Accession of movables to land, South African law and Dutch law*

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Abstract

Accession is an original method of acquisition of ownership. For purposes of this article it refers to the situation where movable things which are attached to land permanently become part of the land and therefore the property of the owner of the land. This method of acquisition of ownership is called 'building' or '*inaedificatio*' in South African law. The Dutch Civil Code provides that buildings or other improvements that have been united with land in a durable manner become immovable things through 'vertical accession'. In this article, the criteria to determine whether a movable thing becomes permanently attached to land that are applied in South African law are referred to and are compared to those applicable in Dutch law. An interesting aspect in this field of study, which will specifically be addressed in this article, is the question whether objective or subjective criteria should be considered when determining whether a movable thing became an immovable thing through accession or not.

INTRODUCTION

The common law principle, *superficies solo cedit*,[1] which provides that buildings and other structures become the property of the owner of the land on which they have been built or erected, forms the basis of the rules relating to accession in both South African[2] and Dutch law.[3]

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1 Gaius *Inst* 2.73.

2 Badenhorst *et al Silberberg and Schoeman's the law of property* (2006) 147; Sonnekus & Neels *Sakereg vonnisbundel* (1994) 301; Van der Merwe & De Waal *The law of things and servitudes* (1993) 126.

3 Heyman 'Wanneer is een gebouw of werk "duurzaam met de grond verenigd?"' in Bartels & Milo (eds) *Open normen in het goederenrecht* (2000) 91; Ploeger *Horizontale splitsing van eiendom* (1997) 93, 105; Van Velten *Privaatrechtelijke aspecten van onroerende goed* (2006) 46; *cf* Snijders & Rank-Berenschot *Goederenrecht* (1994) 223–224.

In this article the focus falls on what is referred to in South Africa as building or *inaedificatio*. Building can be described as the permanent attachment or annexation of buildings or other structures to land.[4] These buildings and other structures become the property of the owner of the land.[5] The attached movable thing is accessory to the principal thing, which is always the land. South African legal writers have different views on the classification of accession as an original method of acquisition of ownership. The majority of authors consider accession as an original method of acquisition of ownership. Badenhorst, Pienaar and Mostert[6] discuss *inaedificatio* as a subsection of accession in a chapter dealing with original methods of acquiring ownership. In a similar vein, Van der Merwe and De Waal[7] indicate that accession and therefore also *inaedificatio*, is an original method of acquisition of ownership.

On the other hand, Sonnekus and Neels[8] argue that acquisition of ownership cannot be a legal consequence of accession. This is so because the owner of the accessory thing which is attached loses his or her ownership because the attached thing is destroyed and loses its independence. This accessory thing can no longer be the object of a real right. The owner of the principal thing can therefore not receive 'original' ownership over the accessory thing.

In Dutch law accession is considered to be an original method of acquisition of ownership.[9] The Dutch Civil Code provides that buildings or other improvements[10] that have been united with land in a durable[11] manner are immovable things. This is called vertical accession.[12] No new thing is formed but one thing becomes a component of another. A component[13] can be described as an object which forms part of an immovable thing and therefore is considered also to be immovable. Such a thing loses its independence. Examples of components would be the floor, the walls and roof tiles of a house. These things are not independent things but components of a house and therefore of the land on which the house is constructed. Accession

4 Badenhorst n 2 above at 147.
5 *Ibid*.
6 *Id* at 141–147.
7 Van der Merwe & De Waal *The law of things and servitudes* (1993) 116.
8 Sonnekus & Neels n 2 above at 299–300.
9 Zwitser 'Accessie hier en in het buitenland (I)' 1996 *WPNR* 87; Fikkers *Privaatrecht natrekking, vermenging en zaaksvorming* (1994) 5; *cf* Snijders & Rank-Berenschot n 3 above at 249.
10 'Werken'.
11 'Duurzaam'.
12 'Vertikale natrekking'.
13 Or 'bestanddeel'.

becomes specifically relevant when the term 'component' is analysed. Snijders and Rank-Berenschot[14] indicate that 'bestanddeelvorming' and 'natrekking' are in fact synonyms. Ploeger,[15] however, argues that vertical accession and 'bestanddeelvorming' should be two separate legal institutions which should be considered separately from each other. Van Velten[16] asks whether a house that is built on land should be considered to be a component of the land. In Van Velten's view, a house does not lose its independent nature like a brick built into the house.

