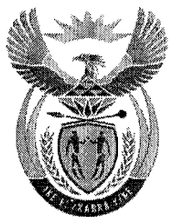


IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE NO. 14255/2006

In the matter between:

MOVE-ON UPS 56 (PTY) LTD	**APPLICANT**
And	
HONEY ATTORNEYS (CAPE TOWN) INC.	**1ST RESPONDENT**
HERMAN GROBLER	**2ND RESPONDENT**
THE 18TH AT PRINCE'S GRANT (PTY) LTD	**3RD RESPONDENT**

JUDGMENT DELIVERED ON 21 NOVEMBER 2008

DLODLO. J

[1] This is an application for an order directing the First Respondent, alternatively the Third Respondent to pay to the applicant the sum of Two hundred and fifty thousand rands (R250 000.00) presently being held in trust by the First Respondent.

The Applicant is Move-On Ups 56 (Pty) Ltd., a company registered and incorporated according the company laws of the Republic of South Africa and has its registered office situated at Unichem House, Gleneagles Park, 10 Flanders Drive, Mount Edgecombe, KwaZulu-Natal. The First Respondent (Honey Attorneys Inc. Cape Town) is a firm of Attorneys situated at Tyger Valley Chambers One, 27 Willie van Schoor Drive, Tiger Valley, Cape Town, South Africa. The Second Respondent (Herman Grobler) is an adult male businessman and his full and further particulars are unknown to Mr. Mark Douglas Carstens, the deponent of the Founding Affidavit. The Third Respondent is (The 18th at Prince's Grant (Pty) Ltd.) a company registered and incorporated according to the company laws of the Republic of South Africa but its full and further particulars are unknown to Mr. Carstens. The application is resisted by the first and Third Respondents. Mr. McClarty SC and Mr. Beyers appeared for the Applicant and first and Third Respondents respectively.

FACTUAL BACKGROUND

[2] On 28 March 2006 a written agreement was concluded between the Applicant and the Second Respondent in terms whereof the Applicant sold to the Second Respondent who was acting as a trustee on behalf of a company to be formed (the Third Respondent) certain immovable property being Erf 215 Prince's Grant in the province of KwaZulu- Natal for a purchase price of Nine million rands (R9 million) (Agreement of Sale, Annexure "B"). Clause 8.5 read with Clause 3.3 of the Agreement provide that the First Respondent would

be the conveyancing attorneys and would attend to the registration of transfer of the property.

[3] The Applicant provided the first Respondent with a written Power of Attorney to pass transfer in terms whereof the Applicant nominated and appointed, *inter alia*, Jacques Du Toit of the First Respondent with power of substitution to be the Applicant's attorney and agent to appear in the Applicant's name, place and stead at the office of the Registrar of Deeds in Pietermaritzburg, KwaZulu-Natal to pass transfer to the Third Respondent the property sold in terms of the Agreement of Sale. The Power of Attorney read *inter alia "and generally, for effecting the purposes aforesaid, to do or cause to be done whatsoever shall be requisite, as fully and effectually, to all intends and purposes, as the transferor might or could do if personally present and acting therein; hereby ratifying, allowing and confirming all and whatsoever the said agent(s) shall lawfully do or cause to be done in the premises by virtue of these presence."*

[4] Clause 7.1 of the Agreement provides that within seven (7) days of the conclusion of the Agreement, the Second Respondent would deposit the sum of One Million rand (R1million) with the First Respondent, to be held in trust. In terms of Clause 7.3 of the Agreement, within seven (7) days of the fulfilment of the suspensive conditions referred to in Clause 4.1 of the Agreement and/or before taking transfer of the property, the Second Respondent would deliver guarantees to the First Respondent, issued by a South African commercial bank, for payment of the balance of the purchase price

plus VAT and any other amounts owing. The guarantee would be payable upon written notification by the First Respondent to the bank which issued the guarantee of registration of transfer in terms of Clause 7.4 of the Agreement.

[5] The registration of transfer of the property into the name of the purchaser would be effected as soon as reasonably possible but would not in any event occur before the deposit had been paid to the First Respondent and the bank guarantee had been provided to the First Respondent. The Applicant would not be required to transfer the property into the name of the purchaser unless the purchaser had complied with all its obligations due for fulfilment in terms of the Agreement. The deposit was paid to the First Respondent by the Second Respondent and the required guarantees were delivered by the Second Respondent to the First Respondent. On 11 August 2006 with the First Respondent as conveyancer, registration of transfer of the property was effected from the name of the Applicant into the name of the Third Respondent. However, the First Respondent failed to pay the full purchase price to the Applicant as against transfer of the property and it withheld payment of the sum of Two hundred and fifty thousand rands (R250 000.00). Notwithstanding demand by the Applicant for the First Respondent to pay the balance of the purchase price, the latter refuses to do so.

