cedit* principle provided that everything built or attached to land became the property of the landowner.<sup>11</sup>

The classical Roman jurists argued in favour of the principle of *inaedificatio*.<sup>12</sup> For instance, as is indicated above, Gaius argued that when someone has built on

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<sup>8</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 997-998.

<sup>9</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 72. See also A Breitenbach "Reflection on *inaedificatio*" (1985) 48 *THRHR* 462-465 463-464.

<sup>10</sup> Gaius 2.73. See also A Borkowski & P du Plessis *Textbook on Roman law* (4<sup>th</sup> ed 2010) 193-194; AM Prichard *Leage's Roman private law founded on the institutes of Gaius and Justinian* (3<sup>rd</sup> ed 1961) 182-184.

<sup>11</sup> *D* 9.2.50. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 147; CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337; *D* 41.7.10; *D* 43.18.2; *D* 44.7.44.1.

<sup>12</sup> See in this regard *D* 41.60; *D* 41.26; *D* 41.1.7.10. See also *D* 19.1.18; *D* 9.2.50; *D* 6.1.39; *D* 18.1.78; *D* 6.1.59; *D* 44.7.44.1.

his own site with the materials belonging to another, he was deemed to be the owner of the building because he owned the land.<sup>13</sup> Ulpian argued that if contractors have built on another's land with their own stones, the stones immediately became the property of the owner of the ground on which they have built.<sup>14</sup> Paul also stated that

“thus, too if a person in transferring property stated that he is transferring the land without its structures, it has not the effect of preventing the structures, which by nature adhere to the land, from passing with it”.<sup>15</sup>

Accordingly, one can conclude from the above texts that Roman law considered the owner of the land or immovable property as the owner of everything that has been permanently attached to it.

The rule *superficies solo cedit* also applied to things inside immovable structures.<sup>16</sup> According to Labeo,<sup>17</sup> things inside immovable structures in general were part and parcel of the structure within which they were attached. Consequently, they became the property of the owner of the immovable structure or house,<sup>18</sup> provided that they were in the building or immovable structure for permanent use.<sup>19</sup> This means that things stored for temporary use could not be held to be attachments of the building or immovable structure. Ulpian wrote in this regard that the pipes that were temporarily placed in a building were not part of the building as they could only form part of the building if they were placed there permanently.<sup>20</sup> Breitenbach argues

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<sup>13</sup> *D* 41.1.7.10.

<sup>14</sup> *D* 6.1.39; *D* 9.2.50.

<sup>15</sup> *D* 44.7.44.1.

<sup>16</sup> *D* 19.1.17.7.

<sup>17</sup> *D* 19.1.17.7.

<sup>18</sup> *Gaius* 2.73. See also AM Prichard *Leage's Roman private law founded on the institutes of Gaius and Justinian* (3<sup>rd</sup> ed 1961) 182-184.

<sup>19</sup> *D* 19.1.17.7.

<sup>20</sup> *D* 19.1.17.7.

that Ulpian's example of water pipes illustrates that the purpose of the thing and its permanent function were treated as requirements for *inaedificatio* in Roman law.<sup>21</sup>

Another requirement in Roman law was that fixtures that were covered by earth formed part of the building even though they were not attached to the building.<sup>22</sup> Conversely, fixtures that were resting on the surface of the earth could not be regarded as forming part of the land if they were not attached to the building and not covered by earth.<sup>23</sup> Scaevola illustrated the position in the form of an example: if Titius erected on Seius' land a new mobile barn that is made of wooden planks, the question is: who is the owner of the barn – Titius or Seius? According to Scaevola the fact that the barn did not meet the requirement of being part of the soil by resting on the surface of the soil meant that it did not become the property of Seius.<sup>24</sup> This indicates that for fixtures to form part of the permanent structure or land, they either had to be covered by or buried in the earth. This requirement may be a useful determinant for permanent attachment, particularly when it is disputed that a fixture is attached to the building.

Labeo and Sabinus contended that, where a neighbour has built on another's wall, the product belonged to the builder.<sup>25</sup> However, Proculus' contention was that the product belonged to the owner of the wall alone because of the principle that what is built on someone's soil became his property. Proculus' view was supported

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<sup>21</sup> A Breitenbach "Reflection on *inaedificatio*" (1985) 48 *THRHR* 462-465 463.

<sup>22</sup> *D* 19.1.17.8. Ulpian wrote that "it is settled that lead cisterns, wells, coverings of wells, and water cocks that are [either] soldered to pipes or covered by earth although not attached, are part of the buildings".

<sup>23</sup> *D* 19.1.18. Javolenus wrote that "granaries, which are normally made of planking, are part of the building if their posts are buried in the earth; but if they rest on the surface, they fall in the category of "things dug and things cut".

<sup>24</sup> *D* 41.1.60.

<sup>25</sup> *D* 41.1.28.

by Pomponius.<sup>26</sup> Nonetheless, the rule seems to have remained that the permanent attachment of buildings and other movable structures to land was subject to the rule *superficies solo cedit*.<sup>27</sup> From the above discussion one can conclude that Roman jurists differed in their views regarding the principle of *superficies solo cedit*. Some Roman jurists were of the view that things that have been built on someone's land did not always belong to the owner of the land whereas other jurists were of the view that things built on someone's land always belonged to the owner of the land.

There were remedies available for an owner whose materials were used to build on another's land or building.<sup>28</sup> The owner of the movable materials did not cease to be the owner of the materials.<sup>29</sup> However, The Law of the Twelve Tables provided that, although an owner of materials did not cease to have ownership of the materials, he could nonetheless not demand separation of the materials<sup>30</sup> from the building while it was still standing.<sup>31</sup> In this regard, Paul argued that where A's timbers have been joined to B's house, A could not vindicate them on account of The Law of the Twelve Tables.<sup>32</sup> It appears that The Law of the Twelve Tables forbade

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<sup>26</sup> D 41.1.28.

<sup>27</sup> In this regard, see D 41.1.60; D 41.1.26; D 41.1.7.10; D 19.1.17-18; D 9.2.50; D 6.1.39; D 18.1.78; D 6.1.59.

<sup>28</sup> D 41.1.7.10; D 41.1.7.12; D 6.1.23.6. See also A Borkowski & P du Plessis *Textbook on Roman law* (4<sup>th</sup> ed 2010) 193-194. However, remedies were dependant on the circumstances of each case. For instance, where B has built on his land with A's materials, the legal position depended on whether there had been theft of A's materials. Therefore, if B had stolen the materials from A, he was liable for theft under The Law of the Twelve Tables for double their value. Moreover, where B has built with his own materials on A's land, the position depended on whether B had acted in good or bad faith. Accordingly, if he had not built in good faith (he built knowing that the land belonged to A) the legal position is that B would be deemed to have made a gift of his materials to A.

<sup>29</sup> D 41.1.7.10.

<sup>30</sup> D 41.1.7.10; D 47.3.1.1. See also JAC Thomas *Textbook of Roman law* (1976) 173. The Law of the Twelve Tables used the term *tignum* to refer to the materials, which literally means a beam or rafter. It is argued that the juristic interpretation of *tignum* covers all building materials. In fact, the Digest uses the term "beam" that covers any building materials. Therefore, all the materials used in building were subject to a claim by their owner in terms of The Law of the Twelve Tables.

<sup>31</sup> D 41.1.7.10; D 6.1.23.6.

<sup>32</sup> D 6.1.23.6.

the demolition of houses.<sup>33</sup> Therefore, the right of ownership of the materials was dormant and could only be exercised after the building had been pulled down or separated by natural forces.<sup>34</sup> Lee argues that if the right of ownership was dormant and could only be exercised after the building had been pulled down, this was a “barren consolation”,<sup>35</sup> because an owner had to wait until the building had collapsed so that he could reclaim the materials that belonged to him.

Nevertheless, Roman jurists differed in their views regarding the provision in The Law of the Twelve Tables that an owner could not demand separation of the materials from the building while it was still standing.<sup>36</sup> On the one hand, Ulpian argued that the owner of the materials who built on someone’s site, which he possessed in good faith, should be allowed to take down the building that he had built, as long as it was done without any loss to the owner of the site.<sup>37</sup> On the other hand, Celsus argued that in a case where the owner of the land was not willing to pay for the expenses that the owner of the materials had incurred, the latter should be allowed to take away his materials from the building, “so long as the land is not put in worse condition than it would be in, if there had been no building”.<sup>38</sup> Subsequently, Justinian followed the law that appears from the text of Ulpian and Celsus. Under Justinian law, a builder who had built on someone’s land in either

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<sup>33</sup> D 41.1.7.10. See also JAC Thomas *Textbook of Roman law* (1976) 173.

<sup>34</sup> M Kaser *Römisches Privatrecht* (6<sup>th</sup> ed 1960 translated by R Dannenbring *Roman private law* 1968) 136. See also A Borkowski & P du Plessis *Textbook on Roman law* (4<sup>th</sup> ed 2010) 193-194. However, under the law of Justinian an owner could remove his materials from the land or building as long he did not cause any damage to the structure. Justinian seems to have followed the position of some of the classical Roman law jurists.

<sup>35</sup> RW Lee *The elements of Roman law with the translation of the institutes of Justinian* (4<sup>th</sup> ed 1956) 133.

<sup>36</sup> D 41.1.7.10.

<sup>37</sup> D 6.1.37; D 47.3.1.2.

<sup>38</sup> D 6.1.38.

good or bad faith was allowed to reclaim his materials in terms of the *ius tollendi*.<sup>39</sup> However, this does not seem to have been the position in classical Roman law. In classical Roman law the *ius tollendi* seems to have been available only to builders who were *bona fide* possessors of land.<sup>40</sup> Nevertheless, this application of the *ius tollendi* seems to have been in conflict with The Law of the Twelve Tables, which prohibited the demolition of buildings. The Law of the Twelve Tables only allowed the owner of the materials to reclaim them when a building has collapsed.<sup>41</sup>

Despite the remedies available to the owner of the materials, it appears from the discussion above that there were few indications in Roman law regarding what constitutes accession through building (*inaedificatio*). However, Lewis states that Roman jurists were not concerned with what constitutes accession through *inaedificatio*, but with the compensation payable and the remedies available to the person who lost ownership through *inaedificatio*.<sup>42</sup> In my view it seems that the focus was on the physical attachment to establish whether movables had formed a permanent part of the immovable structure by *inaedificatio*.<sup>43</sup>

The principle of *inaedificatio* was further developed in the Roman-Dutch law of the seventeenth and eighteenth centuries.<sup>44</sup> Roman-Dutch law also applied the

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<sup>39</sup> AM Prichard Leage's *Roman private law founded on the institutes of Gaius and Justinian* (3<sup>rd</sup> ed 1961) 182-183. See also A Borkowski & P du Plessis *Textbook on Roman law* (4<sup>th</sup> ed 2010) 193-194.

<sup>40</sup> *D* 6.1.38; *D* 6.1.37; *D* 47.3. See also A Borkowski & P du Plessis *Textbook on Roman law* (4<sup>th</sup> ed 2010) 193-194. However, it is argued that uncertainties surround the *ius tollendi*.

<sup>41</sup> *D* 41.1.7.10; *D* 6.1.23.6.

<sup>42</sup> C Lewis "Superficies solo cedit - sed quid est superficies?" (1979) 96 SALJ 94-107 94.

<sup>43</sup> See for example *D* 19.1.18, where Javolenus writes that "granaries, which are normally made of planking, are part of the building if their posts are buried in the earth; but if they rest on the surface, they fall in the category of 'things dug and things cut'".

<sup>44</sup> Grotius 3.8.1; Voet 41.1.24. See also CG van der Merwe "Original acquisition of ownership" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 701-702.

*superficies solo cedit* principle and accepted that everything that has acceded to land formed a permanent part of such land.<sup>45</sup> Grotius stated the law as follows:

“If any one builds upon his land with another man’s timber or stone, he is held to be owner of the building, so long as it stands ... [I]f any one builds upon another’s ground with his own timber or stone, he loses the ownership, which lapses to the owner of the land.”<sup>46</sup>

According to Grotius, fixtures are understood to be sold with the house.<sup>47</sup> Roman-Dutch law regarded movables as part of immovable property if they were affixed or attached thereto permanently.<sup>48</sup> Movables were deemed to be permanently attached if they were fastened by nails to an immovable structure or land.<sup>49</sup> Accordingly, movables such as keys, doors and windows, regardless of whether they were physically or constructively attached to an immovable, were all deemed to be part and parcel of an immovable property to which they were attached.<sup>50</sup> The same applied to the sails of a windmill and the chains of a well.<sup>51</sup> However, movables such as windmills were considered to be immovable only if they were fixed to the

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<sup>45</sup> Grotius 2.1.10. See also DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re postestas* (1984) 58; RW Lee *An introduction to Roman-Dutch law* (5<sup>th</sup> ed 1953) 132-135; U Huber *Heedensdaegse rechtsgeleertheyt* (1868 translated by P Gane *The jurisprudence of my time* 1939, herein referred to as Huber) 2.6.9; S van Leeuwen *Het Roomsche Hollandsch recht* (1783 edited and translated by CW Decker & JG Kotzé *Commentaries on Roman-Dutch law* 2<sup>nd</sup> ed 1921, herein referred to as Van Leeuwen) 2.1.6; W Burge *Commentaries on the civil law and the law of Holland* (1887) 47-49.

<sup>46</sup> Grotius 2.10.8.

<sup>47</sup> Grotius 3.14.22. See also DL Carey Miller *The acquisition and protection of ownership* (1986) 23.

<sup>48</sup> Grotius 2.10.6-2.10.10; Voet 41.1.24. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 147; CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337.

<sup>49</sup> Grotius 2.1.13; Huber 2.1.7; Van Leeuwen 2.1.6. See also DL Carey Miller *The acquisition and protection of ownership* (1986) 26.

<sup>50</sup> W Burge *Commentaries on the civil law and the law of Holland* (1887) 49.

<sup>51</sup> W Burge *Commentaries on the civil law and the law of Holland* (1887) 49.



ground.<sup>52</sup> Pope is of the view that, considering the function of the windmill, it is not clear whether a windmill loses its separate legal identity by being affixed to the land, since a windmill's function indicates that it is an auxiliary.<sup>53</sup> This is true regardless of its attachment to the soil.

Furthermore, movables became immovable when they were attached to or united with immovable property for permanent use and enjoyment.<sup>54</sup> Examples of such things include timbers, pillars and marble.<sup>55</sup> The degree of solidity or firmness of attachment will not be material.<sup>56</sup>

According to Burge, certain movables became immovable by destination. For instance, movables such as seats in a church are said to be immovable in nature.<sup>57</sup> Burge further states that movables should be regarded as immovables if they are affixed or attached to an immovable with the intention to remain there permanently.<sup>58</sup> An example of a movable that became immovable if permanently attached is a windmill that is fixed to the soil by means of posts with the intention to remain there permanently.<sup>59</sup> However, it is argued that the intention cannot be presumed when the

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<sup>52</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 460: "so also are windmills for although for the most part they do not adhere to the soil yet they must be considered to be immovables because they are not easily removed".

<sup>53</sup> A Pope "Inaedificatio revisited: Looking backwards in search of clarity" (2011) 128 SALJ 123-146 137-139.

<sup>54</sup> W Burge *Commentaries on the civil law and the law of Holland* (1887) 48.

<sup>55</sup> W Burge *Commentaries on the civil law and the law of Holland* (1887) 48-49. According to Burge, timbers, pillars or marble will remain immovable notwithstanding their removal only if the intention is to restore them. For instance, the materials that were used to build a house remain immovable even after their removal from the land.

<sup>56</sup> W Burge *Commentaries on the civil law and the law of Holland* (1887) 48.

<sup>57</sup> W Burge *Commentaries on the civil law and the law of Holland* (1887) 50.

<sup>58</sup> W Burge *Commentaries on the civil law and the law of Holland* (1887) 49.

<sup>59</sup> See also *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 459. However, the principle that a movable becomes attached if the annexor has affixed it with the intention that it becomes permanent has proved to be relevant but problematic in recent South African case law. The problems regarding intention are discussed in 2.4 below.

person who affixes the materials has only a temporary interest in the land or house.<sup>60</sup> For instance, a movable remained movable if it had been affixed by a tenant who had a temporary interest in the land,<sup>61</sup> provided that it could be removed without any damage to the land.<sup>62</sup> These were exceptions to the principle that an owner acquires ownership of the property built on his land.<sup>63</sup> However, if the materials that were used to build belonged to someone other than the tenant, the owner of the land was bound to pay compensation if the materials remained part of the house or land.<sup>64</sup>

Therefore, Roman and Roman-Dutch law treated accession of movables to immovables as acquisition of ownership by the owner of the land, but subject to compensation.<sup>65</sup> The compensation that the owner of the materials was entitled to in Roman-Dutch law was different from that in Roman law. In Roman law, the owner of the materials that were used to build on another's land could institute the *actio de tigno iniuncto* for double damages.<sup>66</sup> However, in Roman-Dutch law the *actio de tigno iniuncto* fell into disuse and it was substituted by a general action for damages.<sup>67</sup> Accordingly, one can conclude that neither the Roman nor Roman-Dutch law had a simple, clear criterion that was used to determine whether the movables had become permanently attached to land. It seems that the focus was on the

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<sup>60</sup> W Burge *Commentaries on the civil law and the law of Holland* (1887) 49.

<sup>61</sup> W Burge *Commentaries on the civil law and the law of Holland* (1887) 49.

<sup>62</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 35; CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) paras 336-337; Voet 6.1.36.

<sup>63</sup> *De Beers Consolidated Mines v London and South African Exploration Company* (1892-1893) 10 SC 359. See also DL Carey Miller *The acquisition and protection of ownership* (1986) 35.

<sup>64</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 33. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 154.

<sup>65</sup> Huber 2.6.10-11; Grotius 2.10.8. See also C Lewis "Superficies solo cedit - sed quid est superficies?" (1979) 96 SALJ 94-107 94.

<sup>66</sup> D 6.1.23.6. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 154.

<sup>67</sup> RW Lee *An introduction to Roman-Dutch law* (5<sup>th</sup> ed 1953) 135-136. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 154.

remedies that were available to the owner of the movables after attachment, while the owner of the land became the owner of everything that was attached to the land.

The principle of *inaedificatio* was further applied and developed in the South African case law. However, it seems that South African courts have found it difficult to determine whether movables had become part of land through *inaedificatio*. This is probably because there were no clear guiding rules to determine attachment of movables to immovables in Roman and Roman-Dutch law. This led to the court in *Olivier v Haarhof & Company*<sup>68</sup> (“*Olivier*”) to develop three factors that it considered to determine whether a wood and iron building had become permanently attached to land.<sup>69</sup> The criteria set out in *Olivier*<sup>70</sup> were followed in subsequent cases.<sup>71</sup> Although these criteria seemed to be a solution to the disputes surrounding *inaedificatio*, subsequent cases still faced the problem regarding the interpretation and application of these criteria, more particularly the extent to which the intention of the annexor could play a role when determining whether accession had taken place.<sup>72</sup>

The weight that subsequent case law attached to the third factor varied from case to case. Consequently, academic commentators argue that this led to the development of different approaches to determine accession, namely the traditional

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<sup>68</sup> 1906 TS 497.

<sup>69</sup> See 2 3 below.

<sup>70</sup> *Olivier v Haarhof & Company* 1906 TS 497.

<sup>71</sup> See for instance *Victoria Falls Power Co Ltd v Colonial Treasurer* 1909 TS 140 145-146; *Deputy-Sheriff of Pretoria v Heymann* 1909 TS 280 284; *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561; *Van Wezel v Van Wezel's Trustee* 1924 AD 409; *R v Mabula* 1927 AD 159; *Caltex (Africa) Ltd v Director of Valuations* 1961 (1) SA 525 (C) 528; *Edwards v Barberton Mines Ltd* 1961 (1) SA 187 (T); *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A). See also DL Carey Miller *The acquisition and protection of ownership* (1986) 23; C Lewis “*Superficies solo cedit - sed quid est superficies?*” (1979) 96 SALJ 94-107 95.

<sup>72</sup> See for instance *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454.

approach, the new approach and the omnibus approach.<sup>73</sup> In the next section, I discuss notable early case law that is alleged to have been associated with the traditional approach and how the early decisions applied the test for *inaedificatio* as identified in *Olivier*.

### 2 3 Case law associated with the traditional approach

Case law<sup>74</sup> that is associated with the traditional approach is said to have applied the three factors that the court in *Olivier*<sup>75</sup> has identified to determine *inaedificatio* in a specific manner. The general assumption is that the early decisions associated with the traditional approach emphasised the two objective factors and only resorted to the subjective intention factor if the first two did not produce a clear outcome.

In *Olivier* the appellants appealed against the decision of the magistrate that authorised a messenger of the court to attach certain movables. In the process, the messenger attached amongst other things a wood-and-iron building that belonged to one Roux. The building was erected upon land purchased from the appellants by Roux. The purchase price of the land was payable in instalments. Roux fell in arrears and the messenger attached the house. The appellants claimed that the building,

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<sup>73</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337. See also I Knobel “Accession of movables to movables and *inaedificatio* – South Africa and some common law countries” (2011) 74 *THRHR* 296-304 299; I Knobel “Intention as a determining factor in instances of accession of movables to land – Subjective or objective?” (2008) 41 *De Jure* 156-164 156-157; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 148-149; B Maripe “Intention and the original acquisition of ownership: Whither *inaedificatio*?” (1998) 115 *SALJ* 544-552 546-548.

<sup>74</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 281; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 998. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 153; CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) paras 337-338.

<sup>75</sup> *Olivier v Haarhof & Company* 1906 TS 497.

made of wood and iron, was a fixture and therefore an improvement belonging to them.<sup>76</sup>

The question was whether the wood-and-iron building became immovable or a fixture to the land as described. Should the court find that the building is immovable, the messenger could not attach it.<sup>77</sup> The court held that the authorities on accession to immovable property did not lay down a general principle to decide what is movable or immovable.<sup>78</sup> Therefore, it was impossible to lay down one general rule to determine whether accession of movable to immovable property had taken place. According to the court each case must depend on its own facts.<sup>79</sup> The court stated that in order to establish whether the building was immovable, the points to be considered are the nature of the structure; the manner in which it is fixed to the soil; and the intention of the person who erected it. Significantly, the court described the intention of the person who erected the building as “in some respect” the most important element of attachment.<sup>80</sup> After applying the above criteria to the facts, the court held that the building was immovable.