In this article, the criteria applied in South African law determining whether a movable thing becomes permanently attached to land will be stated briefly and compared to those relevant in Dutch law. Furthermore, the article only deals with accession of buildings and other structures to land. The interesting aspect in this field of study is whether objective or subjective criteria should be considered when determining whether a movable thing became an immovable thing through accession, or not. Special attention is paid to the situation where a third person reserves ownership over movable things that are 'attached' to land.

CRITERIA

South Africa

Whether a movable becomes part of the land through *inaedificatio* depends on the circumstances of every case.[17] South African courts apply three criteria to decide whether permanent annexation has taken place or not. These factors are the nature and purpose of the movable thing; the manner and degree of the annexation to the land and the intention of the owner of the movable or of the person who attached the movable.[18]

Over time, legal scholars identified three possible approaches that can be discerned from the courts' approaches to determine the order in which these criteria must be considered and their relative importance. The first approach,[19] the so-called 'traditional approach', entails that the subjective intention of the owner of the movable is only considered if the first two objective criteria are inconclusive. If the first two factors do not clearly

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14 Snijders & Rank-Berenschot n 3 above at 249.

15 Ploeger *Horizontale splitsing van eigendom* (1997) 125–127.

16 Van Velten *Privaatrechtelijke aspecten van onroerende goed* (2006) 52.

17 *Olivier v Haarhof & Co* 1906 TS 497; *MacDonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454 466.

18 Badenhorst *et al* n 2 above at 147. Van der Merwe & De Waal n 2 above at 126.

19 Badenhorst *et al* n 2 above at 149; Van der Merwe & De Waal n 2 above at 127; *cf* Mostert *et al The principles of property law* (2010) 173–175.

indicate that permanent annexation has taken place, the intention of the owner of the movable is considered, and is decisive.

The second approach, the so-called 'new approach', entails that the subjective intention of the person who attached the movable thing is the most important factor that has to be considered and that the other two factors may be used to determine this intention.[20] A different angle on the new approach is that the intention of the owner of the movable is the only factor that must be considered, and that the other two factors are factors from which the intention of the owner of the movable can be derived.[21]

In *Sumatie (Edms) Bpk v Venter NNO*[22] a third approach, the so-called 'omnibus approach' was suggested. This approach entails that the purpose of the annexation should be the principal consideration. This approach has received much criticism.[23]

Common sense,[24] reasonableness[25] and the prevailing standards of society[26] have also been mentioned in South African case law as criteria that should be considered to determine whether permanent annexation of a movable to land has taken place. In *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd*,[27] Van der Westhuizen AJ argued that the question that must be answered first is whether the movable thing in question was permanently attached to the land. This has to be done with reference to the objective criteria, namely the nature and purpose of the movable thing and the manner and degree of annexation thereof. If these two considerations do not result in a conclusion, one has to consider how the society or a reasonable member of the society would consider the situation. Freedman[28] criticises the latter approach and indicates that this consideration is an

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20 Interpretation of Badenhorst *et al* n 2 above at 149–150; also *Standard-Vacuum Refining* case 678B–C; *Theatre Investments* case 688E–F; *Trust Bank van Afrika Bpk v Western Bank Bpk* 1978 4 SA 281 (A) 295; *cf* Mostert *et al* 173–175.

21 Interpretation of Van der Merwe *Sakereg* (1989) 254; also see Freedman 'The test for *inaedificatio*: what role should the element of subjective intention play?' 2002 *SALJ* 667 670.

22 1990 1 SA 173 T 189.

23 Badenhorst *et al* n 2 above at 150–151; *Konstanz Properties (Pty) Ltd* case 281; *Unimark Distributors (Pty) Ltd* case 1000B.

24 [2008] 1 All SA 557 (T) par 54.

25 *Ibid*.

26 *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 2 SA 986 (T) 1001F.

27 1999 2 SA 986 (T) 1001F.

