REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 32100/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

25/1/2013
DATE

SIGNATURE

In the matter between:

M C PIETERSE CONSTRUCTION CC
t/a CMR CONSTRUCTION Applicant

and

ADOLF WALTER FAULHABER Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This application concerns the temporary restoration of the applicant's security for costs in *lieu* of its builders' lien which was relinquished during arbitration proceedings between the parties, as discussed more fully below.

[2] More specifically, the applicant seeks an order that the respondent pay an amount of R500 000,00 into the trust account of his attorneys, J J S Manton, to be invested in an interest-bearing account in terms of sec 78(2A) of the Attorneys Act 53 of 1979. That such amount is to be retained in the trust account pending the outcome of an action to be instituted by the applicant against the respondent for payment of the sum of R1 130 862,20. From the papers, it appears that the applicant, in the alternative, has no objection if such amount be paid into the trust account of the respondent's attorneys for the same purpose. By all accounts, the relief sought is therefore interim in nature.

[3] I must at the outset point out that the respondent is opposing strenuously the relief sought on several grounds. These grounds, as set out more fully below, include that the applicant is non-suited to launch the present proceedings; that the relevant contract relied upon by the applicant was not valid; that there was no need for the restoration of the security; and that the respondent has a counterclaim against the applicant.

THE COMMON CAUSE FACTS

[4] For present purposes, first, the common cause facts. The parties concluded a written building contract at Germiston on 30 January 2008 ("*the contract*"). In terms of the contract, the applicant was to construct a dwelling on the respondent's property situate at Stand 148, Meyersdal ECO Estate Meyersdal ("*the property*"). The contract price was the sum of R512 068,00.

The construction work duly commenced in February 2008 and, on the version of the applicant, the construction was completed for all practical purposes during October 2009, except for two minor outstanding issues.

[5] Clause 13 of the contract provided for the settlement of any disputes by arbitration. In due course, certain disputes arose between the parties. As a consequence, the applicant instituted arbitration proceedings against the respondent. During November 2009, agreement was reached between the parties on the appointment of an arbitrator, i.e. Adv E P van der Hoven. One of the key issues raised in November 2009 was the applicant's lien over the property. The issue was raised by the applicant's former attorneys of record, Messrs Calteaux and Partners ("*Calteaux and Partners*"), in a letter dated 11 November 2009, annexure "B", addressed to the respondent. The material parts of the letter read as follows:

> "*Our client has performed in terms of the agreement, the dwelling being complete save for a balustrade and electrical object. Notwithstanding our client performing in terms of the agreement, you have failed to pay the sum of R1 000 000,00 which dispute has been referred to arbitration in terms of the agreement. Our client records that notwithstanding the fact that they have a lien over the property due to the fact that you have failed to pay the monies due you are requesting occupation. We record that our client will exercise the lien over the property in consequence whereof the property will not be delivered to you until such time that the arbitration is complete and they have received all monies outstanding to them.*"

[6] The common facts continue. There were several arbitration sessions. However, whilst the arbitration was proceeding, the respondent launched an urgent interlocutory application in which he sought an order, *inter alia*, that the

applicant had no right to a lien, and that the applicant should allow the respondent free and undisturbed possession of the property. The parties agreed that the appointed arbitrator in the main dispute could hear and adjudicate on the urgent interlocutory application.

[7] The parties, however, agreed to settle the interlocutory application and they made the settlement agreement a consent order which provided that the costs of the interlocutory application was to be argued and it was left to the arbitrator to make a final ruling on costs. Pursuant to hearing argument on costs, the arbitrator made a consent and a costs award in the following terms:

> *"6.1 The respondent withdrew the urgent interlocutory application;*
>
> *6.2 The respondent tendered security in the amount of R500,000.00;*
>
> *6.3 The security was to be paid on or before the 7th January 2010, and into the trust account of the arbitrator;*
>
> *6.4 Possession of the property was to be handed over the respondent once security had been paid, as mentioned above;*
>
> *6.5 Until the possession of the property was handed over to the respondent, the applicant was responsible for the security of the property; and*
>
> *6.6 As far as the costs award was concerned, the respondent was ordered to pay the applicant's costs on the High Court tariff on the scale as between party and party."*