The criteria that the court in *Olivier* identified to determine whether a building made of wood and iron was a fixture were approved and applied by the Appellate Division in *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd*<sup>81</sup> (“*Macdonald*”) to determine whether a certain machine was attached to

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<sup>76</sup> *Olivier v Haarhof & Company* 1906 TS 497 499: The court described the building as “of considerable size. It was 33 by 32 ft. Nor was it a mere outbuilding; it had five rooms, and so far as the evidence goes was used as a dwelling-house by Roux. It rested on wooden posts projecting 6 or 9 ins. out of the ground, and was fastened to them by nails which the magistrate says were[] about 6 ins. long. The iron which formed the sides of the house came down on every side to the ground. On one side the sheets had been sunk below the surface”.

<sup>77</sup> *Olivier v Haarhof & Company* 1906 TS 497 499.

<sup>78</sup> *Olivier v Haarhof & Company* 1906 TS 497 497.

<sup>79</sup> *Olivier v Haarhof & Company* 1906 TS 497 500.

<sup>80</sup> *Olivier v Haarhof & Company* 1906 TS 497 500.

<sup>81</sup> 1915 AD 454.

land. According to recent case law<sup>82</sup> and academic literature<sup>83</sup> the traditional approach was set out in *Macdonald*.<sup>84</sup> In terms of the traditional approach, the enquiry for determining accession begins by assessing first the nature and object of the movable and the manner and degree of attachment (objective factors).<sup>85</sup> Accordingly, if the objective factors conclude that accession has occurred, the third factor, namely the intention of the owner of the movable, is not considered.<sup>86</sup> Badenhorst, Pienaar and Mostert<sup>87</sup> argue that this approach is illustrated by the following *dictum* in *Macdonald*:

“The importance of the first two factors is self-evident from the very nature of the inquiry. But the importance of intention is for practical purposes greater still; for in many instances it is the determining element. Yet it is sometimes settled by the mere nature of the annexation. The article may be actually incorporated in the realty, or the attachment may be so secure that separation would involve substantial injury either to the immovable or its accessory. In such cases the intention as to permanency would be beyond dispute”.<sup>88</sup>

It appears that the intention of the owner of the movable is considered only if the objective factors are inconclusive to determine whether accession has occurred.<sup>89</sup>

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<sup>82</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 998. See also *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 281.

<sup>83</sup> H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 169. See also A Pope “Inaedificatio revisited: Looking backwards in search of clarity” (2011) 128 *SALJ* 123-146 128; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 149.

<sup>84</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454.

<sup>85</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 149.

<sup>86</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) paras 337-338.

<sup>87</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 148.

<sup>88</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467.

<sup>89</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467; *Pettersen v Sorvaag* 1955 (3) SA 624 (A) 627. See also H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 169; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006)

The view that the intention of the owner of the movable is considered only if the assessment of the objective factors is inconclusive is explained by the court in *Macdonald* as follows:

“But controversy generally arises where the separate identity of the article annexed is preserved, and when detachment can be affected with more or less ease. Indeed, it may happen (as has happened here) that the annexation is in itself consistent with the article either being, or not being, a portion of the realty; and it thus becomes necessary to examine with the greatest care the intention with which it was annexed”.<sup>90</sup>

In *R v Mabula*<sup>91</sup> the court per Innes CJ stated that

“[t]he nature of the structure, the manner of its annexation to the realty, and the intention of the person who annexed it; these are factors chiefly to be considered. But it by no means follows that they all require consideration equally or at all in every case. In many instances the nature of the thing or the mode of attachment may conclude the enquiry. But where the application of these is indecisive the element of intention may settle the matter”.

Accordingly, case law that is associated with the traditional approach is said to consider first the objective factors in determining *inaedificatio* and only if the assessment of the objective factors is inconclusive of whether accession has occurred, the intention of the owner of the movable should be considered.<sup>92</sup> The

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147 and 149; CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) paras 337-338.

<sup>90</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467.

<sup>91</sup> 1927 AD 159 161.

<sup>92</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561; *Van Wezel v Van Wezel's Trustee* 1924 AD 409; *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34; *R v Mabula* 1927 AD 159; *Gault v Behrman* 1936 TPD 37; *Petterson v Sorvaag* 1955 (3) SA 624 (A); *Edwards v Barberton Mines Ltd* 1961 (1) SA 187 (T); *Caltex (Africa) Ltd v Director of Valuations* 1961 (1) SA 525 (C) 528. See also A Pope “Inaedificatio revisited: Looking backwards in search of clarity” (2011) 128 *SALJ* 123-146 128; P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 169; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and*

question is: how does one determine, in terms of the traditional approach, whether the owner of the movable intended to attach the movable to land permanently?

If a movable is built and incorporated into the building to the extent that it cannot be separated without damage to the building or the movable itself, this is an indication that attachment of the movable to such a building was intended to be permanent.<sup>93</sup> In *Newcastle Collieries Co Ltd v Borough of Newcastle*<sup>94</sup> Innes CJ stated that “the intention of permanency is presumed from the method of annexation; and though the builder may have reserved the right in a specified eventuality to remove the structure, still while it stands it remains portion of the realty”.<sup>95</sup>

Lewis<sup>96</sup> argues that the method for ascertaining what the intention of the owner of the movable was during attachment is “crisply enunciated” in *Standard-Vacuum Refining Co v Durban City Council* (“*Standard-Vacuum*”).<sup>97</sup> In this case the court had to decide whether certain tanks were immovable for the purpose of determining the value of the land on which they stood. According to Van Winsen AJA, “the object of the enquiry is to ascertain whether the movable has been attached to the land or other immovable with the intention that it should remain permanently attached thereto”.<sup>98</sup> The judge stated that intention is the most important factor. However, to determine whether the intention was to attach a movable to land permanently, regard had to be given to the nature of the movable, the method and degree of attachment to the land, and whether the movable could be readily removed without injury to itself

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*Schoeman's The law of property* (5<sup>th</sup> ed 2006) 149; CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) paras 337-338.

<sup>93</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 477.

<sup>94</sup> 1916 AD 561.

<sup>95</sup> *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561 565.

<sup>96</sup> C Lewis “*Superficies solo cedit - sed quid est superficies?*” (1979) 96 SALJ 94-107 98.

<sup>97</sup> 1961 (2) SA 669 (A).

<sup>98</sup> *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 677-678.



or to the land to which it was attached.<sup>99</sup> In other words, although intention is the most important factor, it is inferred from the objective factors.

According to Van Winsen AJA, if a movable is capable of acceding to the land and become secure to an extent that if it is separated from the land it will cause substantial injury either to the land or the movable, “it must be inferred that the movable was attached with the intention of permanency and for that reason it must be held to have become ... immovable”.<sup>100</sup> Furthermore, the court stated that, if after examining the physical features, the results indicate that attachment is inconclusive (in the sense that an examination of the physical features leads to no conclusive inference), the annexor’s intention (presumably the stated intention) is decisive.<sup>101</sup>

The court applied the above test and examined the physical features of the tanks. It held that the tanks were never at any stage independent from the land. Further, the tanks were of such great size and weight upon the land on which they stood that they were not movable from their location by ordinary means unless they were cut up, which – according to the court – would have resulted in loss of their identity.<sup>102</sup> Accordingly, the court stated that the physical features raised an inference that the attachment of the tanks was intended to be permanent.<sup>103</sup>

The effect of the *Standard-Vacuum* decision is that the objective factors are “not regarded as totally independent from the intention with which the attachment took place”.<sup>104</sup> The objective factors are examined with the object of arriving at the objective intention (inferred intention). In other words, if a movable is attached to

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<sup>99</sup> *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 678.

<sup>100</sup> *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 678.

<sup>101</sup> C Lewis “*Superficies solo cedit - sed quid est superficies?*” (1979) 96 SALJ 94-107 98.

<sup>102</sup> *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 678.

<sup>103</sup> *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 679.

<sup>104</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 148.

land to the extent that separation would cause damage to the land or the movable itself, this would give rise to an inference that the movable was attached to the land with the intention that it becomes permanent. Therefore, it seems that in terms of the traditional approach, intention is important but it must be inferred from the objective factors to determine whether a movable is attached to land permanently. If the inferred intention does not conclusively indicate that accession has occurred, it seems that the stated intention of the owner or annexor of the movable (presumably as stated in the contract) should come into play.<sup>105</sup>

However, there is early case law that first considered the stated intention of the owner of the movable in determining accession. Surprisingly, one of the cases that considered the stated intention of the owner of the movable as the most important is *Macdonald*, which is said to have set out the traditional approach. Arguably, what transpired in *Macdonald* contradicts the impression that only recent case law is associated with the so-called new approach, which considers the intention of the owner of the movable as the most important factor. However, although it is true that the court in *Macdonald* considered the intention of the owner of the movable as the most important factor, it is significant that the objective factors in that case were not decisive proof that accession had occurred. The machinery was not permanently attached to the building because it could be removed with ease. Too much significance should therefore not be attached to the court having resort to the intention factor in this particular case.

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<sup>105</sup> *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 679. See also DL Carey Miller *The acquisition and protection of ownership* (1986) 28.

## 2 4 Analysis of the three factors identified in *Olivier*

### 2 4 1 Introduction

The then Appellate Division held in *R v Mabula*<sup>106</sup> that the three factors identified in *Olivier v Haarhof & Company*<sup>107</sup> do not require equal consideration. Hence, the first two factors, namely the nature and object of the movable and the manner and degree of attachment of a movable to an immovable, may in many instances be conclusive of whether accession had occurred.<sup>108</sup> However, it was stated above that there are several early cases (usually associated with what is known as the traditional approach) that considered the subjective intention of the owner of the movable as the most important of the three factors.<sup>109</sup>

This section provides an analysis of the three factors, namely the nature and object of the movable; the degree and manner of attachment of the movable; and the intention of the annexor or owner. The purpose of the analysis is to examine the meaning and role of each factor through the early case law. In the course of the analysis, I point out some instances in which the subjective intention of the owner of the movable is considered as the most important factor from the start of the inquiry. I also indicate the probable reasons for this approach. Moreover, the section briefly outlines the instances in which the objective factors may conclude the inquiry for

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<sup>106</sup> 1927 AD 159.

<sup>107</sup> 1906 TS 497.

<sup>108</sup> *R v Mabula* 1927 AD 159 161. See also *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561; *Van Wezel v Van Wezel's Trustee* 1924 AD 409.

<sup>109</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34; *Champion Ltd v Van Staden Bros and Another* 1929 CPD 330; *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A). See also one of the earlier cases *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation* 1907 ORC 42.

determining accession despite the emphasis being placed on the intention of the owner of the movable.

#### 2 4 2 The nature and object of the movable

This factor entails that a movable must, in its nature, be capable of acceding to realty (land).<sup>110</sup> Movables such as windows and door frames may be capable of being attached to the building and as such will be regarded as part of a building if incorporated in such a building.<sup>111</sup> According to Carey Miller, the nature and object of the movable “is largely a matter of recognising the obvious destination of certain things”.<sup>112</sup> He argues that things like chimney-pots, guttering, plumbing, electrical fittings, which are permanently attached to buildings, would almost always lose their independent legal identity by becoming part and parcel of the building in which they are incorporated.

In many cases, having regard to the nature and object of the things that are incorporated into the building, it could be “self-evident from the very nature of the inquiry” that they are intended to be permanent in such a building.<sup>113</sup> For instance, the nature and object of the bricks and cement that have been used in the construction of a house indicate its capability of acceding to land or being incorporated into an immovable after being used.<sup>114</sup> Consequently, the

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<sup>110</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 466.

<sup>111</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) paras 336-337. See also the recent case of *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1009.

<sup>112</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 24.

<sup>113</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467.

<sup>114</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 147. See also H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 169; Z Temmers *Building encroachments*

manufacturers and suppliers of cement cannot retain ownership of cement after it had been used to build a house, since it is not easy to prove that cement that has been used for construction did not form a permanent part of the building – the very nature and purpose of the object indicate the contrary.<sup>115</sup>

Furthermore, the nature and the object of the structure may not only prove capable of accession but can also indicate that the objects are destined to serve the soil or another immovable structure.<sup>116</sup> For instance, in *Van Wezel v Van Wezel's Trustee*<sup>117</sup> (“*Van Wezel*”) the court had to determine whether a windmill erected by a lessee formed part of the immovable. The windmill was used for dairy purposes and for supplying the house with water.<sup>118</sup> The court held that the windmill was immovable because its nature and object plainly indicated that it was destined to serve the land permanently.<sup>119</sup> Accordingly, because of their nature and purpose, movables such as windmills, irrigation systems, oil tanks serving industrial premises, zinc and steel sheds, carports and undercover parking structures should all qualify as immovables after they have been constructed on or into an immovable.<sup>120</sup>

The application and interpretation of the nature and object of the movable as a factor varies from case to case. A movable may in some instances be regarded as immovable because the nature and purpose indicate that such a movable was destined to serve the land permanently even though the manner of attachment

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*and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University 114.

<sup>115</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 147. See also Z Temmers *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University 114.

<sup>116</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) paras 336-337.

<sup>117</sup> 1924 AD 409.

<sup>118</sup> *Van Wezel v Van Wezel's Trustee* 1924 AD 409 412.

<sup>119</sup> *Van Wezel v Van Wezel's Trustee* 1924 AD 409 414.

<sup>120</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) paras 336-337.

indicates that the movable could be removed from the land with ease. In *Van Wezel* the court held that a windmill was immovable although it could be removed from the land with relative ease.<sup>121</sup> Badenhorst, Pienaar and Mostert argue that the judgment in *Van Wezel* “proves that the classification of things almost invariably involves an adjustment of conflicting interests and is not the result of the application of a rule of thumb”.<sup>122</sup> Moreover, they argue that classifications of things as movables or immovables may depend on the kind of “object and construction of a particular statute”.<sup>123</sup>

It seems that courts may decide accession in the manner that they view as fair and equitable to the parties. Sometimes the interest of the owner of the movable are protected when judging whether a movable has become permanently attached to land. Hence, in other cases a movable may remain movable inasmuch as it can be removed from the land with ease. Moreover, a movable may be regarded as movable regardless of the fact that its nature and purpose indicate that it was destined to serve the land permanently.<sup>124</sup> Also in other cases a movable may be classified as immovable even though such a movable can be removed from the land with ease.<sup>125</sup>

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<sup>121</sup> *Van Wezel v Van Wezel's Trustee* 1924 AD 409 412.

<sup>122</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 154. See also A Pope “Inaedificatio revisited: Looking backwards in search of clarity” (2011) 128 *SALJ* 123-146 139 who argues that the court in *Van Wezel* held that the windmill was immovable because one Van Wezel Jr could not claim removal of the windmill because his father's right of removal no longer existed after he became insolvent.

<sup>123</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 154 fn 167.

<sup>124</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34; *Champion Ltd v Van Staden Bros and Another* 1929 CPD 330. See also *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation* 1907 ORC 42.

<sup>125</sup> In *Gault v Behrman* 1936 TPD 37 43 the court held that a certain stove that contained an apparatus for heating water was immovable simply because the stove's function indicated that the

In *Macdonald* the court had to decide whether certain machinery bought in terms of a hire-purchase had become permanently attached to land. It appeared that the machinery was installed for permanent use. However, the existence of a hire-purchase agreement caused the court to regard the intention of the owner of the movable as the decisive factor to determine accession. According to the majority judgment, the seller did not intend to transfer ownership because the purchase price of the machinery was not paid in full. This implies that if the purchase price was paid in full, ownership of the machinery would have passed to the landowner.<sup>126</sup> However, because of the presence of a hire-purchase agreement (in which the owner reserved ownership of the machinery) and coupled with the fact that the machine was removable with ease, the court held that the machinery remained movable despite the fact that its nature and purpose indicated that it was destined to serve the land permanently. The decision in *Macdonald* was seemingly aimed at protecting the interests of the owner of the machinery. This was supported by the fact that the machine was not permanently attached to the land.

In *Land and Agricultural Bank of SWA v Howaldt and Vollmer*,<sup>127</sup> the court held that a certain windmill remained movable despite the fact that its nature and purpose indicated that it was attached to the land permanently. The court held that the windmill could not become a permanent attachment to the land because the owner of the windmill intended that the windmill would become a permanent attachment only if the purchase price of the windmill was paid in full.<sup>128</sup> Similarly, in *Champion*

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owner installed it with the intention for permanent use. The court held that the stove was immovable although it was clear that it could be removed with ease.

<sup>126</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454. See also H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 171-172.

<sup>127</sup> 1925 SWA 34.

<sup>128</sup> *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34 37-38.

*Ltd v Van Staden Bros and Another*<sup>129</sup> a windmill, sold in terms of a hire-purchase agreement, was erected on a farm. The court held that the windmill remained movable despite the fact that its nature and purpose indicated that it was attached to the land permanently. According to the court the owner of the windmill sold it on a condition that it was not supposed to become the property of the purchaser until he paid the full purchase price.<sup>130</sup> Accordingly, since the purchase price was not paid in full the court held that the windmill remained movable and did not become permanently attached to the land.

In *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation*<sup>131</sup> the court also had to decide whether certain automatic sprinklers (for extinguishing fire in a building) were permanently attached. The court held, after inspecting the premises and considering the statement of facts agreed upon by the parties in writing, that the manner in which the sprinklers were installed and affixed to the buildings indicated that “if there had been no special agreement it would have amounted to a fixture and formed part and parcel of the ground”.<sup>132</sup> Therefore, it was clear that the nature and purpose of the sprinklers indicated that they were installed in the building permanently. The court held that the sprinklers remained the exclusive property of the plaintiffs until the payment of the full purchase price. Accordingly, the court ordered the defendants to pay for the sprinklers and that, if they failed to pay, the plaintiff had to remove the sprinklers but subject to a condition that removal is conducted without damage to the building.<sup>133</sup>

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<sup>129</sup> 1929 CPD 330.

<sup>130</sup> *Champion Ltd v Van Staden Bros and Another* 1929 CPD 330 333-334.

<sup>131</sup> 1907 ORC 42.

<sup>132</sup> *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation* 1907 ORC 42 45.

<sup>133</sup> *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation* 1907 ORC 42 54.



However, an indication that the nature and purpose of the movables indicate that they are intended to serve the immovable property permanently seems to blur the distinction between auxiliaries and accessory items.<sup>134</sup> Auxiliaries are also movables that may belong to the immovable because of their destination, but they are physically not part of the immovable.<sup>135</sup> Auxiliaries maintain their independent physical existence, regardless of being joined to the principal item.<sup>136</sup> Auxiliaries are distinguishable from accessory items that lose their separate legal identity as a result of accession to the principal thing.<sup>137</sup> Yet, it is usually argued that they follow the principal in certain circumstances.<sup>138</sup> In *Van Wezel*<sup>139</sup> the court followed the views of Paulus and Johannes Voet in classifying a windmill as an accessory to the land.<sup>140</sup> Accordingly, it seems that courts may sometimes confuse auxiliary items with the accessory items that form part of the land on which they are sufficiently attached.

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<sup>134</sup> LPW van Vliet "Accession of movables to land: II" (2002) 6 *Edin LR* 199-216 210-211. See also DL Carey Miller & A Pope "Acquisition of ownership" in R Zimmermann, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective: Property and obligation in Scotland and South Africa* (2004) 682.

<sup>135</sup> DL Carey Miller & A Pope "Acquisition of ownership" in R Zimmermann, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective: Property and obligation in Scotland and South Africa* (2004) 682.

<sup>136</sup> DL Carey Miller & A Pope "Acquisition of ownership" in R Zimmermann, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective: Property and obligation in Scotland and South Africa* (2004) 682.

<sup>137</sup> W Freedman "The test for inaedificatio: What role should the element of subjective intention play?" (2000) 117 *SALJ* 667-676 668. See also A Pope "Inaedificatio revisited: Looking backwards in search of clarity" (2011) 128 *SALJ* 123-146 138.

<sup>138</sup> In *Smyth v Furter* 1907 24 SC 424 426 the court held that certain helm and a coil were appurtenances of a kettle that was built into the soil by masonry. The kettle had to pass to the plaintiff with the helm and coil because they were appurtenances of the kettle. See also *Lewis v Ziervogel* 1924 CPD 310; *Spreeth v Lazarus* 1944 CPD 79; DL Carey Miller & A Pope "Acquisition of ownership" in R Zimmermann, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective: Property and obligation in Scotland and South Africa* (2004) 682.

<sup>139</sup> *Van Wezel v Van Wezel's Trustee* 1924 AD 409 414.

<sup>140</sup> Paulus and Johannes Voet's views regarding auxiliaries are discussed in LPW van Vliet "Accession of movables to land: II" (2002) 6 *Edin LR* 199-216 210-211. Van Vliet argues that in Roman law auxiliaries remained movables and there was no accession in regard to them. However, the position changed over time. Paulus and Johannes Voet wrote that certain movables are subject to the rules of land law. Consequently, they are regarded as part and parcel of the immovable property.

Nonetheless, since the application of the nature and object of the movable as a factor for determining accession varies from case to case, a court may on the one hand decide that a movable has become immovable as an attachment to land because its nature and purpose indicate that it was attached to serve the land permanently. This may be the case regardless of whether a movable can be detached from the land with ease. On the other hand, a court may decide that a movable remains movable regardless of the fact that its nature and purpose indicate that the movable was destined to serve the land permanently. In many cases this approach was supported by the fact that a movable can be removed from the land with ease. However, the manner in which a movable is attached to land may change this position. For instance, if the manner in which a movable is attached to land indicates that a movable is firmly attached to land to the extent that it cannot be removed, that is an indication that a movable was permanently attached to land. This is discussed in the next section.

#### 2 4 3 The way in which the movable is fixed on the land

This factor developed in Roman law<sup>141</sup> and was further followed in Roman-Dutch<sup>142</sup> and South African law.<sup>143</sup> In Roman-Dutch law all things that were fixed to land or immovable structures had to be attached to the earth, sometimes by means of nails.<sup>144</sup> If the manner in which a structure was fixed indicated that the structure was

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<sup>141</sup> *D* 18.1.76; *D* 19.1.18; *D* 41.1.60.