[6] In retaining the aforesaid sum of Two hundred and fifty thousand rands (R250 000.00), the First Respondent contends that it did so pursuant to an oral agreement with the Applicant that it could do so.

In this regard the First Respondent alleges that it was instructed by the Second Respondent to withhold the said Two hundred and fifty thousand rands (R250 000.00) based on the contention by the Second Respondent that in breach of the Agreement the Applicant had failed to provide electrical bulk services to the property. A dispute of fact exists concerning the Respondents' interpretation of the relevant provisions of the Agreement and whether the Applicant was in breach of the Agreement. Further, a dispute of fact exists as to whether or not an oral agreement was concluded between the Applicant and the First Respondent concerning the retention of the amount of Two hundred and fifty thousand rands (R250 000.00).

THE FOUNDING AFFIDAVIT

[7] This was deposed to by Mark Douglas Carstens (Mr. Carstens) who is a Director of the Applicant Company and who was duly authorised to do so. Mr. Carstens emphatically denied that the Applicant ever consented to the retention of part of the purchase price, namely Two hundred and fifty thousand rands (R250 000.00) and that transfer only occurred on the basis of any such agreement. Mr. Carstens submitted that the First Respondent's contention that it acted with the Applicant's consent does not bear scrutiny. He brought it to the Court's attention that the First Respondent informed the Applicant that:

(i) It was instructed by the Second Respondent to withhold the said Two hundred and fifty thousand rands (R250 000.00).

(ii) The instruction from the Second Respondent was based on the Second Respondent's contention that, in breach of the agreement,

the Applicant had failed to provide electrical bulk services to the property.

[8] Mr. Carstens averred that the Applicant's disputed the above assertions. Mr. Carstens alerted the Court to the advice he apparently received, namely that the First Respondent was obliged to pay to the Applicant all the purchase price against registration of transfer of the property, failing which, the First Respondent should have delayed the registration of transfer until such time as any disputes had been resolved between the parties. In his view, the First Respondent has sought to justify its conduct *ex poste facto* by claiming that the Applicant consented to its retention of the Two hundred and fifty thousand rands (R250 000.00).

[9] According to Mr. Carstens clearly the First Respondent recognizes that the only basis upon which it could have retained the funds was with the Applicant's consent and it relies on an alleged oral consent by the Applicant to the retention of the Two hundred and fifty thousand rand (R250 000.00). Importantly, Mr. Carstens maintained that the Applicant denied having given such consent. He contended that in any event such oral consent would not be sufficient to relieve the First Respondent of its obligation to pay to the Applicant the full purchase price as against transfer of the property. Mr. Carstens gave a chronology of events as they unfolded. I set out this chronology because it may be relevant when I consider the merits of this application.

CHRONOLOGY OF EVENTS (AS PER MR. CARSTENS)

[10] On 8 August 2006, at four minutes past two in the afternoon (2:04pm), the First Respondent sent an e-mail to the Applicant care of Mr.Carstens' e-mail address, with a pro-forma account attached thereto. This e-mail is attached as **Annexure "C"** to the Founding Affidavit, whilst the copy of the pro-forma account is **Annexure "D"**. Mr. Carstens contended that he never received the abovementioned e-mail because he was then in Cape Town. But he hastened to add that had he received same he would not have objected because the pro-forma account (**Annexure "D"**) was in order. On 10 August 2006 at sixteen minutes past ten in the morning (10:16am), according to Mr. Carstens, a further e-mail was sent by the First Respondent to the Applicant. This e-mail was also not received by Mr. Carstens for the same reasons as set out in the aforegoing paragraph. A copy of this e-mail is attached to the Founding Affidavit as **Annexure "E"** and it records:

"We refer to our e-mail of 8 instant under cover of which we forwarded a copy of our pro-forma final statement of account. We confirm that this transaction will register in the Deeds Office in Pietermaritzburg on 11 instant."

[11] On 10 August 2006, the First Respondent sent yet a further e-mail to the Applicant using Mr. Carstens' e-mail address and this e-mail had an attachment which was a letter. This is attached to the Founding Affidavit as **Annexure "F"**. It will be helpful to quote from the body of **Annexure "F"**:

"We refer to previous correspondence and again confirm that we will register the property in the Pietermaritzburg Deeds Office tomorrow the 11th instant.

With reference to the Deed of Sale dated 28 March 2006 and with specific reference to paragraph 11 page 10 of the said agreement the seller warrants that the bulk services to the property is sufficient to service the development in terms of the zoning status and that the purchaser is liable for the internal services and the connection thereof and that all external services are available.