[8] Thereafter, and on 15 January 2010, the arbitrator issued General Notice No 5 in which he notified the parties that the respondent had in fact complied with the security requirements, and had paid an amount of R500 000,00 into the arbitrator's trust account. The Notice also required the

applicant to hand over complete, free and unrestricted possession of the property to the respondent as of 13 January 2010, in accordance with the agreement between the parties. Once the security had been furnished by the respondent, he was given unrestricted access to the property.

[9] As a consequence of certain developments, which are immaterial for present purposes, the arbitrator recused himself during August 2010. Soon after such recusal, the arbitrator refunded to the respondent, *inter alia*, the amount of R500 000,00 which he had held in the trust account for and on behalf of the applicant as security.

[10] The further developments showed that there was no cooperation between the parties. For example, the respondent was requested to reinstate the security, which requests, on the version of the applicant, were ignored. Attempts to have another arbitrator appointed have been unsuccessful. The parties want the litigation to proceed in the High Court.

THE PROVISIONS OF SECTION 10(1)(b) OF THE HOUSING CONSUMERS PROTECTION MEASURES ACT 95 OF 1998

[11] In response to the applicant's claim, the respondent has raised in his answering papers and heads of argument several defences. The main challenge mounted by the respondent as dealt with in his supplementary heads of argument, in essence was the following: The applicant's right to the reinstatement of the claim was flawed on the basis that the applicant was

never entitled to any lien or payment in security thereof. This, on the contention that the arbitrator's award, referred to above, is void *ab initio* due to the applicant being prohibited in law from receiving any payment whatsoever in terms of any agreement for the construction of a home because applicant was never registered in terms of sec 10(1)(b) of the Housing Consumers Protection Measures Act 95 of 1998 ("*the Act*"). In the alternative, it was argued that the consent award had fallen away upon repayment of the monies and after termination of the arbitration proceedings by agreement between the parties. I deal first with this contention immediately below.

[12] The contention based on the Act is capable of relative easy disposition in favour of the applicant since it clearly overlooked the whole purpose of the present application. It was common cause that there is presently no builders' lien. The latter was surrendered when the security was paid in January 2010. The purpose of the instant application, as argued by the applicant, is merely to restore the *status quo* as it existed in January 2010 when the amount of R500 000,00 was paid pursuant to the agreement between the parties, and the consent award made by the arbitrator.

[13] To the extent necessary, the pre-amble to the Act provides as follows:

> "*To make provision for the protection of housing consumers; and to provide for the establishment and functions of the National Home Builders Registration Council; and to provide for matters connected therewith.*"

More pertinently, sec 10(1) of the Act, on which the respondent relied, provides that:

> *"(1) No person shall –*
>
> *(a) carry on the business of a home builder; or*
>
> *(b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,*
>
> *unless that person is a registered home builder.*
>
> *(2) No home builder shall construct a home unless that home builder is a registered home builder.*
>
> *(3) The Council shall register a home builder, on application in the form and manner prescribed by the Council, if the Council is satisfied that the home builder -*
>
> *(a) meets the criteria prescribed by the Minister under section 7(2);*
>
> *(b) will in carrying on the business of a home builder comply with the home builder's obligations in terms of this Act; and*
>
> *(c) has appropriate financial, technical, construction and management capacity for the specific business carried on by the home builder in order to prevent housing consumers and the Council from being exposed to unacceptable risks.*
>
> *(4) Registration of a home builder shall be subject to the terms and conditions prescribed by the Minister under section 7(2) or imposed in any particular case, and the Council may register a home builder provisionally on the conditions that the Council deem fit.*
>
> *(5) The Council may, without prejudice to the generality of subsections (3) and (4), require any suretyship, guarantee, indemnity or other security that the Council may in its discretion deem necessary to satisfy itself in respect of the requirements contemplated in subsection (3).*
>
> *(6) The Council may, in addition to any other category that the Council may deem appropriate, in the registration of home builders distinguish between -*

(a) home builders themselves having the capacity to undertake the physical construction of homes or to manage the process of the physical construction of homes; and

(c) home builders who in the normal course need to enter into agreements with other home builders in order to procure the capacity referred to in paragraph (a).