<sup>142</sup> Grotius 2.1.13. See also CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337; DL Carey Miller *The acquisition and protection of ownership* (1986) 26.

<sup>143</sup> CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337. See also DL Carey Miller *The acquisition and protection of ownership* (1986) 26.

<sup>144</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 34. See also DL Carey Miller *The acquisition and protection of ownership* (1986) 26.

fixed to an extent that it could not be removed, it became part of the soil or building in which it had been affixed. Carey Miller argues that this factor indicates “an obvious measure of the critical issue of permanence”.<sup>145</sup>

However, questions always arise regarding the permanency of the structure. In which circumstances will the manner and the degree of attachment indicate permanency? In *Macdonald* Innes CJ held that in order for a movable to be considered part of a permanent structure, “there must be some effective attachment (whether by mere weight or by physical connection)”.<sup>146</sup> According to Van der Merwe, two tests are employed to establish whether the manner and degree of the attachment render a movable immovable. Firstly, the attached article must lose its own identity and become an integral part of the immovable. Secondly, the attachment must be so secure that separation would involve substantial injury either to the immovable or to the accessory.<sup>147</sup>

According to the first test, an article must be attached to something physical and immovable.<sup>148</sup> Examples include doors, windows and roof tiles, which are part of the house or building after they have been incorporated into it. However, mere functional or economic integration is not enough for an article to be rendered permanent, even though it is attached to immovable property.<sup>149</sup> This means that if the main component is immovable, this does not always change the status of all

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<sup>145</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 26.

<sup>146</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 466-467.

<sup>147</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA 1<sup>st</sup> reissue vol 27* (2002) para 337. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 148.

<sup>148</sup> *Caltex (Africa) Ltd v Director of Valuations* 1961 (1) SA 525 (C) 529. See also Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 148; CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA 1<sup>st</sup> reissue vol 27* (2002) para 337.

<sup>149</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA 1<sup>st</sup> reissue vol 27* (2002) para 337.

other movable articles attached to it from being movable to immovable. This is regardless of the fact that the movable articles form a functional unit with the main component, which is immovable in nature.<sup>150</sup> For instance, cotton mills, mining machinery or irrigation systems, all objects that form a functional unit with the land, might not be considered as forming one thing with the land or other immovable property in a legal sense.<sup>151</sup> The approach that mere functional or economic integration is not enough for a movable to be rendered immovable, even though it is attached to immovable property, seems to have resulted in unsatisfactory results in recent case law.<sup>152</sup>

Nonetheless, the other test, namely that the extent of attachment must be so secure that separation would involve substantial injury either to the immovable or to the accessory, has been labelled a “negative test of considering the consequences of an attempt to remove the annexed thing”.<sup>153</sup> If an article cannot be removed without causing damage to itself or the land, it may be regarded as having formed

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<sup>150</sup> *Caltex (Africa) Ltd v Director of Valuations* 1961 (1) SA 525 (C) 529. See also *Salisbury Municipality v Nestle’s Products (Rhodesia) Ltd* 1963 (1) SA 339 (SR) 341, where the court stated that “the mere fact that an item of machinery is capable of being detached from the whole, e.g., for cleaning purposes, does not necessarily make it a movable. The test is whether or not it is an integral part of the plant and machinery and put there for that sole purpose, having no separate and independent use on the land as a chattel”.

<sup>151</sup> In *Caltex (Africa) Ltd v Director of Valuations* 1961 (1) SA 525 (C) 529 the court held that “where a complex of things is said to be a unit or entity in a mere functional sense, e.g. with regard to an activity such as production, construction, storage or the like, then nothing is gained in an enquiry of the instant kind by labelling an article as an [‘]integral part[‘] of that unit. Such a unit could obviously consist of things movable as well as immovable: and the character of each component must be determined with reference to the principles and criteria applied earlier in this judgment. For the reasons already stated there is in my view no justification for regarding the pipes in the present case as being in a physical sense an integral part of any immovable thing”. See also CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337.

<sup>152</sup> See for instance the cases of *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A); *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T); *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd* [2007] ZAFSHC 74 (13 December 2007). See also CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337; B Maripe “Intention and the original acquisition of ownership: Whither inaedificatio?” (1998) 115 *SALJ* 544-552 547-548.

<sup>153</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 26.

part of that land by *inaedificatio*.<sup>154</sup> In *R v Mabula*<sup>155</sup> the court had to determine whether a certain structure was immovable in nature so as to warrant a charge and conviction of arson. The court per Innes CJ held that “[t]he house was a dwelling and was so constructed that it could not be removed without being broken down”.<sup>156</sup>

It appears from *R v Mabula*<sup>157</sup> that, since the house could not be removed without being broken down into pieces, it had lost its independent existence as a movable thing and through attachment had become part of the immovable thing. However, if there is proof that the house can be removed by being broken down into pieces and placed again on another piece of land, such a house can be regarded as movable property.<sup>158</sup> In *Petterson v Sorvaag*<sup>159</sup> the court held as follows:

“The fact that the house was very heavy and probably incapable of being moved as a unit does not detract from the fact that it was so constructed that it could be taken to pieces which could be removed and put together again on another site. The house was brought from Norway by a Norwegian and there is no evidence to show that Ellefsen did not regard it as a movable house.”<sup>160</sup>

From this quote it seems that the court applied and interpreted the manner and degree of attachment less rigorously to protect the interest of the owner of the house. This is because the court considered the evidence from Norway that the house in dispute could be taken into pieces despite the fact that it is very heavy and probably incapable of being moved.

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<sup>154</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 26.

<sup>155</sup> 1927 AD 159.

<sup>156</sup> *R v Mabula* 1927 AD 159 162.

<sup>157</sup> 1927 AD 159.

<sup>158</sup> *Petterson v Sorvaag* 1955 (3) SA 624 (A).

<sup>159</sup> 1955 (3) SA 624 (A).

<sup>160</sup> *Petterson v Sorvaag* 1955 (3) SA 624 (A) 628.

Nonetheless, academic commentators<sup>161</sup> criticise reliance on the criterion that a movable is permanent if the extent of the attachment is so secure that separation would involve substantial injury either to the immovable or to the accessory itself. For instance, Van der Merwe<sup>162</sup> and Carey Miller<sup>163</sup> question whether the possibility of removing a movable without damage is still practicable. The reason for this is that modern technological advances can make it possible for an article to be removed without any damage to the land or building to which it is attached much easier than before.<sup>164</sup> This may also mean that people will now attach movables in such a way, on purpose, that it can be easily removed.

However, one can argue that although technological development may defeat the purpose of this factor, it however remains relevant to decide whether accession has occurred, particularly in cases where ownership of the movable that is attached to land is reserved as a security for payment of the purchase price. Therefore, in cases where a movable is attached to land subject to a special arrangement, the degree and manner of attachment may indicate the intention behind attachment. For instance, if a movable is attached to land to the extent that is so secure that separation would involve substantial injury either to the immovable or movable, this

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<sup>161</sup> CG van der Merwe "The law of property (including mortgage and pledge)" 1980 *ASSAL* 230-233 232-233. See also CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337; CG van der Merwe "The law of property (including mortgage and pledge)" 1990 *ASSAL* 214-216 215-216; Carey Miller *The acquisition and protection of ownership* (1986) 26.

<sup>162</sup> CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337.

<sup>163</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 26.

<sup>164</sup> DL Carey Miller & A Pope "Acquisition of ownership" in R Zimmermann, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective: Property and obligation in Scotland and South Africa* (2004) 679. See also CG van der Merwe "The law of property (including mortgage and pledge)" 1980 *ASSAL* 230-233 232-233.

would be an indication of intention to attach the movable permanently even though ownership of the movable is reserved.<sup>165</sup>

Practically speaking, the fact that the owner of the movable intended the movable to become permanently attached to the land only if the conditions of sale or any other arrangement were complied with, would not prevail over an indication that a movable is inseparably attached to land.<sup>166</sup> In *Macdonald*, Wessels AJA held for the minority that a movable will form part of the land “even if the owner of the movable contracts with the owner of the land that the object is to be regarded as a movable, it will lose its [movable character] if firmly built to the land, and it will pass to the purchaser of the land notwithstanding the contract”.<sup>167</sup> This means that a movable will form part of the land inasmuch as it is firmly attached to the land regardless of the retention of ownership in the contract of purchase.

Therefore, if the objective factors do not indicate that a firm attachment of the movable to land has taken place, and if ownership of the movable is reserved in the contract of sale, the court may hold that accession did not take place to protect the interests of seller/owner of the movable.<sup>168</sup> Nevertheless, the degree and manner of attachment may always remain indications of the intention behind attachment.

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<sup>165</sup> *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation* 1907 ORC 42; *R v Mabula* 1927 AD 159 162; *Caltex (Africa) Ltd v Director of Valuations* 1961 (1) SA 525 (C) 528; *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 678.

<sup>166</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 26. See also CG van der Merwe “The law of property (including mortgage and pledge)” 1980 ASSAL 230-233 232-233.

<sup>167</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 488.

<sup>168</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34; *Champion Ltd v Van Staden Bros and Another* 1929 CPD 330; *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A). See also the earlier case of *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation* 1907 ORC 42.

#### 2 4 4 The intention of the person who erected the movable on the land

This factor may be described as the subjective indication of accession. The relevant intention to determine accession was – in terms of the earlier cases – the intention of the annexor at the time of the attachment.<sup>169</sup> However, this position changed in *Macdonald*,<sup>170</sup> where the court was faced with the question of whose intention must be considered to ascertain permanency of the attachment.<sup>171</sup> In *Macdonald* Innes CJ stated that “the intention required (in conjunction with annexation) to destroy the identity, to merge the title, or to transfer the *dominium* of movable property, must surely be the intention of the owner [of the movable]”.<sup>172</sup>

According to Innes CJ in *Macdonald*, the decision in *Olivier* and all other South African cases considered the intention of the owner of the movable property to determine accession.<sup>173</sup> The court stated that considering the intention of the owner is what is expected in view of the fundamental principle that a non-owner cannot transfer the property of another, although this is subject to a few exceptions.<sup>174</sup> The view that the intention of the owner of the movable (and not of the annexor) is important to determine whether accession has occurred has been consistently followed in case law subsequent to *Macdonald*.<sup>175</sup> Interestingly, some of these cases

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<sup>169</sup> See for instance in *Olivier v Haarhof & Company* 1906 TS 497.

<sup>170</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454.

<sup>171</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 466-473.

<sup>172</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467.

<sup>173</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467: “Certainly, in *Olivier v Haarhof*, and, so far as I am aware, in all other South African cases, the intention which was looked to was the intention of the owner”.

<sup>174</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 468.

<sup>175</sup> *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34 36-38; *Champions Ltd v Van Staden Bros and Another* 1929 CPD 330 333; *Clarke v Uhlmann* 1943 CPD 124 127; *Van Rooyen v Baumer Investments (Pty) Ltd* 1947 (1) SA 113 (W) 117; *Bester v Marshall* 1947 (3) SA 206 (SR) 208; *Cape Town & District Gas, Light & Coke Co Ltd v Director of Valuations* 1949 (4) SA 197 (C) 202; *Falch v Wessels* 1983 (4) SA 172 (T) 179-780; *Konstanz Properties (Pty) Ltd v Wm Spilhaus*



concerned movables sold on hire-purchase agreement, as was the case in *Macdonald*.<sup>176</sup>

In *Land and Agricultural Bank of SWA v Howaldt and Vollmer*<sup>177</sup> the court considered the intention of the owner of the windmill to determine whether a windmill sold in terms of hire-purchase agreement had become attached to the land. The court held that the windmill could not pass to one Stoermer because the owners of the windmill had reserved a right to remove it in the event of a failure to pay the purchase price in full.<sup>178</sup> Similarly, in *Champion Ltd v Van Staden Bros and Another*<sup>179</sup> Watermeyer J held that the court was bound to follow the decision of *Macdonald*. According to Watermeyer J, to determine whether a windmill has become part of the farm depends on “the intention with which it was attached to the soil and the intention which must be looked at is not the intention of the person who attached it, but the intention of the owner of the movable”.<sup>180</sup>

In recent case law that involves instalment sale agreements (with reservation-of-ownership clauses), the courts have also considered the intention of the owner of the movable to determine accession.<sup>181</sup> For instance, in *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk*<sup>182</sup> the court considered the decision in

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*en Kie (WP) Bpk* 1996 (3) SA 273 (A) 281; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 998.

<sup>176</sup> *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34; *Champions Ltd v Van Staden Bros and Another* 1929 CPD 330; *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W); *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A).

<sup>177</sup> 1925 SWA 34 37.

<sup>178</sup> *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34 39.

<sup>179</sup> 1929 CPD 330.

<sup>180</sup> *Champion Ltd v Van Staden Bros and Another* 1929 CPD 330.

<sup>181</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W); *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A).

<sup>182</sup> 1996 (3) SA 273 (A).

*Macdonald* and held that the intention of the owner of the movable, and not of the annexor, had to be considered to establish whether accession had occurred.<sup>183</sup>

The intention of the owner of the movable is said to be relevant in two different forms, namely the inferred intention<sup>184</sup> and the stated or actual subjective intention.<sup>185</sup> The inferred intention is the intention of the owner of the movable as determined with reference to the objective indications of accession. For instance, in *Standard-Vacuum Refining Co v Durban City Council*<sup>186</sup> Van Winsen AJA stated that regard had to be given to the nature of the movable, the method and degree of attachment to the land, and whether a movable could be readily removed without injury to itself or to the land for a court to determine the intention of the owner of the movable to attach a movable to land permanently.<sup>187</sup>

The stated or actual subjective intention of the owner of the movable is – in most cases – indicated in the contract of sale of the movable. According to Van Winsen AJA, it seems that the stated or actual subjective intention of the owner of the movable should be considered if the intention as inferred from the objective factors is inconclusive.<sup>188</sup> Carey Miller criticises reliance upon both the inferred intention and the professed or actual intention. He argues that the inferred intention is “largely superfluous – being no more than the court’s objective assessment of the circumstances as indication of permanence”.<sup>189</sup> He further contends that the actual

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<sup>183</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A). See also LPW van Vliet “Accession of movables to land: II” (2002) 6 *Edin LR* 199-216 206-207.

<sup>184</sup> The inferred intention is sometimes referred to as the real intention. See JJ Goldberg “Is a structure a movable or an immovable when annexed to immovable property?” (1961) 78 *SALJ* 366-369 368; CP Joubert “The law of property (including mortgage and pledge)” 1961 *ASSAL* 229-231 231.

<sup>185</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 28-29.

<sup>186</sup> 1961 (2) SA 669 (A).

<sup>187</sup> *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 678.

<sup>188</sup> *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 678-679.

<sup>189</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 28.

or professed intention is irrelevant in determining *inaedificatio*, since it is a form of original acquisition of ownership based on the physical attachment of the accessory to the principal thing.<sup>190</sup>

However, the question is: what would happen if the intention of the owner of the movable conflicts with the objective indications of accession in cases where intention is considered as the most important factor? This is because the inferred intention or objective indications of accession may be in conflict with the stated intention of the owner (probably as stated in the contract).<sup>191</sup> It seems that if there is a conflict between the intention that is inferred from the physical features and the stated intention of the owner, the inferred intention or objective factors must be decisive if they confirm that accession has occurred.<sup>192</sup> This implies that the stated intention of the owner will not be considered in the event when it conflicts with the result of the inferred intention or objective factors that confirm that accession has occurred.<sup>193</sup> According to Goldberg “the physical features are always only [*indiciae*] of the annexor’s true intention, which remains to the end the paramount consideration” in determining *inaedificatio*.<sup>194</sup>

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<sup>190</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 28.

<sup>191</sup> *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 679. See also Z Temmers *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University 115; C Lewis “*Superficies solo cedit - sed quid est superficies?*” (1979) 96 SALJ 94-107 99.

<sup>192</sup> *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 669 678. See also Z Temmers *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University 115; C Lewis “*Superficies solo cedit - sed quid est superficies?*” (1979) 96 SALJ 94-107 99.

<sup>193</sup> *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561 565. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 149.

<sup>194</sup> JJ Goldberg “Is a structure a movable or an immovable when annexed to immovable property?” (1961) 78 SALJ 366-369 368.

The intention of the owner of the movable (as stated in the contract) was considered as the most important factor in some early case law.<sup>195</sup> Although the intention of the owner was sometimes regarded as the most important factor, the objective factors in the specific facts of those cases were not decisive of whether *inaedificatio* had occurred and there was therefore no direct conflict between the stated intention of the owner and the inferred intention derived from the physical features. In *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation*<sup>196</sup> the court held that certain sprinklers had to be removed in the event of failure to pay the full purchase price by the defendants. The court's decision to remove the sprinklers was substantiated by the fact that it was not physically impossible to detach the sprinklers from the buildings. Moreover, the court stated that it was not legally impossible to remove the sprinklers because removal was not "contrary to law or morality, or to public policy or interest".<sup>197</sup> Similarly, in *Macdonald* Innes CJ held that the intention of the owner of the machine was important to determine whether it became part of the building since the machine was "not physically incorporated in the realty".<sup>198</sup> If the objective factors are inconclusive too much significance should not be attached to the decision to focus on the intention.

According to Goldberg, although the intention of the owner of the movable was sometimes considered as the most important in various cases, *dicta* always "found their way into the judgments which were to lend themselves to the interpretation that

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<sup>195</sup> *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation* 1907 ORC 42; *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34; *Champion Ltd v Van Staden Bros and Another* 1929 CPD 330.

<sup>196</sup> 1907 ORC 42.

<sup>197</sup> *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation* 1907 ORC 42 50.

<sup>198</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 469.

intention might not always be of primary importance”.<sup>199</sup> Therefore, even though the intention of the owner of the movable was sometimes considered as more important in various cases, it in any event did not conflict with the objective factors.

## 2 5 Conclusion

The aim of this chapter is to discuss case law that is associated with what is known as the traditional approach when determining *inaedificatio*. As a point of departure, the chapter outlines a brief historical background of the general principles of the law regarding *inaedificatio*. *Inaedificatio* has its origin in Roman law and it was received into Roman-Dutch and South African law. Subsequently, South African courts were faced with the question: what constitutes permanent attachment by *inaedificatio*? It appears that this question was never central in Roman law, where the focus was instead on the remedies available and not on the question of when accession had taken place. Nevertheless, it can be assumed that physical features were only indications of accession of movables to land. The same can be said for Roman-Dutch law.

The chapter points out that the traditional approach is mainly derived from *dicta* in the *Macdonald* case, and that case law that is associated with the traditional approach applied the three factors that the court identified in *Olivier*.<sup>200</sup> In determining accession, early case law indicates that the first two factors may be evident from the beginning of the inquiry whether accession has occurred, and that the first two factors are examined with the object of arriving at the objective (inferred)

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<sup>199</sup> JJ Goldberg “Is a structure a movable or an immovable when annexed to immovable property?” (1961) 78 *SALJ* 366-369 366.

<sup>200</sup> See 2 3 and 2 4 above.

intention. However, if the results of examining the objective factors and inferred intention are inconclusive to determine whether accession has occurred, the stated or actual intention of the owner of the movable should be considered to determine accession.

The chapter also points out that some of the early cases (including *Macdonald*) already considered the stated or actual intention of the owner of the movable as important to determine accession. The stated intention of the owner of the movable was considered as important seemingly to protect the interest of the owner of the movable. However, in all of those cases the objective factors were not conclusive of attachment and therefore these cases did not present an opportunity to determine what would happen if the stated intention of the owner of the movable came up against (or was in conflict with) the inferred intention in the determination of accession. It seems that various cases determined accession in a manner that they thought was fair and equitable to the parties. This is because a movable can sometimes be regarded as immovable regardless of the fact that it could be removed with ease.

Recent case law<sup>201</sup> and academic literature<sup>202</sup> indicate that post-1978 case law is associated with the so-called new approach when determining *inaedificatio*. The view is that the so-called new approach considers the intention of the owner of the movable as the most important factor in determining accession. However, this chapter has revealed that there were cases decided before 1978 that already placed

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<sup>201</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 281; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 998.

<sup>202</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 149; CG van der Merwe "The law of property (including mortgage and pledge)" 1980 *ASSAL* 230-233 232-233; C Lewis "*Superficies solo cedit - sed quid est superficies?*" (1979) 96 *SALJ* 94-107 106-107.

an emphasis on the intention of the owner of the movable. In the next chapter, I discuss case law that is said to be associated with what is known as the new approach in order to determine whether the new approach is really new.

## Chapter 3: Case law associated with the new approach

### 3 1 Introduction

In chapter two it is pointed out that the difficulties related to establishing whether attachment of movables to land has taken place through *inaedificatio* have led to the development of three different approaches by South African courts.<sup>1</sup> The first approach, namely the traditional approach, is discussed in the previous chapter. In terms of the traditional approach three factors are used to determine whether attachment by *inaedificatio* has occurred. The three factors are the nature and object of the movable property, the manner and degree of attachment, and the intention of the annexor.<sup>2</sup>

Chapter two also points out that recent case law and academic literature indicate that case law that is ordinarily associated with the supposed traditional approach considered the objective factors first to determine accession. The view is that the intention of the owner of the movable should only play a role when the objective factors are inconclusive to determine accession.<sup>3</sup> However, it seems that various cases considered the intention of the owner of the movable as important from the beginning of the inquiry. Furthermore, although the intention of the owner of the movable was considered important, the objective factors were not decisive in any of these instances.

The aim of this chapter is to discuss case law that is associated with the so-called new approach. Academic commentators argue that, judging from recent case law, courts have shifted from the traditional approach to a new approach. They argue

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<sup>1</sup> See 2 2 above.

<sup>2</sup> See 2 2 above.

<sup>3</sup> See 2 3 above.



that case law that is normally associated with the new approach places more emphasis on the intention of the owner (subjective intention) to ascertain whether attachment of the movable was intended to be permanent.