28 Freedman 'The test for inaedificatio: what role should the element of subjective intention play' 2000 *SALJ* 667 675–676.

additional objective criterion which has the effect of assigning a less important role to the consideration of the subjective intention of the owner of the movable. For Freedman, this is not in accordance with the new approach. Freedman also expresses doubt about the practical applicability of such a criterion.

It is noteworthy that most South African authors are of the opinion that accession is an original method of acquisition of ownership.[29] This implies that the will or intention of the owner of the movable plays no role because ownership passes by operation of law. Nevertheless, it is clear that in South African law, the subjective intention plays a role to determine whether permanent annexation of movables to land has taken place. A principal point of criticism against the consideration of a subjective intention in order to determine whether building has taken place, is possibly based on the classification of accession as an original method of acquisition of ownership. Sonnekus and Neels[30] maintain that the factor of intention has been over-emphasised and that it should not be applied. They argue that purely objective criteria should be decisive in cases of accession. Van der Merwe[31] argues that when the intention of the owner of the movable thing is emphasised, *inaedificatio* as an original mode of acquisition of ownership is confused with derivative methods of acquisition of ownership. The intention of the owner is required to transfer ownership in the case of derivative acquisition of ownership. Van der Merwe adds that if the intention of the owner of the movable thing is considered as the decisive criterion, the publicity principle is ignored. In Van der Merwe's view, a misrepresentation is created if the objective criteria, namely the nature and purpose of the attached thing and the manner and degree of annexation, indicate that the movable thing has merged with the principal thing, but the thing is nevertheless deemed to have an independent existence only because of the fact that the owner of the movable thing never had the intention that the movable should become part of the immovable thing. Lewis,[32] on the other hand, is of the opinion that a change in ownership should not be effected without an intention to do so and therefore she regards the owner's intention as decisive. Badenhorst *et al*[33] state that the role of intention, especially in the form of direct evidence, has been over-emphasised. Miller[34] argues that a

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29 Badenhorst *et al* n 2 above at 137, 147; Van der Merwe & De Waal n 2 above at 116.
30 Sonnekus & Neels n 2 above at 75.
31 Van der Merwe n 21 above at 257.
32 Lewis '*Superficies solo cedit – sed quid est superficies*' 1979 *SALJ* 94 106–107.
33 Badenhorst *et al* n 2 above at 150.
34 Miller *The acquisition and protection of ownership* (1986) 33.

subjective intention should only be relevant as a means of deciding borderline cases.

The subjective intention of the owner of a movable thing that is attached to land becomes particularly relevant when such an owner reserves ownership until the last instalment has been paid. If such a movable is attached before payment of the final instalment, the owner of the movable usually claims the attached 'movable thing' from the owner of the immovable thing to which the movable has been attached. Examples of this situation can be found in South African cases such as *MacDonald Ltd v Radin NO and The Potchefstroom Dairies and Industries Co Ltd*,[35] *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk*[36] and *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter*.[37] In a relatively recent decision, *Chevron South Africa (Pty) Ltd v Awaiz at 110 Drakensburg CC*,[38] the North Gauteng High Court again applied the intention of the owner of the movable thing, in this case an underground petrol tank, to come to the conclusion that permanent attachment had not taken place. The facts of this case were however, different. The applicant in *Chevron* provided the petrol tanks in terms of a written supply agreement for a specific period of time.[39]

The subjective intention of an owner of movables was also considered in a recent unreported decision, *York International (SA) Inc v The Minister of Public Works*.[40] This decision concerned the question whether certain air conditioners which were installed in a building became permanently attached. The air conditioners were purchased in terms of an agreement that contained a clause providing that the air conditioners shall be deemed to remain movable and severable property notwithstanding the fact that they have been fixed to land owned by the purchaser or any other person. The Western Cape High Court held that the air conditioners were permanently attached. The court's finding was based on the intention of the contractor who installed the air conditioners. Ndita J made an interesting remark:

> … as in all contracts, if the owner of movable property, which is to be attached to immovable property, wishes to denounce the application of the principle of *accessio*, such intention should be unequivocally imparted to

35 1915 AD 454.
36 1996 3 SA 273 (A).
37 2004 6 SA 491 (SCA).
38 [2008] 1 All SA 557 (T) par 68.
39 Paragraph 16.
40 2009 JDR 0603 (WCC).