(7) A home builder registered in terms of subsection (6)(b) shall be obliged, for the purposes of the physical construction of homes, to appoint a home builder registered in terms of subsection (6)(a).

(8) If an application for the registration of a home builder has been made and the Council is of the opinion that the registration of that homebuilder should be refused, the Council shall notify that home builder in writing of its intention and reasons therefor.

(9) A home builder contemplated in subsection (8) shall be entitled to make representations in writing to the Council in response to any reason provided in terms of that subsection.

(10) If the Council, after consideration of the representations contemplated in subsection (9), is of the view that the home builder has not satisfied the Council regarding the requirements of subsection (3), the Council shall notify that home builder accordingly.

(11) A home builder contemplated in subsection (10) may request the Council within 30 days of receipt of a notification referred to in that subsection, to allow the home builder to present its case to a registration committee established by the Council for that purpose, whose decision shall be the decision of the Council and which shall, subject to section 22(2), be final.

(12) If a home builder fails to exercise its rights in terms of subsection (11), the decision contemplated in subsection (10) shall, subject to section 22(2), be final.

(13) Unless it is approved by the Council and subject to the terms and conditions that the Council may impose, the registration of a home builder with the Council shall not be transferred to any other person.

(14) The Council shall provide information regarding home builders to housing consumers and shall publish lists of home builders and their grading and lists of deregistered home builders.

(15) The Council, a member of the Council or any person in the service of the Council or acting on its authority shall not be liable for any loss or damage resulting from anything done or omitted in good faith in terms of section 9, 10 or 11 of this Act."

[14] The definitions contained in sec 1 of the Act, quoted above, are equally instructive:

> "'*Business of a home builder' means –*
>
> *(a) to construct or to undertake to construct a home or to cause a home to be constructed for any person;*
>
> *(b) to construct a home for purposes of sale or otherwise disposing of such home;*
>
> *(c) to sell or to otherwise dispose of a home contemplated in para (a) or (b) as a principal; or*
>
> *(d) to conduct any other activity that may be prescribed by the Minister for the purposes of this definition,*
>
> *but does not include –*
>
> *(i) the bona fide building of a home by any person for occupation by that person;*
>
> *(ii) the bona fide assistance to a person contemplated in para (i) by a person who is not a registered home builder, in the building of a home; or*
>
> *(iii) the sale or disposal of a housing consumer of his or her bona fide home;*
>
> *'home' means any dwelling unit constructed or to be constructed by a home builder, after the commencement of this Act, for residential purposes or partially for residential purposes, including any structure prescribed by the Minister for the purposes of this definition or for the purposes of any specific provision of the Act, but does not include any category or dwelling unit prescribed by the Minister;*
>
> *'home builder' means a person who carries on the business of a home builder;*
>
> *'housing consumer' means a person who is in the process of acquiring or has acquired a home and includes such person's successor in title;*
>
> *'registered home builder' means a home builder registered with the Council in terms of this Act;*
>
> ..."