Furthermore, the objective factors, namely the nature of the object and the manner of its attachment to an immovable, are only considered to determine whether the annexor or owner of the movable intended the attachment to be permanent in terms of the so-called new approach. Moreover, in certain instances the new approach gives priority to the intention of the owner of the movable (even when the owner was not the annexor).<sup>4</sup> In the end, it seems that the case law that is associated with the new approach is not that different from the case law that is associated with the so-called traditional approach. Accordingly, academic commentators hold different views as far as the new approach is concerned. Some argue that the new approach is not really new,<sup>5</sup> while others regard the new approach as both new and a justified departure from the traditional approach.<sup>6</sup> There are also some authors who are completely against the new approach and therefore criticise it.<sup>7</sup> They argue that the new approach is contrary to the rules of accession.<sup>8</sup>

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<sup>4</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A); *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T).

<sup>5</sup> A Pope "Inaedificatio revisited: Looking backwards in search of clarity" (2011) 128 *SALJ* 123-146 130-131 argues that "there is no principled difference between the so-called traditional and new approaches".

<sup>6</sup> C Lewis "*Superficies solo cedit - sed quid est superficies?*" (1979) 96 *SALJ* 94-107 103 supports the view that the intention of the owner of the movable should play an important role to determine *inaedificatio*, since an owner cannot lose ownership of his property without his consent except in limited circumstances.

<sup>7</sup> I Knobel "Accession of movables to land: South African law and Dutch law" (2012) 45 *CILSA* 77-90 81; LPW van Vliet "Accession of movables to land: II" (2002) 6 *Edin LR* 199-216 209-212; W Freedman "The test for *inaedificatio*: What role should the element of subjective intention play?" (2000) 117 *SALJ* 667-676; CG van der Merwe & JM Pienaar "The law of property (including real security)" 1999 *ASSAL* 290-293; B Maripe "Intention and the original acquisition of ownership: Whither *inaedificatio*?" (1998) 115 *SALJ* 544-552; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2<sup>nd</sup> ed 1994) 72; A Breitenbach "Reflection on *inaedificatio*" (1985) 48 *THRHR* 462-465; DL Carey

Section 3 2 of this chapter outlines case law that is associated with what is known as the new approach to *inaedificatio* with the aim of identifying whether it is truly new. Section 3 3 sets out the role of the three factors that are relied on to determine whether a movable became attached to an immovable permanently in terms of the new approach.

## 3 2 Case law associated with the new approach

### 3 2 1 Post-1978 case law

The new approach is said to have been developed in *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd*<sup>9</sup> (“*Theatre Investments*”) and in *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)*<sup>10</sup> (“*Melcorp*”). According to Badenhorst, Pienaar and Mostert the courts adopted a new approach in these two judgments to determine whether movables had been attached to immovable property.<sup>11</sup> Van der Merwe explains that *Melcorp* followed a trend that was already evident in *Theatre Investments* to invert the traditional order of the three factors that are relied on to identify *inaedificatio* by regarding the annexor’s intention as the most important factor.<sup>12</sup>

In *Theatre Investments* the appellants (Theatre Investments) appealed against an interdict granted by the court *a quo* restraining them from removing certain

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Miller “Fixtures and auxiliary items: Are recent decisions blurring real rights and personal rights?” (1984) 101 SALJ 205-211.

<sup>8</sup> See academic criticisms against the new approach in 4 3 below.

<sup>9</sup> 1978 (3) SA 682 (A).

<sup>10</sup> 1980 (2) SA 214 (W).

<sup>11</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 149.

<sup>12</sup> CG van der Merwe “The law of property (including mortgage and pledge)” 1980 ASSAL 230-233 232-233.

equipment from a theatre.<sup>13</sup> The appellants were the lessees of the building, which was owned by the respondent (lessor). The appellants had leased the building for a period of fifty years. In terms of the lease agreement, the appellants had a right of pre-emption to renew the lease for a further period of forty-nine years. Subsequent to the conclusion of the lease agreement, a theatre was erected upon the land and fitted out with seats, carpets, lighting, projection and air-conditioning equipment. The terms of the lease stipulated that upon expiry of the lease, ownership of all buildings and improvements would pass to the lessor and that no compensation would be payable to the lessee.<sup>14</sup>

The parties failed to reach agreement to renew the lease. Upon expiry of the lease, a dispute arose in which the lessee claimed that certain items were movable. The lessee further contended that he remained the owner of such items and that he had the right to remove them from the theatre.<sup>15</sup> The disputed items were the theatre seats, an emergency lighting plant, a projection room dimmer-board with ancillary fittings and attachments. The then Appellate Division of the Supreme Court had to determine whether these items were permanently attached to the land. According to the court the test is whether the annexor, at the time of attachment, intended that the movables should remain permanently attached.<sup>16</sup> The court stated that evidence as to the annexor's intention regarding the permanency of the attachment can be determined from various factors, including the annexor's own evidence as to his intention (*ipse dixit*); the nature of the movable and of the immovable; the manner of annexation as well as the cause for and circumstances that gave rise to such annexation.

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<sup>13</sup> *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) 685-686.

<sup>14</sup> *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) 685-686.

<sup>15</sup> *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) 685.

<sup>16</sup> *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) 688.

According to the court, the annexor's *ipse dixit* as to his intention is not conclusive evidence, since it must be weighed together with the inferences drawn from the nature of the movable and the immovable, the manner of attachment as well as the cause for and circumstances that gave rise to attachment.<sup>17</sup> The court stated further that, in the absence of evidence from the annexor, it will be constrained to determine accession based upon the inferences it may legitimately draw from the nature of the movable and the immovable, the manner of attachment as well as the cause for and circumstances that gave rise to such attachment. Accordingly, the court stated that it will, on consideration of all the evidence, direct and inferential, decide on a balance of probabilities whether the annexor intended permanent attachment of the movable to an immovable.<sup>18</sup> In effect, this means that the first two objective factors (nature of the movable and immovable and the manner of attachment) become indications of the third, subjective factor (intention of the annexor), instead of being two of the three independent factors or, as some early cases suggested, two objective factors that are supplemented by the intention factor only when they are inconclusive.

To establish whether the movable items<sup>19</sup> were annexed with the intention to remain there permanently, the court took into consideration the intended duration of the original contract of lease; the possibility of renewing the lease; the fact that the building had been built to operate as a theatre; and the fact that the seats, emergency lighting and dimmer-board were essential equipment of the theatre.<sup>20</sup>

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<sup>17</sup> *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) 688.

<sup>18</sup> *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) 688.

<sup>19</sup> Namely the theatre seats, an emergency lighting plant, a projection room dimmer-board with ancillary fittings and attachments.

<sup>20</sup> *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) 691.

Accordingly, the court held that the items were intended to remain permanently attached to the building, and dismissed the appeal.<sup>21</sup>

Academic authors hold different views regarding the decision of *Theatre Investments*.<sup>22</sup> Their concerns are particularly directed at the factors from which evidence regarding the annexor's intention was gathered by the court, including the annexor's own evidence (*ipse dixit*). Lewis argues that Van Winsen AJA's approach has altered in determining accession. According to Lewis the evidence of the annexor (who is also the owner of the movable) is now inferred from a number of factors, which amongst other things include his *ipse dixit*. Lewis argues that it seems that the courts would no longer be bound to consider the objective factors only if assessment of accession is inconclusive.

The same argument is advanced by Maripe.<sup>23</sup> He argues that the manner in which the court in *Theatre Investments* gathered evidence of the intention of the annexor indicates a change in approach, which is interesting, since this decision comes from the same judge, Van Winsen AJA, who established accession according to the traditional approach in *Standard-Vacuum Refining Co v Durban City Council*.<sup>24</sup> According to Maripe the *ipse dixit* of the "owner [who was also the annexor in this case] now becomes a factor from the outset, and not merely where the nature of the

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<sup>21</sup> *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) 691: According to Van Winsen AJA, "[i]t is difficult to avoid the conclusion that such items of equipment when they were attached to the building were intended to remain there indefinitely".

<sup>22</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 149-150; B Maripe "Intention and the original acquisition of ownership: Whither inaedificatio?" (1998) 115 SALJ 544-552 548; DL Carey Miller *The acquisition and protection of ownership* (1986) 31; CG van der Merwe "The law of property (including mortgage and pledge)" 1980 ASSAL 230-233 232.

<sup>23</sup> B Maripe "Intention and the original acquisition of ownership: Whither inaedificatio?" (1998) 115 SALJ 544-552 548.

<sup>24</sup> 1961 (2) SA 669 (A).

thing and manner of annexation are indecisive”.<sup>25</sup> Van der Merwe argues that if the annexor’s intention is considered paramount, the status of the other factors, namely the nature of the movable and the manner of the annexation, “is reduced to mere factors which must (or may?) be taken into account” to establish whether accession has occurred.<sup>26</sup> Therefore, according to the aforementioned authors, a shift had taken place in this decision away from the approach that considers the objective factors as important and towards a new approach that considers the intention of the annexor the most important factor.

Carey Miller argues that an important question is how the test in *Theatre Investments* should be interpreted regarding the proper role of intention.<sup>27</sup> He is of the view that, although the court considered the annexor’s intention as the point of departure in determining accession, it was the inferred intention, which the court determined on the basis of the physical circumstances.<sup>28</sup> Carey Miller therefore argues that because the court viewed the annexor’s intention with reference to amongst other things the physical circumstances, the actual or subjective intention of the annexor was given a limited role.<sup>29</sup> Carey Miller’s view differs from that of Lewis, Van der Merwe, and Maripe. According to Carey Miller, it seems that there was no real shift in approach by the court because the intention of the annexor of the movable played a limited role, since it was viewed with reference to the physical indications of attachment by the court. Also the court in *Melcorp* differed with Lewis’ view that the approach in *Theatre Investments* indicates a new approach on the part

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<sup>25</sup> B Maripe “Intention and the original acquisition of ownership: Whither inaedificatio?” (1998) 115 SALJ 544-552 548.

<sup>26</sup> CG van der Merwe “The law of property (including mortgage and pledge)” 1980 ASSAL 230-233 232.

<sup>27</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 31.

<sup>28</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 31.

<sup>29</sup> DL Carey Miller *The acquisition and protection of ownership* (1986) 31.

of the Appellate Division. According to McEwan J what transpired in *Theatre Investment* clarifies what has always been the approach. According to the judge this explains why the other earlier cases placed more emphasis on one (subjective factor) of the three factors than the other two factors (objective factors).<sup>30</sup> Therefore, according to the court there is no shift in approach.

According to Badenhorst, Pienaar and Mostert, the results of the approach followed in *Theatre Investments* case will not differ from the results that could be achieved by applying the three factors according to the traditional approach if “the movable is so securely attached to the immovable that separation must of necessity involve substantial injury”.<sup>31</sup> They argue that if a movable is so securely attached to an immovable that “separation must of necessity involve substantial injury”, this “will still be a strong indication” of permanent attachment, which cannot be easily rebutted by the direct evidence of the annexor (*ipse dixit*).<sup>32</sup>

However, the weight that is attached to the direct evidence (*ipse dixit*) of the intention of the annexor or owner of the movable has varied from case to case. In certain cases, the weight that is attached to the direct evidence of the annexor may produce undesirable conclusions<sup>33</sup> and this is evident from the *Melcorp* case.<sup>34</sup> However, *Melcorp* differs from *Theatre Investment* in that the former involved a hire-purchase agreement with reservation of ownership, whereas the latter dealt with a lease contract and therefore does not seem to be a good example of the so-called new approach.

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<sup>30</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 223.

<sup>31</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 149.

<sup>32</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 149.

<sup>33</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 150.

<sup>34</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W).

In *Melcorp* a company (the plaintiff) responsible for the sale, installation and maintenance of lifts concluded a hire-purchase contract with R Company for the supply and installation of two lifts in a building to be erected by R Company.<sup>35</sup> The contract stipulated that all the apparatus installed in the building would remain movable and would not become fixtures until the full purchase price was paid. R Company financed the erection of the building by means of a mortgage loan that was granted by the defendant (bondholder).<sup>36</sup> R Company encountered financial problems and consequently fell into arrears with its mortgage bond payments to the respondents as well as its obligation to pay the plaintiff in terms of the hire-purchase contract for installation of the lifts. Subsequently, the defendant caused the property to be sold in execution, at which auction the defendant itself purchased the property. It appears that before the sale took place the plaintiff had sent a copy of its hire-purchase agreement with R Company to the defendant. It was alleged that the defendant received the copy but failed to read it. The plaintiff sought to enforce its right against the defendant to remove the lifts in terms of the contract. The defendant averred that the contract between the plaintiff and R Company only gave rise to personal rights, and that the lifts had subsequently become immovable by installation in the building.

The question before the court was whether the lifts had become immovable as a result of their installation in the building. The court stated that the question whether the components of the lifts had acceded to the building is a question of fact that needs to be decided on the circumstances of the case.<sup>37</sup> According to the court the elements to be considered when investigating whether a movable has become

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<sup>35</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 215.

<sup>36</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 216.

<sup>37</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 216.



permanently attached to land are the nature of the particular article, the degree and manner of its annexation, and the intention of the person annexing the movable.<sup>38</sup>

To establish whether the lifts were permanently attached, the court analysed the evidence regarding the degree and manner of annexation.<sup>39</sup> Following analysis of the evidence, the court held that there was no indication that the lifts were attached in such a manner that their removal would cause substantial injury to the building, and that the lifts could be separated from the building without any difficulties. Consequently, the degree and manner of the annexation of the lifts did not result in an unavoidable conclusion that the lift had been attached permanently.

The defendant argued that the lifts were an integral part of the building, which could not be used for its intended purpose without the lifts. Furthermore, he argued that although the lifts could be removed from the building “without causing any damage, the intention behind its installation [could] only [have] be[en] that it should remain in the building with a degree of permanence”.<sup>40</sup> The court upheld the defendant’s contention that the lifts were an integral part of the building. Nevertheless, the court came to the conclusion that the lifts remained movable.<sup>41</sup> According to the court, only “[i]f those facts stood alone it would be a proper and necessary inference that the person who installed the lifts intended them to form a permanent part of the structure and consequently that they acceded to it”.<sup>42</sup> However, since the person who installed the lifts stated in the contract that the lifts

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<sup>38</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 216-217. According to the court the above mentioned elements have always been followed and were elaborated on ever since. See also *Olivier v Haarhof & Company* 1906 TS 497 500-501; *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 466.

<sup>39</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 217.

<sup>40</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 220.

<sup>41</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 150.

<sup>42</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 222.

remained movable until payment of the full purchase price, the court could not hold that the lifts had become a permanent part of the buildings.

Arguably, the court was primarily concerned with the intention of the plaintiff as expressed in the clause of a contract of sale that stated that the lifts remained movable until paid for in full.<sup>43</sup> This was despite the fact that the court conceded that the nature of the lifts as well as their function as an integral part of the building suggested that they were intended to be attached to the building for permanent use. Nonetheless, it seems that the intention of the plaintiff as stated in the contract of sale (that the lifts were to remain movable until the purchase price was paid in full) contradicted the objective indications of accession, being the nature and function of the lifts as an integral part of the building.

Therefore, the question that arose was whether the expressed intention of the plaintiff in the contract should overrule the intention to erect the lifts permanently (as inferred from the nature and function of the lifts in question).<sup>44</sup> In what seems to be a response to this question, the court indicated that “the value of the so-called *ipse dixit* of the annexor ... [should] vary from case to case”.<sup>45</sup> The court stated that in certain cases it would be important to ascertain the so-called real intention inferred from the physical factors and not the professed intention as stated in the contract.<sup>46</sup> This means that in certain cases, the objective factors may be conclusive of the

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<sup>43</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 224. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 150.

<sup>44</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 222. See also A Pope “Inaedificatio revisited: Looking backwards in search of clarity” (2011) 128 SALJ 123-146 142.

<sup>45</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 223.

<sup>46</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 223.

intention of the annexor of the movable property.<sup>47</sup> For instance, the owner of cement who uses it or allows it to be used to build an immovable structure cannot rely on a reservation-of-ownership clause to contest the inference that his intention was for the cement to become part of the immovable structure.<sup>48</sup>

The court stated that the subjective intention of the annexor of the lifts was clearly expressed from the beginning as a term in the contract.<sup>49</sup> Consequently, the expressed term in the contract upon which the annexor was prepared to install the lifts was considered decisive and it overrode the nature and function of the lifts as an integral part of the building, which could not be used without the lifts.<sup>50</sup> In *Melcorp* the court made it clear that if the lifts were not readily removable, the finding would have been different.<sup>51</sup> This implies that if the lifts were not easily removable the court would have found that *inaedificatio* had taken place, and that the lifts accordingly formed part of the building. This raises the question whether this will always be the position if the nature and object of the movables point to accession, but the court ruled that the movables remained movable because ownership was reserved in the contract and because the movables were physically removable.

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<sup>47</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 223. McEwan J stated that “[i]n such event clearly any statement to the contrary by the annexor would be disregarded”.

<sup>48</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 147.

<sup>49</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 224. See also CG van der Merwe “The law of property (including mortgage and pledge)” 1980 ASSAL 230-233 231.

<sup>50</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 224: “What is important in my opinion in the present case is that clause 14 of the contract is not an *ipse dixit* of the plaintiff made *ex post facto*, but embodies the very basis upon which the plaintiff was prepared to install the lifts in the building without prior payment therefor[e], including that the installation should not become a fixture until fully paid for. In the circumstances it appears to me that it would be quite artificial to impute a so-called ‘real’ intention to the plaintiff in conflict with such an unequivocally stated professed intention.”

<sup>51</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 224. See also CG van der Merwe “The law of property (including mortgage and pledge)” 1980 ASSAL 230-233 231.

The remark made by the court that “it might be otherwise if the installation was ... not readily removable” has also raised questions about sophisticated technology that can be used to remove movables that are permanently attached to an immovable.<sup>52</sup> According to Van der Merwe, to decide whether accession has occurred by asking whether a movable can be readily removed without substantial injury to the immovable or movable has become “almost useless” because technology has become more advanced.<sup>53</sup> He contends that it is only “in very extreme cases” where removal must necessarily cause damage to the immovable or movable. For instance, if cement and bricks are used to erect a building, removal will obviously cause damage to either the movable or immovable.<sup>54</sup> By contrast, according to Van der Merwe, things like irrigation systems, stoves, doors and windows of a house can be removed with ease because of advanced technology. He suggests that, to determine whether accession has occurred, the test should be whether a movable is an integral part of an immovable, as was the case in *Melcorp*.<sup>55</sup> This means that if a movable forms an integral part of an immovable, it should be regarded as part of the immovable regardless of whether its removal can be effected with ease due to technological developments.

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<sup>52</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 224.

<sup>53</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337; CG van der Merwe “The law of property (including mortgage and pledge)” 1990 *ASSAL* 214-216 215-216; CG van der Merwe “The law of property (including mortgage and pledge)” 1980 *ASSAL* 230-233 232-233. See also *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1008: According to the court “the question cannot be whether the structure can be removed at all because virtually everything is removable, and perhaps repairable, if blowtorches and other serious equipment are used”.

<sup>54</sup> CG van der Merwe “The law of property (including mortgage and pledge)” 1980 *ASSAL* 230-233 233.

<sup>55</sup> CG van der Merwe “The law of property (including mortgage and pledge)” 1980 *ASSAL* 230-233 233.

Van der Walt raises a further question regarding the expressed term in the contract of sale upon which the annexor was prepared to install the lifts.<sup>56</sup> He argues that a question that remains unanswered in *Melcorp* is whether an intention not to permanently annex a movable would always override the objective factors when such an intention is expressed clearly in advance and made a condition for the attachment. Van der Walt contends that, if the answer is in the affirmative, the implication is that the annexor of the movable can always exclude the possibility of attachment by stating his intention to retain ownership in a contract beforehand.<sup>57</sup> However, removal of the property by the annexor must be physically possible without causing any damage to the immovable. In *Melcorp* the lifts were not difficult to remove. Hence, the court ordered that they were not immovable. Therefore, it seems as if there might be policy reasons in instances where ownership of the movables is reserved and the first two objective factors do not indicate that the movables are attached permanently. Policy considerations may induce the court to rule that accession did not occur to protect the interests of the owner of the movable who sold them to the owner of the land, but only inasmuch as the movables are easily removable from the land.

### 3 2 2 Post-1990 case law

Case law subsequent to *Theatre Investments* and *Melcorp* indicates a further development in the courts' approach to accession. The first relevant case is *Sumatie (Edms) Bpk v Venter NNO*<sup>58</sup> ("*Sumatie*"), in which the court did not follow the new

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<sup>56</sup> AJ van der Walt *Law of property casebook for students* (7<sup>th</sup> ed 2009) 114.

<sup>57</sup> AJ van der Walt *Law of property casebook for students* (7<sup>th</sup> ed 2009) 114.

<sup>58</sup> 1990 (1) SA 173 (T). This case was also discussed in CG van der Merwe "The law of property (including mortgage and pledge)" 1990 ASSAL 214-216.

approach but a completely different approach to determine *inaedificatio*. This one is referred to as the omnibus approach.

In *Sumatie* the plaintiff claimed delivery of two zinc and steel structures that had been erected on the property of one Olivier. Olivier's estate was sequestrated and vested in the defendants in their capacity as joint trustees of the insolvent estate. The plaintiff contended that the structures were movables and that he had remained the owner. He sought an order to enter the property and remove the structures. The plaintiff alleged that, since he remained the owner of the structures, he could enforce his *rei vindicatio*.<sup>59</sup> The defendants opposed the claim and contended that the structures had acceded to the land and hence had become part of the insolvent estate. The question before the court was whether the structures had acceded to the land through *inaedificatio* and thus became part of the insolvent estate. The court examined Roman and Roman-Dutch authorities and concluded that, to establish whether the structures had become part of the land through *inaedificatio*, the primary investigation is to determine whether the purpose (*causa*) of the attachment indicates that the thing was attached permanently or indefinitely in such a manner that it formed a new separate entity with the land and became immovable itself. According to the court, the purpose or *causa* of the attachment could be determined in light of the following factors:

- a) The nature and function of the attached property;
- b) the manner of attachment;
- c) the subjective intention or aim of the attachment at the time of the attachment;

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<sup>59</sup> *Sumatie (Edms) Bpk v Venter NNO* 1999 (2) SA 986 (T) 174. See also CG van der Merwe "The law of property (including mortgage and pledge)" 1990 ASSAL 214-216.

- d) the act or conduct of the owner of the attachment; and
- e) any other relevant facts or circumstances.