> the owner of the immovable property who will then decide whether to accept or reject such terms.[41]

The judge therefore seems to place a qualification on the criterion of the intention of an owner of movable things that are attached to land. A reservation of ownership provision should in his opinion be conveyed to the owner of the immovable property to be effective.

Clearly both objective criteria and subjective criteria are applicable in South Africa law in order to determine whether a movable became permanently attached to an immovable through *inaedificatio*. It is often unclear which approach should be followed.

The Netherlands

The Dutch Civil Code[42] contains different provisions concerning accession. Article 3:3[43] of the Dutch Civil code defines immovable property. Article 3:4[44] defines component parts that accede to property. Article 5:3[45] provides that the owner of a thing is also the owner of the components of that thing. Article 5:20[46] is also relevant and provides that land comprises of buildings and other structures which have been united with the land either directly or through incorporation with other buildings or structures, to the extent that they are not part of an immovable thing of another person.

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41 2009 JDR 0603 (WCC) par 10.

42 Burgerlijk Wetboek (*BW*) hereafter referred to as the 'Dutch Civil Code'.

43 Art 3:3 1 'Onroerend zijn de grond, de nog niet gewonnen delfstoffen, de met de grond verenigde beplantingen, alsmede de gebouwen en werken die duurzaam met de grond zijn verenigd, hetzij rechtstreeks, hetzij door vereniging met andere gebouwen of werken. 2 Roerend zijn alle zaken die niet onroerend zijn.'

44 Article 3:4 1 'Al hetgeen volgens verkeersopvatting onderdeel van een zaak uitmaakt, is bestanddeel van die zaak. 2 Een zaak die met een hoofdzaak zodanig verbonden wordt dat zij daarvan niet kan worden afgescheiden zonder dat beschadiging van betekenis wordt toegebracht aan een der zaken, wordt bestanddeel van de hoofdzaak.'

45 Art icle 5:3 'Voor zover de wet niet anders bepaalt, is de eigenaar van een zaak eigenaar van al haar bestanddelen.'

46 Article 5:20 1 'De eigendom van de grond omvat, voor zover de wet niet anders bepaalt: a de bovengrond; b de daaronder zich bevindende aardlagen; c het grondwater dat door een bron, put of pomp aan de oppervlakte is gekomen; d het water dat zich op de grond bevindt en niet in open gemeenschap met water op eens anders erf staat; e gebouwen en werken die duurzaam met de grond zijn verenigd, hetzij rechtstreeks, hetzij door vereniging met andere gebouwen en werken, voor zover ze geen bestanddeel zijn van eens anders onroerende zaak; of met de grond verenigde beplantingen. 2 In afwijking van lid 1 behoort de eigendom van een net, bestaande uit een of meer kabels of leidingen, bestemd voor transport van vaste, vloeibare of gasvormige stoffen, van energie of van informatie, dat in, op of boven de grond van anderen is of wordt aangelegd, toe aan de bevoegde aanlegger van dat net dan wel aan diens rechtsopvolger.'

Article 3:3 provides that a building or other improvements that have been affixed to the land in a durable manner are immovable things. Heyman[47] argues that the criterion which provides that a movable should be affixed in a durable manner with an immovable, is a vague norm and it is neither clear what 'durable' means, nor when a movable is in fact affixed to land. He points out that the application of this criterion has the result that too many movable things are considered to be permanent attachments. In order to determine whether something is attached to land durably the intention of the builder is considered, but only to the extent that it can be determined objectively. Van der Grinten[48] queries how such an intention could be determined and suggests that a better criterion would be that the attachment should be of such a nature that separation is not possible without causing damage. This would tie in with the definition of a component and the criterion would then be objectively determinable without considering the intention of the builder. He further states that one could also argue that the question should be whether the attached thing can have a separate existence or whether it has been united with the land.

The Dutch Supreme Court, in the so-called '*Portacabin* decision',[49] held that a building may be immovable in terms of article 3:3, if, according to its character and construction, it is destined to remain in place permanently even though it is possible to move the building somewhere else. The court also referred to the destination of the building or other attachment. If the destination is of such a nature that it is objectively visible that the thing should remain permanently attached, accession will take place.