[15] From the above, it is more than plain that in enacting the legislation, the Legislature particularly intended to afford protection to consumers against unregistered home builders. In the *Law of Property*, 5ed, the learned authors at 454 para 19.4.1 state that:

> "*The Housing Consumers Protection Measures Act, which has been effective from August 1999, provides for the establishment of a 'National Home Builders Registration Council' to regulate the building industry and to afford protection to purchasers of new homes, which include sectional title units. It renders registration as a 'home builder' obligatory for all professional builders of residential dwellings.*"

Indeed, in *IS & GM Construction CC v Tunmer* 2003 (5) SA 218 (W), the plaintiff had instituted action in the High Court on the basis of a written agreement in which it undertook to erect a dwelling house for the defendant. The defendant excepted to the particulars of claim on the basis that it lacked averments which were necessary to sustain an action in that it had not alleged that it was a registered home builder and that it was therefore, in terms of sec10(1) of the Act, not entitled to receive any consideration. In upholding the exception, Goldblatt J held that, the wording of the Act was clear and unambiguous and unequivocally prohibited an unregistered home builder from receiving any consideration for the erection of the dwelling house. Further that, the Court would not make an order contrary to an express prohibition imposed by the Legislature, and that the Court could not be asked to order the performance of a prohibited or criminal act.

[16] In stark contrast to the above case, is the judgment of C J Claassen J in *Maurice Leas t/a Building 4 You v Van Kerckhoven and Another* [2008] JOL

21875 (W). In that case, the plaintiff had undertaken to effect certain building works on the defendant's home in terms of an agreement between the parties. After the plaintiff commenced the works, the defendants repudiated the agreement. The plaintiff in turn, accepted the repudiation, cancelled the contract, and claimed damages. In relying on the provisions of the Act, the defendants excepted to the plaintiff's particulars of claim on the basis that it disclosed no cause of action. In dismissing the exception, the learned Judge held that an exception to a pleading is only upheld if upon any reasonable reading of the pleading, no cause of action is disclosed. In addition, the learned Judge found that the particulars of claim could be read as disclosing a cause of action based on oral agreements for the construction of an addition to or renovation of an existing home. Finally, in finding that the Act applies to liabilities imposed upon home builders of new homes and not to the construction of subsequent to or renovations of homes by subsequent builders, the Court ruled the provisions of the Act inapplicable (*cf National Home Builders Registration Council v Phillipus van Rooyen and Others* [2006] JOL 17209 (T).

[17] On the facts of the present matter the reliance by the respondent on the provisions of sec 10(1) of the Act was not only irrelevant, but also plainly misplaced for the reasons advanced in the next paragraph. The reasons are also shown in dealing with the respondent's challenge to the validity of the building contract, which I deal with later herein.

[18] The building contract under discussion was entered into between CMR Construction, represented by Mr Michael C Pieterse, on the one hand ("*Pieterse*"), and the respondent representing himself, on the other hand. This was during January 2008. The annexures to both the respondent's answering affidavit as well as the applicant's replying affidavit contain various registration certificates as a home builder issued by the National Home Builders Registration Council ("*the NHBRC*"), in respect of '*MC Pieterse Construction t/a CMR Construction*', with a registration no 11183. The Annual Certificate of Registration, on the papers, cover the period 7 December 2001 to 7 December 2002; 8 June 2006 to 2 June 2007; 12 June 2009 to 2 June 2010; and 3 October 2011 to 2 June 2012.

[19] The annexures also contain a Residential Unit Enrolment Certificate issued by the NHBRC in terms of the provisions of sec 14(1)(c) of the Act on 13 March 2008. The certificate confirmed that '*MC Pieterse Construction has enrolled Unit/Erf no 148, Meyersdal Nature Estate Ext 1 Region Gauteng*'. It was common cause that the enrolment related to the respondent's property. It is significant that all the certificates, including the Enrolment Certificate, contained the same registration number for the holder thereof, being number 11183. It is also significant that the Certificate of Enrolment of the property contained the following inscription:

> "*The enrolment of a home entitles the housing consumer and his/her successor's-in-title to apply to the NHBRC Fund for assistance to rectify a major structural defect in certain circumstances as laid down in section 17 of the Act.*"

The application for the enrolment of the property completed in March 2008, reflected the applicant company's name, and the Home Builder representative as '*M C Pieterse*'.