The court indicated that in the event of contradictions or uncertainties regarding the applicable factors, the purpose (*causa*) should be resolved on a balance of probabilities.<sup>60</sup>

The court applied the abovementioned factors to the facts of the case and concluded that the nature of the structures indicated that they were intended to be permanent and that the structures' function as a storage for a guava juice factory also indicated that they were intended to be permanent.<sup>61</sup> The court further found that the manner of attachment indicated that the structures were fixed to the land and had become permanent in nature. According to the court, if the structures were removed, there would have been considerable damage and increase in cost, since sophisticated equipment such as pneumatic drills, cranes and graders were required to remove the structures.

The court further stated that, although there was evidence that the structures were erected temporarily, the plaintiff had taken no steps to remove the structures. Furthermore, the lease in respect of the land on which the structures were erected indicated that they were erected for an indeterminate period and it was not indicated in the lease that the structures should be erected in such a manner that they could easily be removed. Accordingly, the court held that the purpose (or *causa*) of the attachment of the structures was that they should attach to the land permanently or for an indeterminate period. Therefore, according to the court the structures were

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<sup>60</sup> *Sumatie (Edms) Bpk v Venter NNO* 1990 (1) SA 173 (T) 174. See also CG van der Merwe "The law of property (including mortgage and pledge)" 1990 ASSAL 214-216 215.

<sup>61</sup> *Sumatie (Edms) Bpk v Venter NNO* 1990 (1) SA 173 (T) 174.

attached in such a manner that they formed a new separate entity with the land. The court dismissed the plaintiff's claim.

The so-called omnibus approach proposed in *Sumatie* was not followed in subsequent case law.<sup>62</sup> For instance, in *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk*<sup>63</sup> ("Konstanz") the court considered the decision of *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd*<sup>64</sup> ("Macdonald") and held that the intention of the owner of the movable, and not of the annexor, had to be considered to establish whether accession had occurred.<sup>65</sup> In *Konstanz* the manager of the appellant's farm concluded a contract with Pumps for Africa (a close corporation) to set up an irrigation and circulation system on the farm. Pumps for Africa purchased the components of the system from the respondent. The agreement was that the respondent remained the owner of the equipment until full payment of the purchase price by Pumps for Africa. Once the system was installed on the farm, the appellant paid Pumps for Africa, but Pumps for Africa did not pay the respondent for the equipment. The respondent obtained default judgment against Pumps for Africa.<sup>66</sup>

The court ordered that Pumps for Africa should return the equipment and, should payment not be made within ten days of the judgment, the Deputy Sheriff was authorised to attach and remove the equipment. Pumps for Africa did not comply

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<sup>62</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A). See also CG van der Merwe, JM Pienaar & A Eisenberg "The law of property (including real security)" 1996 ASSAL 369-372 370.

<sup>63</sup> 1996 (3) SA 273 (A).

<sup>64</sup> 1915 AD 454 466.

<sup>65</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 276. See also LPW van Vliet "Accession of movables to land: II" (2002) 6 *Edin LR* 199-216 206-207.

<sup>66</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A). The facts of this case appear from the editor's summary. See also A Pope "Inaedificatio revisited: Looking backwards in search of clarity" (2011) 128 *SALJ* 123-146 142-143; LPW van Vliet "Accession of movables to land: II" (2002) 6 *Edin LR* 199-216 206-207; CG van der Merwe, JM Pienaar & A Eisenberg "The law of property (including real security)" 1996 ASSAL 369-372.



with the order of the court and the Deputy Sheriff's return indicated that he had attached the equipment but had not removed them, since they were attached to the land. Subsequently, the appellant brought an application for a rescission of the judgment that authorised the Sheriff of the court to attach the equipment and remove it from his land. The appellant further applied for an order declaring him to be the owner of the equipment attached to his land.<sup>67</sup>

The appellant and the respondent agreed before the former's application was heard that the latter's claim would be based on the *rei vindicatio*, and that any order that the court would make should have the legal consequences of the *rei vindicatio*. The two main issues that the court *a quo* had to decide were whether the equipment had become part of the appellant's land by *inaedificatio*, and if not, whether the respondent was precluded by estoppel from relying on the reservation-of-ownership clause.<sup>68</sup> The court *a quo* decided in favour of the respondent and ordered the appellant to allow the respondent to remove the equipment. Subsequently, the appellant appealed against the judgment of the court *a quo*.

The question revolved around whose intention must be considered to establish whether a movable was attached to land to the extent that it became permanent. However, the court did not rule on the question regarding intention, since the appellant did not argue against the view that the intention of the owner of the movable should play a role to determine *inaedificatio*. It appears that the court *a quo*

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<sup>67</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A).

<sup>68</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 279.

followed the approach in *Macdonald* and considered the intention of the owner of the movables to decide whether accession had occurred.<sup>69</sup>

Conversely, on appeal the appellant contended that the nature and manner in which the irrigation system had been attached indicated that the irrigation system had been attached permanently and that it was not necessary to consider the intention of the owner of the movable to investigate whether the irrigation system was attached to land with the intention that it should remain there permanently.<sup>70</sup> Furthermore, the appellant argued that, although the intention of the respondent had to be considered, the respondent had in any event associated himself with the permanent attachment of the irrigation system to the appellant's property.<sup>71</sup>

According to the court, since the appellant did not argue that the approach in *Macdonald* should be reconsidered, the court had to accept that the test in *Macdonald* was still applicable.<sup>72</sup> Interestingly, the court seems to have accepted the position in *Macdonald*, viz that the intention of the owner of the movable was important to establish whether a movable is attached to land permanently. However, the court in *Konstanz* held that this position might be reconsidered in future in view of the criticism by academic commentators.<sup>73</sup> The court therefore suggested that it

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<sup>69</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 284. See also *York International (SA) Inc v Minister of Public Works and Others* (7067/07) [2009] ZAWCHC 87 (1 May 2009) para 10.

<sup>70</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 283.

<sup>71</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 284.

<sup>72</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 282.

<sup>73</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A). See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 152; CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 339; LPW van Vliet "Accession of movables to land: II" (2002) 6 *Edin LR* 199-216 206-207.

might be time to reconsider which approach is appropriate and whose intention is relevant to establish accession.<sup>74</sup>

Nonetheless, the court followed the decision in *Macdonald* and held that the intention of the owner of the movable is still relevant to the question of *inaedificatio*.<sup>75</sup> Accordingly, the intention of the owner of the movable was relevant despite the fact that the respondent was not the annexor of the irrigation system.<sup>76</sup> Furthermore, the court dismissed the appellant's contention that the court had to consider only the nature and the manner in which the irrigation system was attached to land because it indicated that the irrigation system had been attached permanently. The court rejected this argument on the ground that it would be leaning towards the traditional as opposed to the new approach.<sup>77</sup> Consequently, the court held that *inaedificatio* had not occurred because the respondent had stated clearly in the hire-purchase contract that he would remain the owner of the irrigation system until payment in full of the purchase price. Also, the items in question were not impossible to remove.<sup>78</sup> Accordingly, the appeal based on *inaedificatio* was dismissed.

Van Vliet argues that the approach followed in *Konstanz* logically entails that reserving ownership of the movables in the contract of sale would preclude accession of those movables to land, even if the movables are substantially

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<sup>74</sup> CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 339 argues that this judgment "has opened the door for a complete reconsideration of this area of the law in a future case before the supreme court of appeal". See also H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 173.

<sup>75</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 284.

<sup>76</sup> LPW van Vliet "Accession of movables to land: II" (2002) 6 *Edin LR* 199-216 206-207 argues that the court has opted for the new approach by holding that the intention of the owner of the movable was decisive.

<sup>77</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 283.

<sup>78</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A). See also CG van der Merwe, JM Pienaar & A Eisenberg "The law of property (including real security)" 1996 *ASSAL* 369-372 371.

incorporated into land.<sup>79</sup> However, there has not been any conclusion in case law that a substantial incorporation of a movable to land can be overridden by the stated intention of the owner of a movable in a contract. What is clear in case law is that, if there is controversy with regard to accession and the movable can readily be detached from the land, the courts consider the intention of the owner of the movable to determine accession only if the intention to reserve ownership (generally for security purposes) was stated beforehand in the contract of sale.<sup>80</sup> In that regard, courts could decide that accession did not take place probably for policy reasons. However, this may also mean that people will now intentionally attach movables in such a way that they can be easily removed.

As was pointed out earlier in this chapter,<sup>81</sup> the weight that the courts attach to the stated intention may lead to unsatisfactory outcomes. However, it appears in the cases discussed so far that the stated intention of the owner conflicts with the nature and object of the movable and not the degree and manner of attachment of the movable. This is because in most cases where the courts have held that the intention of the owner of the movable was important, the manner and degree of attachment did not indicate permanent attachment although the nature and object of the movable indicated that the movable was intended to serve the land permanently.

Nonetheless, the view that the stated intention of the owner of the movable may conflict with the objective indicators led the court in *Unimark Distributors (Pty) Ltd v*

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<sup>79</sup> LPW van Vliet "Accession of movables to land: II" (2002) 6 *Edin LR* 199-216 206-207.

<sup>80</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W); *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A); *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T); *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd* [2007] ZAFSHC 74 (13 December 2007); *Opperman v Stanely and Another* [2010] ZAGPPHC 221 (09 December 2010).

<sup>81</sup> See 3 2 1.

*Erf 94 Silvertondale (Pty) Ltd*<sup>82</sup> to hold that the stated or professed intention of the owner of the movable cannot be the only factor even though it is the most important factor that needs to be considered to establish whether accession has occurred. According to the court, all other relevant factors must be considered to determine accession.

The plaintiff in *Unimark* installed chip-core wall partitions and ceilings, an alarm system, an intercom system, an electrical system, a steel undercover parking area, a steel canopy, steel security gates, air conditioners, carpet tiles, a kitchen sink and fire extinguishers.<sup>83</sup> When the plaintiff was evicted from the property, it sought to recover the items that it had installed on the premises.<sup>84</sup> The defendant argued that the items claimed by the plaintiff had acceded to its factory by means of *inaedificatio* and hence they were no longer owned by the plaintiff.<sup>85</sup> The question before the court was whether the items in question indeed had acceded to the premises. The court stated that a number of factors had to be taken into account to determine whether a movable thing that is affixed to an immovable has lost its identity and became an integral part of the immovable.<sup>86</sup>

According to the court the professed intention of the owner of the movable cannot be the only factor, since his intention as the owner is not necessarily credible.<sup>87</sup> Moreover, the court stated that although the owner can contend that he did have the intention that the movable should remain movable, that intention will not

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<sup>82</sup> 1999 (2) SA 986 (T).

<sup>83</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 993.

<sup>84</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 995.

<sup>85</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 996-997.

<sup>86</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 998.

<sup>87</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1001.

necessarily be real or possible to condone. Accordingly, the owner's intention has to be determined and judged within the context of all the relevant facts.<sup>88</sup>

In that regard the court stated that if the nature of the thing and the manner of its attachment are inconclusive, the elements of reasonableness, common sense, or the prevailing standards of the society must be invoked. According to the court, the question cannot only be what the specific individual intended or believed to be possible or feasible, regardless of all objective facts, but also how society, or a reasonable member of society, would view the situation.<sup>89</sup>

The court held that the exposition of the above principles is in line with the approach of the other Appellate Division judgments and that it had to be applied to the facts of this case.<sup>90</sup> However, before the court decided whether the items became immovable, it stated that in order to view the annexed property and the manner of attachment in the correct perspective, it is not only the nature of the annexed items that is relevant to investigate accession, but also the nature of the immovable property.<sup>91</sup>

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<sup>88</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1001.

<sup>89</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1001. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 152; W Freedman "The test for inaedificatio: What role should the element of subjective intention play?" (2000) 117 SALJ 667-676 672; CG van der Merwe & JM Pienaar "The law of property (including real security)" 1999 ASSAL 290-293 292.

<sup>90</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1001. See also CG van der Merwe & JM Pienaar "The law of property (including real security)" 1999 ASSAL 290-293 291.

<sup>91</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1006: "A residential dwelling or up-market office building has to be judged differently from a factory warehouse. Damage to a residential dwelling when some fixtures are removed has different implications than to a factory warehouse. The last mentioned is by its nature a more basic and somewhat 'rougher' structure, where the emphasis is on utility rather than on aesthetics. Smallish holes in the walls and floors of a residence, or a sophisticated office building where these walls and ceilings were used, is more serious damage than in a factory warehouse. A factory warehouse is to some extent an empty shell, solid and sturdy enough to accommodate changes in it by way of different fixtures etc. Even the paint ... which is difficult to remove, would matter much more in a residence or an upmarket office building than in a factory warehouse".

On the basis of the above arguments the court held that the undercover parking area was immovable because it could not be removed without causing damage to the components. Interestingly, the court stated that the question was not whether the structure could be removed at all because “virtually everything is ultimately removable, and perhaps repairable, if blowtorches and other serious equipment are used”.<sup>92</sup> According to the court this is an example where the subjective intention of the owner has to be judged within the context of and subject to the prevailing objective standards.

With regard to the canopy the court held that it could not simply be unbolted, that it was welded to the building and seemed to be part of it, and thus it had acceded to the main building.<sup>93</sup> The steel gates were regarded as immovable because they were welded to the steel door frames and the kitchen sink was found to have become immovable upon installation. The floor carpet tiles were also held to have acceded to the building because it is unlikely that the intention was to remove them and use them elsewhere, since floor tiles are used to cover a floor in the normal run of things.<sup>94</sup> However, with regard to the chip-core wall partitions and vinyl-clad ceilings, the court judged the intention of the owner at the time of attachment and stated that

“the plaintiff’s occupation of the premises was based on a lease agreement for five years with an option to renew (between the lessor and the lessee) and an option to purchase was expressly ruled out when the sublease to Redwoods was permitted ... and no objective facts indicate that [t]his would have been impossible or unreasonably difficult ... [and] it appears that the plaintiff wanted to

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<sup>92</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1008.

<sup>93</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1009.

<sup>94</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1010.

remove the office partitioning, especially after the agreed compensation fell through.”<sup>95</sup>

The court considered the above facts and decided on a balance of probabilities that the chip-core wall partitions and vinyl-clad ceilings were not intended to accede to the immovable property, and thus remained movable.<sup>96</sup> The court referred to the alarm system as an integral part of the house, but held that it could not be an integral part of a factory warehouse, “which is leased out and adapted to suit changing needs”.<sup>97</sup> Accordingly, the court concluded that the alarm system was not immovable.<sup>98</sup>

According to Freedman, the judge in this case should have followed the decisions of the Appellate Division, since the Transvaal Provincial Division was bound by the former judgments of the same court.<sup>99</sup> However, Van der Westhuizen AJ explained that

“[the] court, [was] of course, bound to follow the decisions of the Appellate Division and has no desire to deviate from those. Perhaps an attempt could be made, not necessarily to formulate new and better ‘tests’ or ‘criteria’, but to gain a better understanding of the law as laid down by the Courts, from the perspective of logic and common sense, rather than from the old authorities-based criticism of textbook authors.”<sup>100</sup>

Although Van der Westhuizen AJ pointed out that the court did not formulate a new test or criteria to determine accession, one could still argue that the court introduced new elements that may be considered to determine accession. Moreover, the

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<sup>95</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1006.

<sup>96</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1006.

<sup>97</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1008.

<sup>98</sup> The intercom system, electrical system, air conditioners and fire extinguishers were not permanent parts of the immovable either.

<sup>99</sup> W Freedman “The test for *inaedificatio*: What role should the element of subjective intention play?” (2000) 117 *SALJ* 667-676 673.

<sup>100</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1000.



Transvaal Provincial Division is a lower court and should have been bound by previous decisions of the Appellate Division.

### 3 2 3 Concluding remarks

It can be concluded from the preceding discussion that courts increasingly emphasise the intention of the owner/annexor of the movable in determining whether accession has occurred. As a point of departure, the court in *Theatre Investments* determined whether accession had occurred by enquiring whether the annexor of the movables had attached the movables with the intention that they should remain there permanently. The court gathered the evidence of the intention of the annexor from, amongst other things, the annexor's *ipse dixit* and the contractual relationship between the parties (terms of the lease agreement). The court stated that the lease contract "provided a context within which" attachment was viewed.<sup>101</sup>

Logically, the court in *Theatre Investments* should have gathered the evidence of the annexor's intention from the objective indications of attachment to determine whether accession had occurred. *Theatre Investments* follows a trend evidenced in some earlier cases that considered the intention of the owner of the movable as more important. However, although the stated intention of the owner was considered as important in various earlier cases, the objective factors were not ignored completely. Hence, in *Theatre Investment* the court considered the stated intention (in the form of the annexor's *ipse dixit*) with the objective factors in mind and held that accession had occurred.

*Melcorp* placed considerable weight on the annexor's *ipse dixit* (as stated in the hire-purchase contract) to arrive at the conclusion that the lifts remained movable

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<sup>101</sup> *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) 689.

until the purchase price was fully paid. It is arguable that the basis for the *Melcorp* judgment was the parties' agreement, particularly the reservation-of-ownership clause. This was despite the lifts' function, which indicated that the lifts were installed with the intention that they should remain there permanently and therefore formed an integral part of the building.<sup>102</sup> However, an analysis of *Melcorp* suggests that the court interpreted the objective factors of accession with reference to the stated subjective intention of the annexor of the lifts in the contract to determine whether *inaedificatio* had taken place. Consequently, since the lifts were removable from the buildings (coupled with the fact that ownership was reserved in the contract until the lifts were paid for in full) the court held that the lifts remained movable.

The position in *Melcorp* also follows the trend evidenced in earlier case law, which considered the stated intention of the owner of the movable as the most important factor. However, the objective factors did not conclude that the lifts were permanent, although the nature and function of the lifts indicated the intention to attach them permanently to the building.<sup>103</sup> Therefore, it seems that the court's decision to order removal of the lifts was based on policy reasons (to protect the owner of the lifts) because the owner of the lifts had not yet paid the full purchase price.

Post-1990 case law indicates a further development in the courts' approach to determine whether accession has taken place. The case of *Sumatie* developed a completely different approach, namely an omnibus approach. Therefore, *Sumatie* is an outlier and should probably be ignored, since it did not find any favour with the Appellate Division in subsequent cases. Nonetheless, cases subsequent to *Sumatie*

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<sup>102</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 150.

<sup>103</sup> See 3 2 2 above.

continued to emphasise the subjective intention of the owner of the movable. In *Konstanz* the court followed the decision in *Macdonald* and indicated that the intention of the owner of the movables had to be considered to ascertain whether accession had occurred. The court in *Konstanz* went further than *Macdonald* and emphasised that the intention of the owner is not merely important but in fact decisive to determine whether accession had occurred. Accordingly, the court concluded that *inaedificatio* did not take place because the contract provided for the retention of ownership of the system by the owner until the full purchase price was paid.

In *Unimark* the court emphasised the intention of the owner of the movable, but also introduced new elements for determining accession. The court stated that the question cannot only be what the specific individual intended or believed to be possible or feasible, regardless of all objective facts, but also how society, or a reasonable member of the society, would view the situation (publicity principle).<sup>104</sup> The decision in *Unimark* contradicts the decisions of the other Appellate Division decisions. Since the Transvaal Provincial Division in *Unimark* arguably should have been bound by previous decisions of the Appellate Division, *Unimark* is also an outlier case and probably not authoritative.

Be that as it may, if the *dicta* from the cases discussed above are anything to go by, one can conclude that, if the movables cannot be removed from the land without causing any damage to the land, the courts will not order removal of the movables even though ownership might have been reserved as a security for payment of the purchase price. Moreover, the courts' approach in the cases discussed above is not truly new because it has been coming along since before

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<sup>104</sup> See 3 2 2 above.

1978.<sup>105</sup> In *Melcorp* McEwan J held that what transpired in *Theatre Investment* clarifies what has always been the approach in case law. Nonetheless, it is only the courts' reliance on the owner of the movable's *ipse dixit* that seems to be new.

### 3 3 Role of the three factors in the new approach

It appears from the case law discussed in the preceding section that the three factors originally used to test for permanent attachment of movables to immovable property (namely the nature and object of the movable property, the degree and manner of attachment, and the intention of the annexor) are still applied in the new approach to *inaedificatio*. The first factor, the nature and object of the movable, still applies to the extent that the movable must in its nature be capable of acceding to the immovable, as was the position in the early case law that is associated with what is known as the traditional approach.<sup>106</sup> Building materials like cement and bricks are by their nature and purpose capable of acceding to land. In *Unimark* the court held that steel security gates, which were welded to steel door frames, were by their nature capable of acceding to land. The court in that case added that

“[n]ot only the nature of the annexed items is relevant, but also the nature of the immovable structure to which these were annexed, in order to see the nature of the annexed items and the manner of attachment in the correct perspective.”<sup>107</sup>

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<sup>105</sup> See for example *Johnson & Co Ltd v Grand Hotel and Theatre Co Ltd in Liquidation* 1907 ORC 42; *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34; *Champion Ltd v Van Staden Bros and Another* 1929 CPD 330.

<sup>106</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 466; *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A). See also CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337.

<sup>107</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1006.

Therefore, it seems that it is not only the nature of the movable that needs to be considered to establish whether it is permanently attached to an immovable, but also the nature of the immovable property. Moreover, the nature and object of the movable must not only be indicative of its accession to land but the movable should also be attached to the land with the object of serving it on a permanent basis.<sup>108</sup> For instance, in *Konstanz* the court accepted that the irrigation system was destined to serve the land and to become a permanent part of the farm physically, economically and functionally.<sup>109</sup> In *Sumatie* the court also held that “the nature of [the zinc and steel] structure was such that it could indeed have been a permanent attachment while its function, namely to serve as a store for a guava juice factory, was just as reconcilable with a permanent attachment”.<sup>110</sup> However, although the nature and object may indicate that a movable was destined to serve the land permanently it seems that it would not become immovable as long as ownership is reserved in the contract and coupled with the fact that the movable is still movable.

To determine whether a movable is by nature capable of being attached permanently to land, the integration test is applied.<sup>111</sup> As was pointed out earlier,<sup>112</sup> the integration test was also applied in earlier case law that followed the traditional approach. This test asks whether a movable is “structurally integrated” into or “part of

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<sup>108</sup> See 2 4 2 above.

<sup>109</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A). See also CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA 1<sup>st</sup> reissue* vol 27 (2002) para 337 fn 9; CG van der Merwe, JM Pienaar & A Eisenberg “The law of property (including real security)” 1996 *ASSAL* 369-372 371.