Van der Plank[50] indicates that the development of the destination criterion has in fact led to the extension of the provisions contained in article 3:3. She states that in terms of this criterion, no physical connection is necessary, but the only requirement is that the building or structure should be destined to become part of the land in a durable manner. This extension has led to much criticism.[51]

The court in the *Portacabin* decision also referred to the subjective intention of the builder as far as it is objectively determinable. This criterion means

47 Heyman n 3 above at 118.

48 Van der Grinten 'Bestanddeel, bijzaak, hulpzaak' 1971 *WPNR* in Jansen *et al* (eds) *Verspreide Geschriften van W.C.L. Van der Grinten* (2004) 231–239 238.

49 NJ 1998, 97.

50 Van der Planck 'De indirecte vereniging van art 3:3 j art. 5:20 sub e BW' 2009 *WPNR* 346–352 347.

51 Heyman n 3 above at 91 118; Kortmann 'De *Portacabin*' 1998 *Ars Aequi* 101 105.

that the builder should have had the intention that the building should be attached in a durable manner.

Article 3:4 of the Dutch Civil Code provides that when common opinion ('verkeersopvatting') indicates that a movable thing became a component part of a piece of land, accession will take place even though the attached thing can be separated without damaging the movable or the land (for example the door of a house). However, if a thing cannot be separated from the land without damaging either the attached thing or the land, the attached thing will be considered to have become a component of the principal thing. In the *Portacabin* decision, the Dutch Supreme Court pointed out that common opinion will only be relevant if it is not clear whether an object has been attached with the land in a durable manner. Van der Grinten[52] argues that referring to common opinion in this regard is inescapable and that the only way to determine whether things were united permanently is by referring to common opinion. Kortmann[53] also states that common opinion should not only fulfil an ancillary role, but that it should be considered in order to determine whether a building that is united with land in a durable manner is immovable and therefore a component of the land.

The true meaning of the term 'verkeersopvatting' or, translated into English 'common opinion', 'public opinion', 'generally accepted principles' or 'generally accepted views', is unclear and Memelink,[54] in her doctoral thesis, contends that there is no theoretical framework for the concept and that the potential for legal uncertainty and arbitrariness exists if it is applied. Van Schaick[55] explains that considering common opinion when determining whether a movable thing became a component of an immovable thing through accession protects third parties who may be relying on the apparent or external appearance. Van Schaick admits that this protection of third parties would be at the expense of the owners of the components or the original movable things.

Fikkers[56] mentions certain specific elements that could be considered to determine the contents of 'common opinion'. First, he refers to construction techniques which make it possible to separate components easily. Second, he

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52 Van der Grinten n 48 above.

53 Kortmann n 51 above at 101–105 105.

54 Memelink *De verkeersopvatting* (2009) 389.

55 Van Schaick 'Verkeersopvattingen in het goederenrecht' in Bartels & Milo (eds) *Open normen in het goederenrecht* (2000) 84.

56 Fikkers n 9 above at 34.

suggests that if specific movable things in a certain industry are frequently purchased in terms of a reservation of ownership provision, it could influence the content of common opinion. A third element is that if in a certain industry specific movables usually form part of a particular principal thing, it could also influence the opinion. A fourth consideration suggests that if an immovable thing, such as a factory, would be incomplete without a certain apparatus or machine, such thing should be considered part of the immovable thing.

Zwitser[57] argues that the rules of accession have an unfair result, because sometimes a person's ownership over his or her thing is lost against his or her will. He also refers to jurisdictions where more value is attached to the will of the parties and the interests of the owner of the movable thing. Fikkers,[58] however, strongly argues that the will of the parties is irrelevant in cases of accession. Van Schaick[59] states that if certain components of an immovable thing can be vindicated merely because they can be separated without damaging the principal thing, it will certainly influence potential buyers of such an immovable thing. He concludes that if such a situation is accepted, it could cause uncertainty in commercial dealings. Van Schaick[60] concludes that consideration of the common opinion or 'verkeersopvattingen' has the important advantage of binding a judge to objective criteria.