[20] In the papers, the applicant is cited as '*M C Pieterse Construction CC t/a CMR Construction*". In the replying affidavit, the applicant also attached a close corporation registration number CK198/24968/23 which showed the applicant as '*M C Pieterse Construction CC*'. Mr Michael Christiaan Pieterse is the sole member of the close corporation, registered on 5 May 1998. The respondent contended that the building contract in question was concluded with M C Pieterse in his personal capacity, trading as CMR Construction and not with the applicant.

[21] I have deliberately and extensively dealt with the provisions of the Act, and the annexures relating to the documents issued by the NHBRC. This was merely to demonstrate that the respondent's contention regarding the non-registration of the applicant was untenable and technical in the extreme. These documents all reflect '*M C Pieterse*' as the applicant. The contract price was a staggering R5 120 680,00 of which the applicant is still owed an amount of about R1 130 862,20. It was highly improbable that the applicant would undertake such construction without proper registration with the NHBRC. The respondent too, went through all the procedures agreed to between the parties until the appointed arbitrator recused himself. There was, however, an attempt by the applicant during the arbitration proceedings to rectify the issue of the correct citation of the applicant, which was abandoned.

As matters stand, the respondent remains under the consumer protection afforded by the enrolment of his property by the NHBRC. In addition, the respondent has consistently made interim payments for the contract works completed to CMR Construction, surprisingly not from his personal funds, but by cheques issued by another entity, namely, '*Bramed Family Holdings (Pty) Ltd*'. The applicant has in any event disputed strongly the respondent's assertions regarding non-registration with the NHBRC. In any event, the pertinent and short answer to the respondent's contentions is that the contentions are plainly in conflict with the building contract and occasional oral agreements concluded by the parties. The contentions are also irrelevant to the instant application. It is clear that these issues will best be decided in due course at the trial since the present application is purely interim in nature.

THE APPLICANT'S *LOCUS STANDI*

[22] I deal with the respondent's contentions that the building contract was concluded with M C Pieterse t/a CMR Construction, and not with the applicant, the close corporation. The reasons for the finding that the respondent's contentions regarding the non-registration of the applicant as a home builder are related to the present issue. The contract was concluded between CMR Construction and the respondent. There is no identification in the contract of who carries on business under the name CMR Construction. However, as stated above, the contractor's capacity, i.e. the close corporation registration number is supplied. The number is plainly a company/or close

corporation registration number, and not a personal ID no of Pieterse. M C Pieterse is the sole member of the close corporation.

[23] The respondent argued that all the invoices were issued by CMR Construction and all payments in terms thereof were made to CMR Construction. The argument, however, in fact lends credence to the applicant's contention that the contracting parties were CMR Construction and the respondent. The respondent also contended that the mediation proceedings were conducted on behalf of the contractor, CMR Construction represented by M C Pieterse and Carrin Pieterse (the wife of M C Pieterse), and that the subsequent arbitration proceedings were instituted by CMR Construction. In the same breathe, the respondent alleged in the answering papers that the arbitration process was commenced and pursued by Mr M C Pieterse t/a CMR Construction from inception in November 2009 until 8 June 2010 when there was an attempt to substitute M C Pieterse Construction CC t/a CMR Construction for CMR Construction. In this regard the applicant conceded, quite correctly so in my view, that both the mediation and the arbitration should properly have been conducted with CMR Construction as the claimant. The correction was to be effected by the applicant's legal representatives in due course. However, this did not materialise.

[24] The respondent in a manner challenged the applicant's *locus standi in iudicio* to bring the present application. As correctly argued by counsel for the respondent, the test is whether the party litigating has a direct and substantial interest in the matter, and whether that party has the legal capacity to litigate.

In this regard two issues are trite. The first is that the sufficiency of interest depends on the facts of each case, and there are no fixed rules. See *Jacobs v Waks* 1992 (1) SA 521 (A) at 534D. The second is that generally, it is for the party instituting proceedings to allege and prove its *locus standi*, and it must appear *ex facie* the founding pleadings that the parties thereto are clothed with the requisite legal standing or *locus standi in iudicio*. See *Maris Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) 575. In *Jacobs v Waks* it was held, *inter alia*, that it was not necessary that a litigant have a financial or legal interest in a business for a finding that he has *locus standi*: Any one who was a director and in full control of a company which was trading and any one who was the manager of a business had a real interest that the business should survive and that its profitability should not be harmed.