<sup>110</sup> *Sumatie (Edms) Bpk v Venter NNO* 1990 (1) SA 173 (T) 175.

<sup>111</sup> CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA 1<sup>st</sup> reissue* vol 27 (2002) para 337. See also W Freedman “The test for inaedificatio: What role should the element of subjective intention play?” (2000) 117 *SALJ* 667-676 668.

<sup>112</sup> See 2 4 3 above.

the fabric” of the immovable property.<sup>113</sup> As was the case in the so-called traditional approach, it seems that the integration test in the new-approach cases does not consider the manner in which the movable functions when deciding whether it has become part of the immovable. Accordingly, in the new approach functional or economic integration is still not adequate to change a movable into an immovable, even though the movable was attached to an immovable.<sup>114</sup> This is evident in the case of *Melcorp*, where the court held that the lifts formed an integral part of the building in a functional sense but nonetheless remained movable.<sup>115</sup>

Moreover, complex things that are attached to immovable property will not become immovable under the integration test if they are not structurally incorporated into the immovable.<sup>116</sup> For instance, in *Konstanz* the sprinkler system, which was the third part of the main irrigation system, was held to be movable, although it functioned together with the main parts of the irrigation system, which were held to have become immovable through attachment.<sup>117</sup> Therefore, in *Konstanz* the third part of the irrigation system would have been immovable had it been structurally incorporated with the main parts of the irrigation system, since the integration test requires structural incorporation of the movables with the immovable.

In case law associated with the new approach, the second factor (the degree and manner of attachment) still focuses on the manner in which the movable had been attached to the land. If the movable is attached to land by sufficient means, it therefore becomes part of the land. The test is whether the movable can be removed

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<sup>113</sup> *Secretary for Inland Revenue v Charkay Properties (Pty) Ltd* 1976 (4) SA 872 (A) 881. See also DL Carey Miller *The acquisition and protection of ownership* (1986) 25.

<sup>114</sup> See 2 4 3 above.

<sup>115</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W).

<sup>116</sup> See 2 4 2 above.

<sup>117</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A).

without causing damage to itself or the land.<sup>118</sup> If the movable can be removed but only with considerable damage to itself or to the land, it would indicate that the movable had become part of the land through *inaedificatio*. Recently, in *Opperman v Stanely and Another*<sup>119</sup> the court held that a weighbridge and two augers were not immovable or fixed to the land because there was no reason to believe that their removal would cause irreparable damage to the land.<sup>120</sup> It seems that a movable would not become permanently attached to the land if it is removable from such land. Therefore, if ownership of the movable was reserved courts would decide that accession did not take place and the movable still belongs to the owner.

As pointed out above,<sup>121</sup> Van der Merwe argues that it has become “almost useless” to decide whether accession has occurred by asking whether a movable can be readily removed without substantial injury to the immovable or the movable.<sup>122</sup> This is because technology has become so sophisticated that practically anything can be removed from immovable property without damage. He suggests that the test should be whether the movable has become an integral part of the immovable, as was the case in *Melcorp*.<sup>123</sup>

The third factor (the intention at the time of the annexation) asks whether the movable was attached to the land with the intention that it should remain there

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<sup>118</sup> W Freedman “The test for *inaedificatio*: What role should the element of subjective intention play?” (2000) 117 *SALJ* 667-676 669; DL Carey Miller *The acquisition and protection of ownership* (1986) 26.

<sup>119</sup> [2010] ZAGPPHC 221 (09 December 2010).

<sup>120</sup> *Opperman v Stanely and Another* [2010] ZAGPPHC 221 (09 December 2010) para 16: “It is a simple matter of unscrewing bolts, lifting metal structures and the filling of possible holes where the foundation has been set”.

<sup>121</sup> See 3 2 1 above.

<sup>122</sup> CG van der Merwe “The law of property (including mortgage and pledge)” 1980 *ASSAL* 230-233 232-233. See also CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337; CG van der Merwe “The law of property (including mortgage and pledge)” 1990 *ASSAL* 214-216 215-216.

<sup>123</sup> See 3 2 1 above.

permanently.<sup>124</sup> The new-approach cases focus on the intention of the owner of the movable, as some early cases did, instead of the intention of the person who has attached the movable to the land.<sup>125</sup> However, if the annexor was the owner of the movable at the time of the attachment, his intention would be considered to establish whether accession had occurred.<sup>126</sup> According to Van der Merwe, the third factor should not be concerned with the intention of the owner of the movable but the intention of the annexor at the time when the movable was attached to the land.<sup>127</sup>

It was explained earlier that intention as a factor for determining whether accession had taken place may be relevant in either one of two forms, namely the intention that can be inferred from the first two objective factors and the stated or professed intention as it is indicated in the purchase contract.<sup>128</sup> The intention that is inferred from the combination of the two objective factors is referred to as the objective intention.<sup>129</sup> The intention as stated in the contract is referred to as the subjective intention. The subjective intention of the owner of the movable seems to play a prominent role in the new approach, as it did in some earlier cases associated with the traditional approach.

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<sup>124</sup> See 2 4 4 above.

<sup>125</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A); *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T). In these cases there is a clear indication that the intention of the owner of the movable is decisive to accession. See also *York International (SA) Inc v Minister of Public Works and Others (7067/07)* [2009] ZAWCHC 87 (1 May 2009) para 10.

<sup>126</sup> *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A); *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 216. In these cases the intention of the annexor was considered because he was at the same time the owner of the movables in dispute.

<sup>127</sup> CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 1<sup>st</sup> reissue vol 27 (2002) para 337.

<sup>128</sup> See 2 3 4 above.

<sup>129</sup> CG van der Merwe & JM Pienaar "The law of property (including real security)" 1999 *ASSAL* 290-293 292.



Mostert *et al* argue that the intention that is relevant to investigate accession should be the intention at the time of the annexation, which is logically inferred from the physical factors (objective intention) and not the stated intention in the contract.<sup>130</sup> However, the sale of movables through instalment sale agreements, where parties agree to reserve ownership until full payment of the purchase price, seems to have resulted in the subjective intention, as stated in the contract, being the primary consideration used by the courts to determine accession in the so-called new approach.<sup>131</sup> It seems that if parties agree beforehand that the movable will not form a permanent part of the land before payment of the full purchase price, the stated subjective intention of the owner is considered the most important factor to determine whether accession has occurred. According to the courts the stated subjective intention of the owner of the movables will not be ignored to determine whether accession has occurred, because he cannot be deprived of ownership without his consent.<sup>132</sup>

Therefore, it seems that under the new approach, contractual reservation of ownership, coupled with the fact that the movable can be removed from the land with ease, is still an indication that the owner of the movable did not intend the movable to become a permanent part of the land.<sup>133</sup> A question that arises is what the position would be if the stated intention accords with the movable being removable with ease

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<sup>130</sup> H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 170.

<sup>131</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34; *Champion Ltd v Van Staden Bros and Another* 1929 CPD 330; *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W). See also H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 170.

<sup>132</sup> This position was adopted by the court in *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454.

<sup>133</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 216; *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A).

from the land, but conflicts with the nature and object of such a movable. In this regard the courts are likely to hold that accession did not occur, especially if the ownership of the movable property was reserved in the contract along with the fact that the movable could be removed from the land with ease.<sup>134</sup>

However, it is not entirely clear from the case law whether the stated (or subjective) intention of the owner of the movable will always be considered decisive, even when the objective factors indicate that accession has occurred. This is because in some cases, although the objective factors may point decisively to accession, the intention of the owner of the movable is still considered decisive in concluding that accession did not occur. For instance, in *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd*<sup>135</sup> (“*De Beers*”) the court held that the tailings dump was movable on the basis that the owner did not intend for it to accede to the land.<sup>136</sup> Having regard to the nature and the size of the tailings dump in the *De Beers* case, one can hardly argue that the tailings dump was movable in its nature.

However, the uncertainties surrounding the role of intention seem to have led the court in *Unimark* to state that the professed intention of the owner of the movable cannot be the only factor to determine accession, even though it is the most important factor in this regard.<sup>137</sup> In *Unimark* it was held that the owner’s intention must be determined and judged within the context of all the relevant facts. Accordingly, the court stated that the elements of reasonableness, common sense,

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<sup>134</sup> *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 216; *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A); *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1001; *Opperman v Stanely and Another* [2010] ZAGPPHC 221 (09 December 2010) para 16. See also 2 4 above.

<sup>135</sup> [2007] ZAFSHC 74 (13 December 2007).

<sup>136</sup> This decision followed a trend that was evidenced in *Simmer and Jack Mines Ltd v GF Industrial Property Co (Pty) Ltd and Others* 1978 (2) SA 654 (W), where a mine dump was also found to be movable regardless of its weight and size.

<sup>137</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1001.

or the prevailing standards of society had to be invoked to determine whether the intention of the owner of the movable was credible.<sup>138</sup> Similarly, in *Opperman v Stanely and Another*<sup>139</sup> the court held that the issue had to be decided in each case on its own facts and added that it had to be decided with a “liberal sprinkling of common sense, fairness and practicality”, and that the principle of justice between man and man should also come into play.<sup>140</sup>

From the above discussion, it can be concluded that the three factors that are used to determine *inaedificatio* are still applied in the so-called new approach, albeit with more emphasis on the subjective intention, particularly in cases where movables are sold subject to a reservation of ownership. It seems in cases of reservation of ownership that courts may order that accession did not take place provided that the movables can be removed without significant damage.

### 3 4 Conclusion

The aim of this chapter is to discuss case law that is associated with what is known as the new approach when determining *inaedificatio*. The post-1978 cases indicate that the courts have adopted an approach that some earlier South African cases followed to determine whether a movable had become permanently attached to land. In the decisions of *Theatre Investments* and *Melcorp* there are indications that the courts considered the intention of the annexor of the movable to establish accession. However, it appears from the aforementioned cases that the annexor was also at the same time the owner of the movable. Accordingly, the objective factors served as the

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<sup>138</sup> See 3 2 2 above. As was indicated earlier, *Unimark* should be treated with care because is an outlier case.

<sup>139</sup> [2010] ZAGPPHC 221 (09 December 2010).

<sup>140</sup> *Opperman v Stanely and Another* [2010] ZAGPPHC 221 (09 December 2010) para 15.

factors from which the intention of the annexor could be inferred, which according to the court had to be weighed against the annexor's own evidence as to his intention (his *ipse dixit*). Therefore, if the annexor had stated in the contract that his intention was to retain ownership of the movable until full payment of the purchase price, it appears that he was allowed to detach his property if it could be removed with ease.

The chapter also outlines a further development in post-1990 case law. Most important is the *Konstanz* case in which the court held that, to determine *inaedificatio*, one must consider the intention of the owner of the movable and not the intention of the annexor. *Konstanz* went even further and stated that the intention of the owner of the movable is not merely important, but in fact decisive. The reason advanced for this view is that an owner could not lose ownership of his property without an intention to pass ownership. This position therefore remains the same as in earlier case law, but the court in *Konstanz* stated that to regard the intention of the owner of the movable as an important element for accession might be reconsidered in the future.

The chapter further lays out the role of the three factors in the new approach. It establishes that the three factors that the traditional approach applied in the earlier case law are still applied in more recent case law, and that the subjective or stated intention still takes priority over the other factors, as was the case in some of the other early cases. This mostly occurred in cases where movables were sold in terms of instalment-sale agreements whereby the parties agreed to reserve ownership of the movable with the seller until payment of the purchase price. The interests of the owner of the movable are protected in such cases. Therefore, if the movable can be removed without damage and ownership is reserved, the court may order that a movable should be removed even though it became an integral part of an

immovable. The rationale behind the emphasis of the intention of the owner seems to be policy reasons. Accordingly, when ownership of the movable is reserved by the owner the courts seem to hold that the property remains movable until the conditions of the reservation of ownership are fulfilled.

There seems to be policy reasons for the emphasis placed on the owner's subjective intention. Therefore, in the next chapter I discuss and assess the implications for considering the subjective intention of the owner of the movable as the most important factor in determining accession with the aim to examine whether the result is justified in view of section 25 of the Constitution of the Republic South African, 1996.

## **Chapter 4: Assessment and implications**

### **4 1 Introduction**

The object of this chapter is to discuss and assess the implications of the conclusions from the previous chapters, particularly the tendency of the courts in certain decisions to override the objective factors and focus primarily on the stated intention of the owner of the movable to determine whether or not accession had taken place. As a point of departure, section 4 2 summarises the main conclusions from chapters two and three. The focus in this overview is on the question whether there is sufficient evidence from the case law to conclude that the courts had in fact shifted from the traditional to the new approach. After this summary of the conclusions of the previous chapters, section 4 3 discusses academic criticisms against the so-called new approach; as appears there, much of this criticism is relevant to the conclusions and assessment in this chapter. Section 4 4 sets out possible justifications for the so-called new approach, again because some of these justifications are relevant to the conclusions in this chapter. Finally, section 4 5 assesses whether the conclusions reached in this chapter have any constitutional implications.

### **4 2 Summary of conclusions from the previous chapters**

Chapter two analyses case law that is associated with what is usually described as the traditional approach in determining whether *inaedificatio* had taken place. The chapter commences with the definition of *inaedificatio* and a brief overview of its historical background. The principles relating to *inaedificatio* have their origins in

Roman law and were received into Roman-Dutch and South African law.<sup>1</sup> The early South African cases were faced with the question: what constitutes permanent attachment of movables to land by *inaedificatio*? It is argued in chapter two that this question was never central in Roman law. Instead, the focus was on the remedies available to either party and not on the question of whether or when accession had taken place. Nevertheless, it is assumed that in Roman law the objective, physical factors were the only indications of accession of movables to land and the same can be postulated for Roman-Dutch law.<sup>2</sup>

Chapter two describes how case law that is usually associated with the so-called traditional approach applies the three factors that the court identified in *Olivier*.<sup>3</sup> Some of the early cases indicate that the first two objective factors may be evident from the beginning of the inquiry whether accession had occurred, and that the first two factors are examined with the object of arriving at the objective (inferred) intention to attach permanently (or not, as the case may be). If the results of examining the objective factors and inferred intention are inconclusive as to whether accession had occurred, the stated or actual intention of the person who brought about the attachment (or, in some instances, the owner of the movable; the two may or may not be the same person) is considered.<sup>4</sup> Since the owner of the movable was often also the person who brought about the attachment, the case law does not make a clear and principled distinction between considering the stated intention of the one rather than the other. The objective factors are seemingly always important determinants for accession in terms of the traditional approach. Accordingly, the stated or actual intention of the owner of the movable is only considered when the

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<sup>1</sup> See 2 2 above.

<sup>2</sup> See 2 2 above.

<sup>3</sup> *Olivier v Haarhof & Company* 1906 TS 497.

<sup>4</sup> See 2 3 above.

objective factors are inconclusive of whether *inaedificatio* had taken place. Since this seems to have been the approach in the majority of early cases, it became customary to associate what has since been described as the traditional approach with the tendency to focus on the first two objective factors and to resort to the actual stated intention (of either the person who made the attachment or the owner of the movable) only if the objective factors are inconclusive.

However, chapter two also reveals that some of the early cases, including an important decision such as *Macdonald*, considered the stated or actual intention of the owner of the movable as a crucial factor to determine whether accession had occurred. I argue in chapter two that what emerged in *Macdonald* and some of the other early cases contradicts the notion that only recent case law is to be associated with the so-called new approach, which considers the stated or actual intention of the owner of the movable as the most important factor.<sup>5</sup> Nonetheless, although it is true that various early cases considered the stated intention of the owner of the movable, significantly the objective factors in those cases were in fact not conclusive of attachment and therefore – according to my view – the courts' approach in cases like *Macdonald* did not conflict with the traditional approach to *inaedificatio*, which requires sufficient attachment of a movable to land according to objective factors. At least some of the older cases that seem to indicate that the stated intention is important do not necessarily indicate a shift from the objective to the subjective factor because in those cases the objective factors were sufficiently inconclusive to justify the courts' resorting to evidence about the subjective intention.

However, it remains true that the stated or actual intention (as opposed to the objective intention) of the owner of the movable (as opposed to the intention of the

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<sup>5</sup> See 2 3 above.



person who made the attachment) is considered important even in some of the older decisions that are usually associated with the so-called traditional approach. Significantly, this is most evident in cases where the attached movable was subject to a credit sale with reservation of ownership and was reasonably easily removable from the land.<sup>6</sup> Determining whether accession had taken place always depends on the circumstances of each case, and this is true of the older cases as well. Notably, in some early cases it was held that movables had become attached to the immovable property even though they were removable from the land with ease. Again, significantly, this occurred in cases that did not involve a credit sale of the movables subject to reservation of ownership. In these cases the courts held that the movables had been attached to the land even though the owner of the movable's intention might have indicated the contrary.<sup>7</sup> For instance, in *Van Wezel v Van Wezel's*<sup>8</sup> *Trustee* the court held that a windmill (which was not a subject of credit sale) was immovable although it could be removed from the land with relative ease. Similarly, in *Gault v Behrman*<sup>9</sup> the court held that the stove (which was not a subject of credit sale) was immovable although it was clear that it could be removed with ease. It would seem, therefore, that the decisive factor that nudged decisions like *Macdonald* towards the conclusion that accession did not take place was not just the fact that the objective factors were inconclusive (the movables were easily removable), but also the fact that the movable was subject to a reservation of ownership provision in a credit sale.

From chapter two one can conclude that the early case law that is usually associated with the so-called traditional approach determined whether accession

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<sup>6</sup> See 2 4 above.

<sup>7</sup> See 2 4 2 above.

<sup>8</sup> 1924 AD 409 412.

<sup>9</sup> 1936 TPD 37 43.

had taken place with reference to the three factors identified in *Olivier*, based on the circumstances of each case. In the majority of cases, the tendency seems to have been to decide the case based on the first two, objective factors and to resort to the stated intention of either the annexor or the owner of the movable (with no clear distinction between them) only if the first two factors were inconclusive. This observation has become associated with the so-called traditional approach. However, in cases that involved attachment of movables that were subject to a credit sale agreement with reservation of ownership of the movable there are signs of a slightly different approach. In at least one or two early cases of this nature it seems as if the courts determined whether *inaedificatio* had taken place in a manner that they deemed fair to the owner of the movable, insofar as the objective factors did not exhaustively indicate permanent attachment to the land (the movable could reasonably easily be removed) and if ownership of the movable was reserved in the contract of sale. These cases do not fit the picture of the so-called traditional approach that is usually associated with the older case law.

Chapter three analyses case law that is usually associated with the so-called new approach. The aim of the chapter is to establish whether there was a shift in post-1978 case law from the traditional approach towards a so-called new approach when deciding whether *inaedificatio* had occurred. The general view is that the approach of the courts after 1978 is new to the extent that it considers the stated or actual intention of the owner of the movable as the most significant factor from the outset. Academic authors argue that the decisions in *Theatre Investments* and *Melcorp* indicate such a new approach to accession. Lewis argues explicitly that *Theatre Investments* indicates a change in approach by the Appellate Division and contends that this change is in line with the principle that an owner of property

cannot be deprived of his property without his agreement. According to Lewis the Appellate Division should not deviate from this approach in future. Other academic authors also state that post-1978 case law is indicative of the new approach but do not necessarily support the rationale behind the new approach, especially since they regard the reasons why so much emphasis is placed on the subjective intention as doctrinally incorrect.<sup>10</sup>

In chapter three I argue that analysis of the post-1978 case law does not really support the conclusion that there was a shift to a new approach, since the later cases merely continue or, at most, increasingly emphasise the intention of the owner or annexor of the movable, particularly in cases where ownership of the movable is reserved in a credit sale contract.<sup>11</sup> Most importantly, although more emphasis is arguably placed on subjective intention in the post-1978 case law, the objective factors are not ignored in these cases but relied on to confirm that there was no accession.

However, chapter three does outline a development that can in fact be observed in the post-1990 case law. In *Konstanz* the court held that, to determine whether *inaedificatio* had taken place, one must consider the intention of the owner of the movable and not the intention of the annexor. In earlier cases there was some confusion about the question whether it is the intention of the annexor or the intention of the owner of the movable that is relevant, mostly because they were

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<sup>10</sup> The criticisms against the new approach are discussed in 4.3 below.

<sup>11</sup> That there is probably no shift in approach also finds support in *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W) 223, where McEwan J differed with the view that *Theatre Investments* indicates a new approach on the part of the Appellate Division. According to McEwan J, what transpired in *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) simply clarifies what has always been the approach in case law. McEwan J's view in *Melcorp* is arguably correct. The intention of the owner of the movable was in some early cases considered as more important than the other factors. The support of intention was sustained by the fact that the movables in question were removable from the land with ease.

often in fact the same person. In *Konstanz*, the court stated explicitly that the intention of the owner of the movable is not merely important, but in fact decisive. However, the court stated that the decision to regard the intention of the owner of the movable as an important element for accession might be reconsidered in the future.<sup>12</sup>

Chapter three sets out the role of the three factors in the so-called new approach. It establishes that the three factors that the so-called traditional approach applied in the earlier case law are still applied in more recent cases, and that the subjective or stated intention of the owner of the movable still takes priority over the other factors in certain (but not all) cases.<sup>13</sup> The reason advanced for this approach is that an owner could not lose ownership of his property without the intention to transfer ownership. However, generally speaking it would be inaccurate to state that the newer case law has abandoned the objective factors completely and only focus on the stated intention of the owner; such a complete shift apparently remains isolated to a few decisions.

From the analysis of case law in chapter two and three one cannot conclusively infer that the courts have abandoned the traditional and adopted a completely new approach. The courts mostly still refer to all three factors and consider both objective factors and the stated intention of the owner. What is seemingly new in post-1978 case law is that at least some courts now explicitly focus on the owner of the movable's *ipse dixit* regarding his intention during attachment. However, the tendency to sometimes place more emphasis on the subjective intention is not really new to the extent that earlier decisions already followed a similar approach,

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<sup>12</sup> See 3 2 2 above.