Van Vliet[61] argues that either article 3:3 or article 3:4 could lead to accession. A movable could accede to land in terms of article 3:3 because it should be regarded as immovable. It could also accede to land, because it should be regarded as a component part of the land in terms of article 3:4. In light of this, Van Vliet maintains that the criteria for accession should be the same irrespective of whether article 3:3 or article 3:4 is applied. He also points out that a thing should be considered to be a component part of the land in terms of article 3:4 if the principal thing would be incomplete without the component part.

A good example of the application of the criterion of completeness is found in the so-called '*Dépex*-case'.[62] The Dutch Supreme Court in this decision

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57 Zwitser n 9 above at 87.
58 Fikkers n 9 above at 23.
59 Van Schaick n 56 above at 84.
60 Van Schaick n 55 above at 89.
61 Van Vliet 'Accession of movables to land: I' 2002 *EdinLR* 67 73.
62 NJ 1993, 317.

had to determine whether a certain distillation apparatus which had been purchased in terms of a reservation of ownership provision for installation in a pharmaceutical factory became part of the factory through accession. The court decided that the factory would have been incomplete without this apparatus and would not have been able to serve its purpose. The apparatus was therefore considered to be a component of the immovable thing and consequently the reservation of ownership provision was ineffective. The apparatus in this decision was not attached to the factory in such a manner that article 3:4 could apply. It was apparently possible to remove the apparatus without causing damage.

Van der Plank[63] discusses the interpretation of and interaction between the relevant articles of the Dutch Civil Code. In her discussion she clearly distinguishes between the situation where buildings and other structures which are directly united with *land* in a durable manner on the one hand and *buildings* and *structures* which are indirectly united with land through the union with another building or structure. She concludes that a better interpretation than the destination criterion, which was formulated in the *Portacabin* decision, is that buildings and other structures become immovable if they are destined to remain on the land to which they attach in a durable manner. A movable thing should in her view[64] only become a component of a building or other structure if the movable is attached in such a manner that separation thereof cannot take place without causing damage to either of the things in terms of article 3:4.

Van Vliet[65] has yet another interpretation, namely that the criterion of completeness sets a requirement for accession which is much more severe than the criterion that was set out in the *Portacabin* decision. In his view industrial equipment will usually not accede permanently if the completeness criterion is applied. Van Vliet points out that this would result in the possibility of financing expensive industrial equipment separately from the immovable to which they are attached. Because they do not accede, they may serve as objects of a non-possessory pledge or a sale and lease back transaction. The possibility of separate financing could be jeopardised if such equipment would accede in terms of the *Portacabin* criterion of article 3:3 which entails that a building may be immovable if, according to its character and construction, it is destined to remain in place permanently even though the building could be moved somewhere else. The destination of the building

63 Van der Planck no 50 above at 346, 348.
64 *Id* at 346 352.
65 Van Vliet n 61 above at 67, 74.

is also relevant. Accession will take place if the destination is such that it is objectively clear that the thing should remain permanently attached.

As mentioned above, a third article, namely article 5:20(e), is also relevant for this discussion. Wolfert[66] discusses the interaction between articles 3:3, 3:4 and 5:20 respectively. She states that the popular view is that article 5:20 is a specific method of 'bestanddeelvorming'.[67] With reference to the *Portacabin* decision and also a decision concerning the accession of a tombstone, she refers to an extraordinary situation; in both these decisions the Dutch Supreme Court held that the movable things (a caravan and a tombstone) became immovables through accession in terms of article 3:3 and therefore became the property of the owner of the land in terms of article 5:20, but not components of the land in terms of article 3:4.[68]

Kortmann,[69] in a note regarding the *Portacabin* decision, indicates that the fact that the court decided that the land and the container forms one thing, should mean that the container is also a component of the land. He suggests that 'bestanddeelvorming' could take place both in terms of articles 3:4 and 5:20 respectively and argues that article 3:4 contains the general criteria and article 5:20 specific criteria.