[25] Based on the above, and to the extent relevant, the respondent argued that the contract was concluded with M C Pieterse t/a CMR Construction and not with the applicant. However, the close corporation registration documents showed that Mr M C Pieterse is the sole member of M C Pieterse Construction CC. Surely, the close corporation has a substantial and direct interest in the application. The fact of the matter is that the respondent is bound by the written contract unless he applies for and obtains rectification thereof. In any event, the respondent has not contended that the written contract stands to be rectified. Furthermore, as correctly argued by the applicant in its heads of argument, the issue of who trades under the name CMR Construction is an issue that properly should be decided in the action to

be instituted by the applicant in due course if the respondent claims rectification thereof. It is CMR Construction the entity that concluded the contract, that constructed the respondent's dwelling, and exercised its lien, and that reached an agreement with the respondent to pay security in substitution for the lien. In the result the respondent's contentions regarding the applicant's *locus standi* must fail.

THE RESPONDENT'S CHALLENGE TO RIGHT OF APPLICANT TO REINSTATE CLAIM

[26] Finally, I deal with the respondent's contentions that the applicant's right to reinstatement of the claim is invalid or non-suited. The contentions were based on several grounds. The chief ground was that the applicant was never entitled to any lien or payment in security thereof since the consent award is void *ab initio*, due to the applicant being prohibited in law from receiving any payment whatsoever in terms of the building contract as the applicant was never duly registered in terms of the provisions of sec 10(1)(b) of the Act. In the alternative, it was contended that the consent award had fallen away upon repayment of the monies by the arbitrator, and after termination of the arbitration proceedings by agreement between the parties. In order to complete the contentions, the respondent argued that when the monies (including the security of R500 000,00) were repaid by the arbitrator, there was no objection from M C Pieterse or his legal representative. As a consequence, the respondent inferred that such failure to object amounted to an agreement to the repayment of the R500 000,00.

[27] I have already dismissed the respondent's contentions dealing with the alleged non-registration in terms of sec 10(1)(b) of the Act. There is no question that the applicant as builder would normally have a lien over the property for any amount due to it under the contract. See *Wynland Construction (Pty) Ltd v Ashley-Smith* 1985 (3) SA 798 (A), and *Lamontville African Transport Co v Mtshali* 1953 (1) SA 90 (NPD). However, in the present matter it is common cause that there is no builder's lien at present. As stated earlier in this judgment, the builder's lien was given up when the security was paid during January 2010. It is indeed the purpose of the instant application to restore the *status quo* as it existed during January 2010 when the R500 000,00 was paid pursuant to the agreement between the parties and the consent award made by the arbitrator. The issue of the existence of the *nexus*, and nature thereof, between the parties should be decided in the impending trial.

[28] The respondent contended that when the security of R500 000,00 which he paid was refunded by the arbitrator, no objection was raised by the applicant. The version of the respondent in this regard has been disputed by both Mr M C Pieterse on behalf of CMR Construction and the arbitrator. In the replying affidavit, paras 19.2 and 19.3, Mr M C Pieterse stated:

> *"In any event, I did not consent to the repayment by the arbitrator of the amount of R500,000.00 held by him as stakeholder. The arbitrator confirms that the amount of R500,000.00 was refunded to respondent on 13 August 2010 without any reference to me or my attorneys."*

[29] What is telling and rather convincing are the contents of the arbitrator's confirmatory affidavit at paras 6 and 7 wherein he stated as follows:

> *"Upon the termination of the mandate, I simply refunded to both parties all monies deposited less my fees, included amongst which was the amount of R500,000.00 which, without any reference to applicant or its attorneys, I refunded to the respondent on 13/8/2011. The furnishing of security by respondent was agreed upon by the parties and totally independent of any award made by me in respect of the arbitration proceedings. I simply held the agreed amount of R500,000.00 for and on behalf of the applicant as security and which served the purpose of applicant waiving its rights in terms of the lien."* (underlining added)

To this allegation by the arbitrator, and at best for the respondent, the respondent's answer was unsatisfactory. In any event, the respondent admittedly assumed that the R500 000,00 was refunded by agreement between the parties. On the facts and under the circumstances described, it is highly improbable that the applicant would have consented to the repayment of the security at a stage when it no longer had a lien over the contract works. The respondent admitted that there was a reason and agreement between the parties for him to pay the security of R500 000,00 when he was allowed to take occupation of the nearly furnished dwelling, the property. However, he now for unconvincing reasons, disputes the need for the security. On the test in *Plascon-Evans Paints Limited* 1984 (3) SA 623 (A) at 634I-635C, the version of the respondent is capable of rejection with relative ease. Instead the applicant's version is the more probable. It is entitled to have the security reinstated. It is significant that the respondent conceded that the applicant had a lien when it concluded the agreement to pay security *in lieu* of the lien. The applicant has a claim of some R1 130 862,20 representing what it alleges to be the balance on the contract price.

The claim has not been challenged convincingly thus far. The version of the respondent that the amount of R500 000,00 was paid by him, not on the basis that he was liable to do so, but merely as a gesture of *bona fides* has no merit at all. The same applies to the respondent's contention that the arbitration award was a nullity and unenforceable.

THE BALANCE OF PREJUDICE AND CONVENIENCE

[30] One of the submissions advanced by the respondent in the supplementary heads of argument was the following: The interests of the respondent will be severely harmed since the balance of prejudice would clearly be against the respondent in that the respondent will have to pay an enormous amount in circumstances where applicant is not entitled thereto in law which is already ascertainable at this stage of the proceedings and which position will not change even if applicant were to institute the main action for payment. The submissions overlooked several fundamental considerations.

[31] The first is that the applicant essentially seeks interlocutory relief. The applicant is currently without security or lien. The applicant is owed a substantial amount in the form of the balance of the contract price. The respondent has since taken possession of the property. The end of the litigation between the parties is unpredictable at this stage. The legal principles applicable to the relief sought by the applicant are well-settled. In *Setlogelo v Setlogelo* 1914 (A) at 227:

> *"So far as the merits are concerned the matter is very clear. The requisites for the right to claim an interdict are well-known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."*

See also *V & A Waterfront Properties (Pty) Ltd v Helicopter and Marine Services (Pty) Ltd* 2006 (3) SA 252 (SCA) para 21. As to the specific requirements of interim relief, see *Johannesburg Municipal Pension Fund and Others v City of Johannesburg* 2005 (6) SA 273 (W) para [8]. The requirements of the balance of convenience, a discretionary matter, also come into play as is the granting of an interdict. See *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D&CLD) at 383C-F.

[32] Based on the above, I am more than satisfied that the applicant has plainly demonstrated that it has a *prima facie* right that the R500 000,00 be paid into a trust account. Such amount is to be retained in the trust account pending the decision of the dispute between the parties. The applicant has also proved on a balance of probabilities that there exists a well-grounded apprehension of harm if the relief sought is not granted. If relief is granted in favour of the applicant at the trial, the applicant will have no security for its claim unless security is paid into trust. On the facts, the balance of convenience also favours the applicant. The applicant cannot have its lien, which existed previously, reinstated.

CONCLUSION

[33] I conclude that the applicant has succeeded on a balance of probabilities to make out a case for the relief claimed in the notice of motion. The various defences raised by the respondent, when properly analysed, have no merit at all. The costs ought to follow the result.

ORDER

[34] In the result the following order is made:

1. An order is granted in terms of prayers 1, 2, 3, 4 and 5 of the notice of motion dated 24 August 2011.

D S/S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	10 OCTOBER 2012
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