<sup>13</sup> See 3 2 2 above.

especially if the objective factors were inconclusive. It is therefore safer to conclude that both early and recent cases have always emphasised, more or less strongly, the intention of the owner of the movable to determine whether or not accession had occurred. Moreover, although it is true that various cases emphasise the stated intention of the owner of the movable, this tendency is more common in cases where the objective factors were not conclusive that attachment had taken place. The cases associated with the so-called new approach do not provide convincing proof that courts will, in instances where the objective factors clearly indicate that permanent attachment had taken place, override those indications and decide against attachment purely based on the stated intention of the owner of the movables. For the most part, therefore, it cannot be said that there is sufficient evidence of a shift away from the traditional and towards a new approach in the case law.

However, this conclusion must be qualified with reference to one specific set of circumstances, both in the older and in the recent case law. It seems that the courts will not easily find that accession had taken place in instances where the objective factors are inconclusive of permanent attachment and where ownership was reserved in the contract of a credit sale of the movables. This approach appears from both older cases that are usually associated with the so-called traditional approach as well as recent cases associated with the so-called new approach, and therefore it cannot be forwarded as proof of the emergence of a general new approach. In *Macdonald*, *Melcorp* and *Konstanz* the relevant movables were sold in terms of instalment-sale agreements and the parties agreed to reserve ownership of the movable as security for payment of the full purchase price. The interests of the owners of the movables (who reserved ownership for security purposes) were

protected in these cases when it was held that accession had not taken place. In all three cases the decision was justified with reference to the fact that the movables could be removed from the land with ease. However, it was possible in all these cases to argue that the movable formed an integral part of the building, in which case the conclusion might have been different. Therefore, one can conclude that a movable that is attached to land and that is subject to a security reservation of ownership remains movable until the conditions of the reservation of ownership are fulfilled, at least inasmuch as that movable is removable with relative ease and without causing any damage to the land or itself.

In conclusion, it does not seem as if there is convincing proof of a substantive shift from a so-called traditional approach (in which intention was only referred to if the objective factors are inconclusive) to a so-called new approach (in which the stated intention of the owner of the movable is determinative of the outcome). At most, it can be said that there are signs of such a shift to the extent that some courts now seem explicitly to place more emphasis on the stated intention of the owner of the movable, sometimes based on the argument that an owner should not lose ownership against her will. At the same time, there are some signs (in both older and more recent cases) that in a specific set of cases, where ownership of the movable had been reserved as security in a credit sale, the courts are more willing to find that attachment had not taken place, provided that the movable remains removable with relative ease, even in circumstances where the courts might (in the absence of the credit sale and the reservation of ownership) otherwise have concluded that attachment had taken place.

Insofar as the observed tendency to protect credit grantors in cases like *Macdonald*, *Melcorp* and *Konstanz* prioritizes the subjective, stated intention of the

owner of the movables over the objective factors it might be said that there are signs of an alternative approach that differs from the traditional approach in the majority of cases. However, as was argued above, these indications cannot be said to establish proof of a new approach that signifies a general shift away from the traditional approach. In the following sections criticism against and justifications for the so-called new approach are discussed to establish whether the more limited alternative approach that was identified here can be justified.

### **4 3 Criticisms against the so-called new approach**

Case law that is said to be associated with the so-called new approach is criticised for the emphasis that it places on the subjective intention of the owner of the movable. The greater emphasis that is said to be placed on the intention of the owner of the movable in the so-called new approach is criticised for various reasons. To the extent that it is concluded in the paragraphs above that there is evidence in the case law that the owner's intention plays a large role in at least some cases (even if there is insufficient evidence of a general shift towards the new approach), this criticism is relevant for what follows.

To begin with, placing so much emphasis on the intention of the owner of the movable is criticised for confusing the original and derivative modes of acquisition of real rights. Badenhorst, Pienaar and Mostert explain the distinction between the original and derivative modes of acquiring real rights.<sup>14</sup> This distinction hinges on the question whether the acquisition of the movable property "is constituted by unilateral or bilateral transaction, that is, whether or not the co-operation of a predecessor in

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<sup>14</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 71-72.

title is required".<sup>15</sup> Therefore, acquisition of ownership is original if ownership is not derived from any predecessor or if the thing upon which ownership is acquired was *res nullius*. Moreover, according to the rules of original acquisition of ownership, consent is not required to acquire ownership.<sup>16</sup> Consequently, if *inaedificatio* occurs, ownership of the movable is lost without any regard for the intention of the owner of the movable since ownership is not transferred from one person to another, but lost by one and incorporated into the property of another by operation of law. The owner of the movable cannot base his claim for ownership on the fact that he did not intend to transfer his movable property to the owner of the immovable because there is no question of transfer of ownership; the former owner of the movable lost ownership by operation of law when the movable lost its independent existence and at that point it became incorporated into the property of the landowner.<sup>17</sup>

Conversely, acquisition of ownership is derivative if ownership of the movable property is derived from the previous owner by transfer. A bilateral juridical act is required to transfer ownership of the movable to a new owner in terms of derivative acquisition of ownership,<sup>18</sup> and as a result the intention of the owner of the movable will always play a role in cases where the change of ownership is derivative. According to Badenhorst, Pienaar and Mostert, the intention of the owner of the movable has been over-emphasised, particularly in the form of direct evidence, in accession cases that focus too heavily on the intention of the owner of the movable

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<sup>15</sup> *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1000. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 71-72 137.

<sup>16</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 72. See also A Breitenbach "Reflection on *inaedificatio*" (1985) 48 *THRHR* 462-465 463-464.

<sup>17</sup> See 2 2 above.

<sup>18</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 72.



to establish whether accession had taken place.<sup>19</sup> The authors argue that the emphasis on the intention of the owner has produced unsatisfactory outcomes in terms of how it is determined whether *inaedificatio* had occurred.<sup>20</sup>

The emphasis that is placed on the intention of the owner of the movable is also criticised for confusing the rules of property with those of contract. Freedman argues that the emphasis on intention undermines the principles of property law, since it allows the requirements (or rather elements) of contract law to play an unwarranted role in *inaedificatio*, which has nothing to do with consensual transfer of property. He maintains that it is important to retain the fundamental distinction between the law of property and the law of obligations.<sup>21</sup> It seems that the emphasis that is placed on intention allows a contractual undertaking to trump proprietary rights that were acquired originally.<sup>22</sup> Pope argues, somewhat in the same line, that placing so much emphasis on the agreement to transfer may distract the courts from the core issue, which is whether accession has occurred and not whether the owner of the movable intended to transfer ownership in the event of the purchase price being paid in full.<sup>23</sup>

Finally, the role of the intention of the owner in the new approach does not only confuse property law and contract law principles, it also conflicts with the publicity

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<sup>19</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 150. See also I Knobel "Accession of movables to land: South African law and Dutch law" (2012) 45 *CILSA* 77-90 81; JC Sonnekus & JL Neels *Sakereg vonnisbündel* (2<sup>nd</sup> ed 1994) 72.

<sup>20</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 150.

<sup>21</sup> W Freedman "The test for *inaedificatio*: What role should the element of subjective intention play?" (2000) 117 *SALJ* 667-676 674.

<sup>22</sup> DL Carey Miller "Fixtures and auxiliary items: Are recent decisions blurring real rights and personal rights?" (1984) 101 *SALJ* 205-211 207.

<sup>23</sup> A Pope "Inaedificatio revisited: Looking backwards in search of clarity" (2011) 128 *SALJ* 123-146 143.

principle.<sup>24</sup> According to the publicity principle a real right as well as its contents and the identity of its holder should be made known and published to the world at large.<sup>25</sup> Van der Merwe asserts that the principle of publicity attaches greater importance to the outward appearance (objective factors) than the intention of the owner of the movable who may have reserved ownership prior to attachment.<sup>26</sup> Therefore, the publicity principle seeks to protect third parties who might hold interests in the land in question. To comply with the publicity principle in cases of *inaedificatio* the landowner's rights to anything that is permanently attached to his land should be made known to the public at large.<sup>27</sup> This is because third parties are likely to rely on the physical appearance that movables are permanently attached to the land and to conclude that they form part and parcel of that land. On this basis Van der Merwe argues that the so-called new approach undermines the publicity principle in that it regards the intention of the owner of the movable as more important than the outward appearance created by physical attachment, based on the nature and purpose of the movable property and the degree and manner of attachment. Consequently, it might prejudice third parties, like prospective mortgagees and purchasers, who rely on the outward appearance of attachment of movables to an

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<sup>24</sup> DL Carey Miller "Fixtures and auxiliary items: Are recent decisions blurring real rights and personal rights?" (1984) 101 *SALJ* 205-211 207; A Breitenbach "Reflection on *inaedificatio*" (1985) 48 *THRHR* 462-465 464.

<sup>25</sup> DL Carey Miller "Fixtures and auxiliary items: Are recent decisions blurring real rights and personal rights?" (1984) 101 *SALJ* 205-211 207.

<sup>26</sup> CG van der Merwe "The law of property (including mortgage and pledge)" 1980 *ASSAL* 230-233 232-233.

<sup>27</sup> W Freedman "The test for *inaedificatio*: What role should the element of subjective intention play?" (2000) 117 *SALJ* 667-676 673-674; CG van der Merwe "The law of property (including mortgage and pledge)" 1980 *ASSAL* 230-233 232-233.

immovable, and who are likely to assume that everything attached to an immovable forms part of it and belongs to the landowner.<sup>28</sup>

From the analysis above, it is clear that the majority of academic commentators are of the view that the intention of the owner of the movable should not play a conclusive role in determining whether accession had taken place. The main reason for their view is that accession is a form of original acquisition of ownership and therefore does not require the intention of the owner of the movable to transfer ownership.

This criticism is correct but even though the courts sometimes consider the intention of the owner of the movable as the most important factor, in fact the objective factors were not conclusive of accession in the relevant cases, which – in my view – are therefore not necessarily in conflict with the basic principles of accession. According to the *inaedificatio* principles, movable structures that have been permanently attached to land cease to exist as independent things and become part of the immovable object to which they are attached.<sup>29</sup> Therefore, if the independent identity of a movable is not lost and the movable is still easily removable from the land, it is not necessarily clear from the objective factors that accession had indeed taken place. To consider the subjective intention of the annexor in cases of that nature is therefore not necessarily confusing original with derivative acquisition of property, unless what the court does in fact (as one or two decisions indeed suggest) is to emphasize the owner's intention not to transfer ownership instead of the annexor's intention not to attach permanently. It is only the

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<sup>28</sup> W Freedman "The test for *inaedificatio*: What role should the element of subjective intention play?" (2000) 117 *SALJ* 667-676 673-674. See also in CG van der Merwe "The law of property (including mortgage and pledge)" 1980 *ASSAL* 230-233 232-233.

<sup>29</sup> See 2 2 above.

decisions (and academic views) that rely on the owner of the movable's intention to transfer ownership as a factor that indeed confuse the two methods of acquisition and that should therefore be rejected.

However, it also has to be said that the courts do sometimes conclude too easily that the objective factors are inconclusive. In some cases the manner and degree of attachment is not decisive of accession (for example when the movable can be removed with relative ease) but the nature and object of the movable should indicate (objectively) that the movable was intended to be permanently attached to the land, even though it might physically be removable with relative ease. This is especially the case where the movable becomes an integral part of the immovable property, such as the lifts in *Melcorp*. In these cases, although the manner and degree of attachment might not be decisive of accession, one could probably argue that the other objective factor (nature and object of the movable) indicates the objective intention to attach the movable permanently, which implies that the subjective or stated intention should not necessarily be as important.

However, it seems as if reservation of ownership for security in a contract of credit sale of the movable more or less consistently distracts the courts from considering the objective factors with sufficient clarity. Hence, the courts tend to protect the interests of the owner of the movable probably to ensure equity and fairness in the event where ownership was reserved and the purchase price has not been paid in full, by finding that the movable is removable and therefore did not become attached to the land permanently. Therefore, one could conclude that, in these cases, the true reason for a finding that accession had not taken place might be a policy decision to protect security interests in credit transactions and not the fact that the movable is removable and that it therefore had not become attached

permanently. If policy indeed plays such an important role in the few cases that could arguably have gone either way but were decided in the way that best protects security interests, it becomes important to consider the role of policy considerations in attachment cases.

#### **4 4 Justifications for protecting the interests of the former owner of the movable**

As was indicated above, a few cases indicate that movables that are attached to land subject to a reservation of ownership agreement (in the contract of a credit sale of the movable) would not become permanently attached to the land until the terms of agreement are honoured, provided that it can be shown that the movable can be removed with relative ease. The decisions of *Macdonald*, *Melcorp* and *Konstanz*, which concerned such sales of movables subject to reservation of ownership, indicate that the stated intention of the owner of the movable (as stated in the contract of credit sale) is important to determine whether or not *inaedificatio* had occurred. In the aforementioned cases the presence of a hire-purchase agreement led the courts to regard the intention of the owner of the movable (who in some cases was the annexor) as the most decisive factor in determining whether accession had taken place.<sup>30</sup> It must be emphasized that these decisions were possible because it was possible to remove the movable with relative ease.

In *Macdonald* Innes CJ stated that “the intention required (in conjunction with annexation) to destroy the identity, to merge the title, or to transfer the *dominium* of movable property, must surely be the intention of the owner”.<sup>31</sup> According to the

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<sup>30</sup> See 4 2 above.

<sup>31</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467.

court, consideration of the intention of the owner of the movable is what is expected in view of the fundamental principle that a non-owner cannot transfer the property of another. The majority view was that, since the owner of the movable was not paid in full, he is regarded to have not intended to give up ownership. The majority view was sustained by the fact that it was not difficult to remove the machinery in question from the land. One can conclude that the court in *Macdonald* refused to accept that accession had taken place and elected instead to enforce a debt that was owed to the owner of the machine under a hire-purchase agreement, which reserved ownership of the machine.

Similarly, in *Melcorp* the court placed considerable weight on the annexor's *ipse dixit* (as stated in the hire-purchase contract) to arrive at the conclusion that the lifts remained movable until the purchase price was fully paid. Since the lifts were readily removable from the buildings (coupled with the fact that ownership of the lifts was reserved) the court in *Melcorp* held that the lifts remained movable.<sup>32</sup> The court refused to accept that accession had taken place and instead enforced the debt that was owed to the owner of the lifts under the hire-purchase contract, which reserved ownership of the lifts as a security for payment of the full purchase price. Since the lifts were readily removable the court decided that accession had not occurred, despite the fact that the nature and object of the lifts indicated that the lifts were intended to be installed permanently in the building.

In *Konstanz* the court went even further and stated that the intention of the owner of the movable is not merely important, but in fact decisive. The court held that *inaedificatio* had not occurred because the hire-purchase contract indicated clearly that the respondent would remain the owner of the irrigation system until

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<sup>32</sup> See 3 2 1 above.

payment in full of the purchase price.<sup>33</sup> The court's finding that the irrigation system did not become part of the land through *inaedificatio* also protected the interests of the owner of the movables who reserved ownership as security for full payment of the purchase price.

The question is whether it is desirable to rely so heavily on the stated or actual intention of the owner of the movable when determining whether accession had taken place in cases of credit sales. The courts justify their reliance on the intention of the owner of the movable in these cases by explicitly stating that an owner of a movable should not be deprived of ownership without his consent.<sup>34</sup> However, since it is evident from case law that the movable would form part of the land if the purchase price had been paid in full, one can argue that the real justification of the courts' reliance on the intention of the owner of the movable is commercial policy, namely to protect the real security interest.

It seems that a decision that accession had not occurred in cases where the transfer of ownership of the movable is reserved subject to payment of the full purchase price, is presumably a decision in favour of enforcing contractual debts in credit sales. Effective enforcement of contractual debts is said to be vital for the proper functioning of any market based system.<sup>35</sup> Therefore, a finding that accession had not occurred after having had regard to the intention of the owner of the movable in the contract of sale would arguably promote the social and commercial stability of society. A finding that attachment is not permanent may provide security for

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<sup>33</sup> See 3 2 2 above.

<sup>34</sup> *Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467.

<sup>35</sup> R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 316.

commercial transactions and ensures that the interests of creditors who reserve ownership of the movable as security are protected.

Therefore, if it is decided that accession is suspended by a reservation of ownership for credit security the landowner should either pay the amount due for purchase of the movable or allow the seller to remove the movable from the land. This is – in my view – an effective way of debt enforcement as long as the movable is still reasonably easily removable from the land. Therefore, a court order to allow removal of the movable from the land to enforce the purchase price that is due to the owner of the movable, presumably for commercial policy reasons, is justifiable at least insofar as the movable is in fact easily removable from the land without causing damage. If this policy consideration is indeed the true reason for deciding that accession had not taken place in certain cases, it is doubtful whether courts would be willing to question the wisdom of the policy considerations.

## **4 5 Constitutional implications**

### **4 5 1 Introduction**

As indicated in 4 4, there seems to be a valid reason for considering the intention of the owner of the movable important to determine whether accession had taken place in certain attachment cases, particularly in instances where ownership of the movable had been reserved in a contract of credit sale. However, decisions about accession should also be grounded in a constitutionally sound approach.<sup>36</sup>

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<sup>36</sup> A Pope “Inaedificatio revisited: Looking backwards in search of clarity” (2011) 128 *SALJ* 123-146 146; A Pope “Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles” (2007) 124 *SALJ* 537-556 542.



This section examines whether a decision that accession had taken place, or a decision that it had not taken place in specified circumstances for policy reasons, constitutes a deprivation of property in view of section 25 of the Constitution of the Republic of South Africa, 1996. Section 25(1) of the Constitution states that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation. Therefore, a decision either that accession had taken place or that it had not taken place (to protect ownership of the movable the ownership of which had been reserved for security reasons) must be compatible with the constitutional prohibition against arbitrary deprivation of property.<sup>37</sup>

In light of section 25(1) that protects owners against arbitrary deprivation of property, together with the methodology laid down by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>38</sup> (“FNB”), the following section investigates whether a decision either for or against accession (the latter for policy reasons) has any constitutional implications.

#### 4 5 2 Structure, purpose and application of section 25

Section 25(1) contains two formal requirements for deprivation of property, namely that the deprivation of property must be in terms of law of general application and no law may permit arbitrary deprivation.<sup>39</sup> The “law of general application” requirement

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<sup>37</sup> A Pope “Inaedificatio revisited: Looking backwards in search of clarity” (2011) 128 *SALJ* 123-146 125 argues that “at all times ... compatibility with the constitutional prohibition against arbitrary deprivation of property must be evident in the finding [of accession]”. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 232.

<sup>38</sup> 2002 (4) SA 768 (CC). The *FNB* methodology is discussed in 4 5 3 below.

<sup>39</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 218.

ensures that deprivation of property cannot take place without “proper authority”.<sup>40</sup> If a deprivation is not authorised by law of general application, it is invalid and unconstitutional. Consequently, it would be unnecessary for courts to test whether such law constitutes arbitrary deprivation. Moreover, the validity of a deprivation is dependent on the law of general application that authorises it and not a particular act of deprivation.<sup>41</sup> Therefore, an individual who intends to institute a constitutional property challenge could challenge the law that permits the deprivation.<sup>42</sup> The courts must inquire whether the law validly authorises the deprivation that is challenged. In decisions outside of property law it has been established that the common law is law of general application.<sup>43</sup> The common law rules that regulate accession therefore qualify as law of general application for purposes of section 25(1) and therefore the first requirement would usually be met whenever a decision about accession was based on the common law principles.<sup>44</sup>

Questions may arise regarding the application of section 25 to disputes that involve private parties.<sup>45</sup> For instance, in a case of *inaedificatio*, where ownership of the attached movable is disputed, the question is whether section 25(1) can apply directly to resolve the dispute surrounding *inaedificatio*, which is a dispute between private parties and that is purely governed by common law.

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<sup>40</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 237.

<sup>41</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 235; T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) 46-21. See also R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 297.

<sup>42</sup> T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) 46-21.

<sup>43</sup> *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) para 44; *S v Thebus* 2003 (6) SA 505 (CC) paras 64-65.

<sup>44</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 234.

<sup>45</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 59.

Section 8(1) of the Constitution provides that the Bill of Rights applies to all law and it binds the legislature, the executive and the judiciary. This section provides for the direct vertical application of the Bill of Rights. Section 8(2) of the Constitution provides that the Bill of Rights also applies between private individuals. This section provides for horizontal application, which can be either direct or indirect.<sup>46</sup> Direct horizontal application involves direct reliance on a provision in the Bill of Rights for a cause of action or defence against another private person.<sup>47</sup> In a case of *inaedificatio*, direct horizontal application would mean that an owner of a land may want to rely on section 25 as a cause of action or defence against a claim for a removal of a movable, which ostensibly was attached to land.

In the case of indirect horizontal application, Van der Walt states that the cause of action or defence relies on the Constitution in such a way that the private law rules (statutory or common law) that govern the dispute are open to amendment or influence from the Constitution, even though a state threat against either party is not directly in issue.<sup>48</sup> Applied to a case of *inaedificatio* this means that an owner of land may want to challenge the existing legal rules that permit the deprivation of property or their interpretation and application, instead of directly challenging the action of the owner of the movable. This kind of application (indirect horizontal application) is governed by section 39(2) of the Constitution, which provides that:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.

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<sup>46</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 58; I Currie & J de Waal *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 43.

<sup>47</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 59.

<sup>48</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 59.

This implies that when the courts apply statutory or common law that permits deprivation of property, they must do so in a manner that promotes the spirit, purport and objects of the Bill of Rights, which includes section 25. Considering this analysis, it seems that indirect horizontal application would be possible in resolving disputes between private parties regarding the common law regarding *inaedificatio*. Therefore, courts may apply or develop legal rules that regulate whether or not *inaedificatio* had occurred in the event of dispute, but this must occur in line with section 25 of the Constitution.

#### 4 5 3 FNB methodology

According to the two-stage approach that is followed by the Constitutional Court in constitutional litigation, litigants who claim protection under a provision in the Bill of Rights must – in the first stage – show that they are beneficiaries of a right in the Bill of Rights.<sup>49</sup> Moreover, the beneficiaries must show that the right in question has been limited or infringed. In the second stage, a party who bears the onus of proof must be afforded an opportunity to prove that the infringement in question is justified under the limitation provision in section 36(1) of the Constitution.<sup>50</sup>

This approach will also be followed in a constitutional property dispute.<sup>51</sup> The applicant in a constitutional property challenge will have to prove in the first stage that his property right, which is protected in section 25, has been infringed upon. In the second stage the state or the party who relies on the validity of the act will have to prove that the infringement of the applicant's existing property right can be justified

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<sup>49</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 100-102. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 74-75; T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) 46-3.