As in South Africa, similar problems arise in the Netherlands if a seller of a movable thing reserves ownership until the full purchase price has been paid, but then loses his or her ownership because the 'movable' thing became part of land through accession. Fikkers[70] explains that the owner of the principal thing to which a movable thing has been attached will become the owner of the movable thing even though such a thing has not been paid for and was purchased under a reservation of ownership clause. The predecessor of article 3:4 of the Dutch Civil Code, namely article 3.1.1.3 of the *Ontwerp BW*, provided that accession of a movable thing and an immovable principal thing could be prevented by registering the agreement containing the reservation of ownership provision of the movable thing. Van der Grinten[71] expresses concern about this provision and argues that if such a provision is allowed, a bricklayer who provides the bricks himself would be able to remain owner of the bricks even though they have been built into a wall. This provision has

66 Wolfert 'Bestanddeel of zaak? Over het onderscheid en samenhang tussen de artikelen 3:4 en 5:20 BW (I)' 2003 *WPNR* 191

67 *Id* at 192.

68 *Id* at 193.

69 Kortmann n 51 above at 101–105, 103.

70 Fikkers n 9 above at 23.

71 Van der Grinten n 48 above at 185–194, 188–189.

however been scrapped because of the uncertainty it held for creditors, as they would never have been able to know exactly which objects were subject to their security.

The Dutch Supreme Court, in a taxation decision,[72] stressed that the subjective intention of the owner of the movable thing cannot determine whether an object is movable or immovable. The court stated that the subjective intention of the plaintiff could only be relevant in so far as it could be derived from the physical features.

One can conclude that in contrast to South African law, where both subjective and objective criteria are applied to determine whether a movable thing became immovable through accession, only objective criteria are considered in terms of Dutch law.

CONCLUSION

This exposition of accession in South African law and Dutch law clearly highlights that the application of the principles to determine whether a movable thing became permanently attached to land or not, are complicated and sometimes also confusing. For purposes of South African law, it is important to note that even if the so-called modern approach is applied, objective criteria cannot be ignored. South African case law suggests that it is correct to apply not only objective criteria, but under appropriate circumstances also to consider the subjective intention of the owner of the movable thing. The modern approach, as explained above, provides that the objective criteria are '*indicia*' from which the intention of the owner can be inferred. It is clear that the circumstances of every case should be considered to determine whether permanent annexation has taken place or not. In the *Chevron* decision,[73] mentioned above, the court was also influenced by the fact that it could be potentially harmful to the environment if a petrol tank is left in the ground.

Two final remarks regarding the exposition are appropriate: first, the criteria in South African law and Dutch law are very different. South Africa does not have a Civil Code and therefore the criteria were formulated differently in a range of South African court decisions. The criteria applicable to accession in the Dutch Civil Code are contained in different articles of the code. The principal difference between the criteria applicable in the two legal systems

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72 *HR* 5 January 2000, BNB 2000/83.

73 [2008] 1 All SA 557 (T) par 75.

is that in South African law, the subjective criterion of intention plays an important role, although its application is subject to criticism. On the other hand, only objective criteria are applied in Dutch law. As mentioned, the intention of the builder is sometimes considered, but it is interpreted in a manner that also objectifies it. Van der Grinten[74] holds the view that the term 'bestanddeel' (component) should not be interpreted generously, because that would harm the 'rechtsverkeer' in the sense that it would make the reservation of ownership in respect of components which were delivered ineffective. Zwitzer[75] points out that in certain countries, more value is attached to the will of the parties. He points out that legal certainty underlying the rules of accession does not always convince and that these rules could have unreasonable results.

Second, South African legal authors have developed certain approaches in order to achieve some logical order in the various criteria applied in the courts. In Dutch law, although not specifically referred to as 'approaches', Dutch legal commentators have also attempted to determine the relationship and the interaction between the different articles in the Dutch Civil Code regarding accession.

It is perhaps appropriate to conclude with the opinion of Heyman,[76] who states that the question whether permanent accession has taken place or not is 'een lastige kwestie, waarmee tot op die huidige dag in de rechtsstelsels die het superficies-beginsel hebben aanvaard, wordt geworsteld'.[77]

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74 Van der Grinten n 48 above at 188.

75 Zwitser n 9 above at 87.

76 Heyman n 3 above at 91.

77 or freely translated: 'a perplexing issue with which legal systems that accept the *superficies* principle are struggling with until today'.