<sup>50</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 75.

<sup>51</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 75.

in terms of section 36(1). However, the Constitutional Court in *FNB* further developed the two-stage approach and laid down a methodology that generally proceeds in a set of steps for conducting constitutional property disputes.<sup>52</sup> Roux lists the steps as follows:

- “(a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purpose of s 25?
- (b) Has there been a deprivation of such property by the [organ of state concerned]?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose of s 25(2)?
- (f) If so, does the [expropriation] comply with the requirements of s 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under s 36?”<sup>53</sup>

The starting point of any constitutional challenge is section 25(1). Accordingly, step (a) questions whether the interest that is affected qualifies as property in terms of section 25(1).<sup>54</sup> If the answer is in the affirmative, step (b) questions whether there has been deprivation of property.<sup>55</sup> If there is deprivation present, step (c) questions whether such a deprivation is in line with the provisions of section 25(1).<sup>56</sup> If the deprivation is consistent with the provisions of section 25(1), the inquiry proceeds to

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<sup>52</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 75.

<sup>53</sup> T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) 46-3.

<sup>54</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(a).

<sup>55</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(b).

<sup>56</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(c).

step (e). However, if the deprivation is not consistent with section 25(1), step (d) inquires whether such a deprivation can be justified under section 36 of the Constitution.<sup>57</sup> If the deprivation in question cannot be justified under section 36, the inquiry ends there and the law that permits the deprivation would be declared invalid and unconstitutional. If the deprivation in question did comply with section 25(1) or can be justified under section 36, step (e) asks whether the deprivation also amounts to expropriation in terms of section 25(2).<sup>58</sup> If it does, step (f) questions whether such expropriation complies with section 25(2)(a) and (b).<sup>59</sup> If the expropriation does not comply with section 25(2), step (g) asks whether such expropriation can be justified under section 36(1).<sup>60</sup> If the expropriation cannot be justified under section 36, the expropriation would be invalid and unconstitutional.

Roux argues that the *FNB* decision has added greater clarity in terms of how section 25 should be interpreted to achieve the goal of balancing private and public interests in property.<sup>61</sup> Van der Walt also argues that the decision in *FNB* has terminated a number of uncertainties and debates concerning the interpretation of section 25(1) of the Constitution and has for the first time brought clarity about the

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<sup>57</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(d).

<sup>58</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(e).

<sup>59</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(f).

<sup>60</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(g).

<sup>61</sup> T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) 46-21 – 46-25 nevertheless argues that the threshold questions are likely to be "sucked into" the arbitrariness test, which is whether there was an arbitrary deprivation of property. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 220.

approach to be followed when the property clause is interpreted.<sup>62</sup> However, Roux argues that the arbitrariness test dominates the whole constitutional property inquiry. Van der Walt agrees with Roux and argues that all cases that concern constitutional property disputes and that follow the *FNB* methodology are likely to get stuck in the section 25(1) arbitrariness analysis and end there.<sup>63</sup>

Nonetheless, from the analysis above, it seems that the *FNB* methodology is necessary to determine whether the deprivation of property meets the requirements of section 25(1). In the next section I apply the *FNB* methodology to determine whether a decision by the court to the effect that accession had either occurred or been suspended for policy reasons constitutes a deprivation of property in terms of section 25(1).

#### 4 5 4 Accession decisions in view of the *FNB* methodology

##### 4 5 2 1 *Is there “property” in terms of section 25?*

Before asking whether any interference with property interests amounts to arbitrary deprivation, the first question – in terms of *FNB* methodology indicated above – is whether the interest that is affected qualifies as property for constitutional purposes. Section 25(4)(b) of the Constitution provides that property is not limited to land. Moreover, the Constitutional Court in *FNB* confirmed that corporeal movables and land are at the heart of the constitutional concept of property and must in principle be

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<sup>62</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 220.

<sup>63</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 77-78.

protected under section 25.<sup>64</sup> Van der Walt explains the meaning of property in terms of section 25:

“For purposes of section 25 ‘property’ can therefore relate to a wide range of objects both corporeal and incorporeal, a wide range of traditional property rights and interests both real and personal, and a wide range of other rights and interests which (in civil-law tradition) have never been considered in terms of property before.”<sup>65</sup>

According to the sources referred to above, property may in terms of section 25 encompass a range of rights, object and interests in property.<sup>66</sup> In the case of accession, it is clear from the preceding explanation of property that the ownership of movables that may cease to exist as independent objects if they become permanently attached to land by building clearly falls within the scope of “property” for the purposes of section 25 of the Constitution. The property interest that is almost always involved in attachment cases is ownership of movables, and the *FNB* decision makes it clear that both the object (tangible movable objects) and the right (ownership) involved in such cases qualify as property for section 25 purposes.

In attachment cases it needs to be determined which property interests are lost when the court decides whether or not accession had occurred. In a “normal” accession case where the court decides that accession had indeed occurred, the owner of the movable loses ownership of the property that has ceased to exist independently and become permanently attached to land as a result of accession. In *Theatre Investment*, the court did not allow the lessee to remove certain seats,

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<sup>64</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51. See also *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1996 12 BCLR 1573 (CC); T Roux & D Davis “Property” in H Cheadle *et al* (eds) *South African Constitutional law: The Bill of Rights* (2<sup>nd</sup> ed RS 10 2011) 20-17.

<sup>65</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 192.

<sup>66</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 192.



emergency lighting and dimmer-board because they had become attached to the immovable property permanently. Accordingly, the lessee lost the ownership of his property, which now formed part of the land of the lessor by accession. In this case the lessee can have a section 25(1) claim because the movables that it owned ceased to exist when they became permanently attached to the land of the lessor, with the result that the lessee lost ownership by operation of law. The lessee was thus deprived of its property by the operation of the common law rules of accession. The lessee will be able to prove that it had a property interest (ownership of the movables) of which it was deprived by operation of law.

However, this may be different in a case where the court decides that accession had not occurred, for instance because ownership of the movable was reserved in the contract of credit sale. In *Melcorp* the court held that certain lifts did not become part of the building through accession and that they remained movable. This was probably inspired by the fact that the ownership of the lifts was reserved in the contract of credit sale by the seller/owner, combined with the fact that they were reasonably easily removable. The owner of the building could not claim ownership of the lifts because they never became his property. Therefore, in a case such as *Melcorp* there is no party who can have a section 25(1) claim: the owner of the lifts still owns his lifts and will have nothing to claim. Conversely, the landowner never acquired ownership of the lifts because they had not become attached to the building and therefore the landowner has no property interest for the purposes of section 25(1).

4 5 2 2 *Has there been a deprivation of property?*

Once it has been established that the interest affected is property in terms of section 25, the next question is whether there has been deprivation of that property that triggers a section 25(1) inquiry. In *FNB* the court interpreted “deprivation” widely to mean:

“Any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned”.<sup>67</sup>

According to Van der Walt,<sup>68</sup> the apparent clarity that the *FNB* decision brought regarding the meaning of deprivation was “clouded” by a subsequent decision of the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of Executive Council for Local Government and Housing, Gauteng and Others*<sup>69</sup> (“*Mkontwana*”). In *Mkontwana* the Court stated that the question whether there has been a deprivation “depends on the extent of the interference or limitation on the use, enjoyment or exploitation” and “substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society”.<sup>70</sup>

Van der Walt criticises the definition of deprivation in *Mkontwana* and argues that the court restricted its *FNB* definition of deprivation without clearly explaining the

<sup>67</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

<sup>68</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 204.

<sup>69</sup> 2005 (1) SA 530 (CC).

<sup>70</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 32.

differences between the two definitions.<sup>71</sup> He argues that the definition in *Mkontwana* was made subject to a disclaimer and should be carefully approached because it is problematic. According to Van der Walt “it is unclear why the definition of deprivation should be linked to the notion of what is normal in an open democracy”.<sup>72</sup>

The approach to the definition of deprivation in *Mkontwana* was not followed in the subsequent case of *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another*<sup>73</sup> (“*Reflect-All*”). The Constitutional Court in *Reflect-All* followed the wider *FNB* definition of deprivation rather than the narrow *Mkontwana* definition.<sup>74</sup> The Constitutional Court in *Offit Enterprises (Pty) Ltd and Another v COEGA Development Corporation (Pty) Ltd and Others*<sup>75</sup> is said to have increased the confusion by stating that it would follow the *Mkontwana* definition of deprivation, but in fact it applied the original, wider *FNB* test.<sup>76</sup> Accordingly, there seems to be uncertainty in regard to the meaning of deprivation. However, Van der Walt defines deprivation as any uncompensated, regulatory restriction on the use, enjoyment and exploitation of property.<sup>77</sup> This definition seems to be in line with the wider *FNB* definition of deprivation.

The next question is whether there has been deprivation of property if the court decides either that accession has occurred or that it has not occurred in a case where the movable is subject to a credit sale with reservation of ownership. In the former instance (a “normal” accession case), the owner of the movable can prove a

<sup>71</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 204.

<sup>72</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 205.

<sup>73</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC).

<sup>74</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 36. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 207.

<sup>75</sup> 2011 (1) SA 293 (CC) paras 38-39.

<sup>76</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 207.

<sup>77</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 192 and 196.

deprivation of his property because he lost ownership when his movables ceased to exist as a result of permanently acceding to the land. In *Unimark* the court held that a certain canopy, steel gates, kitchen sink and floor tiles had become immovable as a result of accession. In this case, deprivation can be proved because the owner of the attached movables lost ownership of the movables that became permanently attached to the land, while the owner of the land now owns everything that is permanently attached to his land by accession. Therefore, it is clear in this case that the rules of accession deprived the owner of his movables. If accession did in fact take place, the former owner of the movables can therefore prove both that he had a property interest (ownership of movables) and that he was deprived of that property by the common law rules of accession.

In the instance where the court decides that accession had not occurred, for instance because the movable is subject to a credit sale with reservation of ownership, the owner of the land cannot prove that he had been deprived of property. The movable property never becomes the property of the landowner in these cases and still belongs to the original owner. If accession had not taken place, the landowner never owned anything that he could have been deprived of. In *Melcorp* the court held that certain lifts remained movable and were not permanently attached to the building by accession. In this case, the court made it clear that if the lifts were not readily removable the finding would have been different. This implies that if the lifts were not easily removable from the building the court might have found that *inaedificatio* had taken place, and that the lifts accordingly formed part of the building. However, since the court decided that accession had in fact not taken place the owner of the building never became the owner of the lifts through *inaedificatio*. In this case the owner of the land cannot prove deprivation either.

It therefore seems that the constitutional issue of a deprivation of property can only be raised in “normal” accession cases, where the objective factors indicate that permanent attachment of a movable to land had occurred and that ownership of those movables had been lost by operation of law. Therefore, in “normal” accession cases, once it has been established that there was accession and that a deprivation of property had taken place, step (c) in the *FNB* methodology is to ask whether the deprivation of property that had taken place in terms of the principles of accession is in line with section 25(1). Section 25(1) of the Constitution states that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation. This section contains two formal requirements for the deprivation of property. Firstly, the deprivation of property must be in terms of law of general application which is satisfied by the principles of the common law.<sup>78</sup> The second formal requirement in section 25(1) provides that no law may permit arbitrary deprivation of property. According to Van der Walt it is difficult but not impossible to prove that a deprivation authorised by common law rules constitutes arbitrary deprivation.<sup>79</sup> Nonetheless, in a case of *inaedificatio* the rules that regulate accession may in principle not permit deprivation of property that is arbitrary. In accordance with the conclusions in the preceding paragraphs, this analysis will only arise in the “normal” accession cases, where it has been established that accession did take place and that the former owner of the movables had lost ownership when the movables became permanently attached to land and thus lost their independent existence as objects of property rights.

According to the Court in *FNB* deprivation is arbitrary if the law that authorises the deprivation does not provide sufficient reason for the particular deprivation in

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<sup>78</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 218.

<sup>79</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 234-235.

question or is procedurally unfair.<sup>80</sup> If there are sufficient reasons for the deprivation in terms of the guidelines set out by the court in *FNB*, the authorising law would not constitute arbitrary deprivation in terms of section 25(1) of the Constitution. Therefore, if the court decides that a movable no longer exists independently because accession had occurred and that its removal from the land would cause damage to the land or the movable, that seems to be sufficient reason for holding that the deprivation was not arbitrary. Moreover, in most cases where the loss of ownership of the movables might seem unfair the former owner of the movable will possibly have an action for compensation based on an unjustified enrichment against the owner of the land.<sup>81</sup> On this basis, a deprivation in the form of loss of ownership of a movable that has become permanently attached to land would generally not be arbitrary if the court holds that accession had occurred. Generally speaking, the reasons why a court would hold that accession had taken place would be sufficient to ensure that the deprivation is not arbitrary for purposes of section 25(1).

As was argued above, this issue does not arise when the court decides, for policy reasons, that permanent attachment had not taken place because the property is reasonably easily removable and because ownership of the movable had been reserved in a credit sale. In such a case the landowner does not have a section 25(1) ground for an attack on the court's decision that accession had not taken place. Insofar as there is evidence of a new or a different approach to accession in certain cases, particularly where ownership of the movables had been reserved as

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<sup>80</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>81</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 154.

security, the owner of the land does not have a section 25(1) arbitrariness-based remedy against the courts' application of the accession principles because in these cases the very principles themselves determine that the landowner does not acquire a property interest that qualifies for protection in terms of section 25.

However, it might be possible that the landowner in such a case could attack the court's decision, and with it the particular policy-driven interpretation of the common law principles of accession in credit sale cases, on the basis of section 9 of the Constitution. Section 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Therefore, if the courts' interpretation of the rules of common law when deciding whether *inaedificatio* had occurred results in an unequal treatment between the owner of the land in some cases (ownership of the movable was reserved for security in a credit sale) and a similarly placed landowner in other cases that look exactly the same but for one aspect (there is no reservation of ownership), such interpretation may be attacked on the grounds of section 9 of the Constitution for unfairly discriminating against the owner of the land.<sup>82</sup> In that instance the landowner would have to prove the requirements for unfair discrimination. However, the outcome of the discrimination case might be affected by the fact that the landowner has another remedy, for example that the original owner of the movable may be estopped from sustaining his reservation of ownership against the innocent purchaser (the landowner).

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<sup>82</sup> *Harksen v Lane* 1998 (1) SA 300 (CC) para 53. See also I Currie & J De Waal *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 235; I Currie & J De Waal *The new constitutional and administrative law* vol 1 (2001) 350.

4 5 2 3 *Was there an expropriation?*

The question whether accession results in expropriation in terms of step (e) of the *FNB* methodology would not arise in a case of accession. This is because there is no common law authority for expropriation under South African law. The authority to expropriate is said to be derived exclusively from statutory authority.<sup>83</sup> In building encroachment cases, it has been argued that the common law rules that allow the courts to leave the encroaching structures in place or to order that the encroached-upon land should be transferred to the encroacher, do not qualify as expropriation for the same reason.<sup>84</sup> The same applies to the enforcement of the common law right of a way of necessity. Enforcing the common law regarding the right of way of necessity by a court order does not amount to expropriation under South African law.<sup>85</sup> Therefore, it seems that loss of property by operation of the rules of common law would generally not qualify as expropriation in South African law. If property is therefore compulsorily “transferred” from one person to another by operation of law in terms of a common law principle such as the rules of accession, that “transfer” does not qualify as an expropriation that activates section 25(2) or 25(3).

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<sup>83</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 81. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 346-453; AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2009) 125 *SALJ* 592-638 622; A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 10 and 93.

<sup>84</sup> AJ van der Walt *Property in the margins* (2009) 200-201; AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2009) 125 *SALJ* 592-638 622. See also Z Temmers *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University 172-173.

<sup>85</sup> TN Raphulu *The right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University 102.



## 4 6 Conclusion

The main object of this chapter is to discuss and assess the implications of this thesis regarding the so-called new approach to accession by building, which considers the stated intention of the owner of the movable as the most important factor when determining whether accession had taken place. Section 4 2 summarises the conclusions from the previous chapters. The section concludes that both early and recent cases have emphasised the intention of the owner of the movable to determine whether or not accession had occurred. Moreover, although it is true that various cases emphasise the stated intention of the owner of the movable, the objective factors have never been abandoned in the recent cases and in cases where the intention is emphasised more heavily, the objective factors are not really conclusive.

Perhaps the most important conclusion in this section is that there are a small number of important decisions, both from the earlier cases usually associated with the so-called traditional approach and from the recent cases associated with the so-called new approach, where the courts seem to explicitly rely on the relative ease with which the movables can be removed to conclude that attachment had not taken place, even though the movables might seem to have become an integral part of the land or the immovable structure on it. What seems to set these cases apart is the fact that they involve situations where the movables are subject to a credit sale in which the owner reserved ownership as security. It seems as if the courts are willing to uphold that security right as far as the flexible principles of attachment allow, especially by focusing on the removability aspect. Therefore, since it is true that the movables in all these cases were in fact capable of removal, it is difficult to reach any firm conclusions to this effect.

In section 4.3 the chapter discusses criticisms against case law that is associated with the new approach. The criticisms are mainly directed at the emphasis that various cases in the so-called new approach place on the intention of the owner of the movable when determining whether accession had taken place. Academic commentators criticise the role that intention plays in these cases because accession is a form of original acquisition of ownership and not derivative acquisition, which requires intention to transfer ownership. Moreover, the role of intention in the so-called new approach is criticised for confusing the rules of contract with those of property. The emphasis that the so-called new approach places on the intention is also criticised for conflicting with the publicity principle, which ensures that a real right as well as its contents and the identity of its holder should be made known and published to the world at large.

I argue in section 4.3 that criticism against the greater emphasis on subjective intention is correct, but point out that even though the courts sometimes consider the intention of the owner of the movable as the most important factor, the objective factors are not conclusive of accession in those cases in any event. According to the *inaedificatio* principles, movable structures that have been permanently attached to land cease to exist as independent things and become part of the immovable object to which they are attached. Therefore, if the independent identity of a movable is not lost or if the movable is still removable with ease, it is unnecessary to see the courts' increased reliance on the intention of the owner of the movable as an indication that the court either abandoned the objective factors or shifted to a whole new approach. However, I also point out that there are a few recent decisions that follow what appears to be a new approach to the extent that they explicitly focus on the intention of the owner of the movable, as opposed to the intention of the annexor, and that

they explicitly justify this focus with an appeal to the principle that an owner should not lose ownership against his will. These decisions are open to the academic criticism already mentioned.

Section 4.4 discusses justifications for the courts' apparent willingness to uphold security rights created by reservation of ownership of the movables. The section focuses on the decisions in *Macdonald*, *Melcorp* and *Konstanz*. In these cases the courts seemed to justify their reliance on the intention of the owner of the movable by explicitly stating that an owner of a movable should not be deprived of ownership without his consent. It also appears that this approach might be justified by commercial policy reasons. This is because in the event where accession does take place the owner of the movable loses not only ownership but a significant real security interest that is important to commercial transactions and economic stability. I argue that if the courts hold that accession is suspended in these cases it might be an effective way of debt enforcement, as long as the movable is in fact still removable, which prevents a complete abandonment of the accession principles.

In section 4.5 above I assess the constitutional implications for deciding that accession had either occurred or that it had been suspended by a reservation of ownership. In this section I discuss the structure, purpose and application of section 25 of the Constitution and the *FNB* methodology that is to be followed when dealing with a constitutional property challenge in terms of section 25. In section 4.5.2.1 I ask – in terms of the first step in *FNB* methodology - whether there is property for purposes of section 25(1). The section indicates that the property interest involved in attachment cases is ownership of the movables, which qualifies as property for section 25 purposes. The section also describes the interests that are affected when the court decides a “normal” accession case and a case where accession had not

occurred, for example because ownership was reserved in a credit sale. In the former instance, the owner of the movable loses ownership of the property that has become permanently attached to land as a result of accession while in the latter instance no loss or acquisition of property interests is involved because the affected landowner does not acquire any property for purposes of section 25(1). The landowner never acquired ownership of the movable property that was not attached to the land and therefore has no property interest to protect.

Section 4 5 2 2 asks whether there is deprivation of property if the court decides either that accession has occurred or that it has not occurred in a case where the movable is subject to a credit sale with reservation of ownership. After an analysis of what constitutes deprivation for the purposes of section 25, section 4 5 2 2 indicates that an owner of the movable can prove deprivation of property in a “normal” case of accession, where it is decided that accession had indeed taken place. The section also indicates that a landowner cannot prove deprivation of property in a case where it is held that accession had not taken place, for example when a movable is subject to a credit sale with reservation of ownership. This is because the land owned by the landowner never included the movable through *inaedificatio* and was therefore never deprived of any property interest. I conclude in this section that deprivation will only occur in a “normal” case of accession where the objective factors indicate permanent attachment of a movable to land and the owner of the movable can no longer claim ownership thereof. Accordingly, the question whether the deprivation amounts to arbitrary deprivation of property also only arises in the cases where accession did in fact occur.

Deprivation is arbitrary if the law that authorises the deprivation does not provide sufficient reason for the particular deprivation in question or is procedurally

unfair. Therefore, if the court decides that a movable no longer exists independently because accession had occurred and that its removal from the land would cause damage to the land or the movable, that seems to be sufficient reason for holding that the deprivation was not arbitrary. On this basis I conclude that a deprivation in the form of loss of ownership of a movable that has become permanently attached to land would generally not be arbitrary if the court holds that accession had occurred.

In section 4 5 2 3 I ask whether the deprivation that is not arbitrary amounts to expropriation. The section concludes that loss of ownership by operation of law in terms of a common law principle such as the rules of accession does not qualify as an expropriation that activates section 25(2) or 25(3). This is because loss of property by operation of the rules of common law does not generally qualify as expropriation in South African law.

## List of abbreviations

*ASSAL*: Annual Survey of South African Law

*CILSA*: Comparative and International Law Journal of Southern Africa

*Edin LR*: Edinburgh Law Review

*LAWSA*: The Law of South Africa

*SALJ*: South African Law Journal

*THRHR*: Tydskrif vir die Hedendaagse Romeins-Hollandse Reg

*TSAR*: Tydskrif vir die Suid-Afrikaanse Reg

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