In terms of the above we have confirmation from the purchaser's professionals and specifically the electrical engineer that such bulk services are not available as warranted and that the cost for the electrical bulk services to comply with the agreement of sale is approximately an amount of R250 000.00 which amount, on instructions of the purchaser, we are instructed to hold such monies in trust in your name until installation is completed and the terms of the agreement of sale have been fulfilled.

As a result of time constraints and the fact that if registration does not take place tomorrow the 11th Deeds will be rejected in the Deeds Office which will result in a re-lodgment and more time lost we will continue with registration as aforementioned except if a written instruction to the contrary is received prior to registration, namely 9:00am on 11 August 2006. We trust that you find the abovementioned in order."

[12] Mr. Carstens attached to the Founding papers as **Annexure "G"** a copy of the e-mail which had the letter quoted above as an

attachment. **Annexure "G"** was transmitted by the First Respondent to Mr. Carstens' e-mail address at eighteen minutes to four the afternoon (3:42pm) on 10 August 2006. Mr. Carstens draws my attention to the portion of **Annexure "F"** where it refers to the retention of the Two hundred and fifty thousand rand (R250 000.00) *"...until installation is completed and the terms of the agreement of sale have been fulfilled."* Of significance is that nowhere in **Annexure "F"** is it stated that the retention of the Two hundred and fifty thousand rand (R250 000.00) would endure until the dispute between the Applicant and the Second Respondent has been resolved. According to Mr. Carstens, it is clear from **Annexure "F"** that the First Respondent assumed that the Second Respondent is correct in its assertions. In this regard, it is the view of Mr. Carstens that the First Respondent acted in a partisan fashion on behalf of the Second Respondent. Mr. Carstens added that he (on behalf of the Applicant) would never have agreed to the retention of the monies. This would be his attitude even more so when the retention thereof was based upon the assumption that the Second Respondent was correct in its assertions. To do so would be prejudicial to the Applicant's best interests.

[13] Mr. Carstens expressed some concerns and he remains uninformed why would the First Respondent wait until late in the afternoon of the day prior to registration to notify the Applicant of the Second Respondent's contention. The latter conduct has never been explained by the First Respondent and it smacks of mischievous intent on the part of the latter. On 11 August 2006 at eighteen

minutes past nine (09:18) the First Respondent sent and e-mail to the Applicant on Mr. Carstens' e-mail address. This e-mail is attached to the Founding papers as **Annexure "H".** Mr. Carstens contended that this e-mail too was never received by him. This e-mail also had an attachment in the form of a letter. This too is attached to the Founding papers as **Annexure "J"** and it reads:

"We confirm that the abovementioned transaction will today be registered in the Deeds Office. Kindly let us have bank details for payment of balance of the purchase price."

[14] Mr. Carstens remarked that significantly **Annexure "J"** *supra* is devoid of any mention of the Two hundred and fifty thousand rand (R250 000.00) to be retained. Mr. Carstens had earlier on been advised by his business partner that transfer was to take place on 11 August 2006 hence he telephoned the First Respondent at about seventeen minutes to ten (09:43) to enquire about the transfer. It was then that he learned for the very first time that certain e-mails informing him about transfer and attaching for his attention a copy of the pro-forma account had been sent to him. He was still in Cape Town. He made it clear that he had not received any e-mails and at eighteen minutes past ten (10:18) at his request, a lady in the conveyancing department of the First Respondent transmitted to him (per telefax) a copy of the amended pro-forma account which reflected the retention by it of the sum of Two hundred and fifty thousand rands (R250 000.00). The copy of the telefax is attached to the Founding papers as **Annexure "K".** According to Mr. Carstens, he was shocked at the sight of the content of **Annexure "K"**,

resulting in him urgently telephoning the First Respondent at nineteen minutes past ten (10:19) the same day. He spoke to a certain Mr. Jacques Du Toit of the First Respondent and voiced his anger and disputed that the First Respondent had any entitlement to retain the sum of Two hundred and fifty thousand rand (R250 000.00) or any amount at all. He reiterated that he did not consent to the transfer taking place subject to the retention of the Two hundred and fifty thousand rands (R250 000.00). Subsequently Mr. Carstens was sent a telefax from the First Respondent, copy of which is **Annexure "L"** to the Founding papers. **Annexure "L"** reads:

"We refer to writer's telephone conversation today and confirm that you are aware that the transaction will be registered today. Kindly let us have your concerns in writing so that we can take same up with the purchaser. Kindly also let us have banking details for Move-On-Up 56 (Pty) Ltd for payment of the proceeds as per our pro-forma statement of account."

[15] On receiving a bank statement reflecting the amount which had been deposited into the Applicant's account, Mr. Carstens discovered that the sum of Two hundred and fifty thousand rands (R250 000.00) had been retained by the first Respondent. On 22 August 2006, the First Respondent wrote to the Applicant. A copy of this letter is **Annexure "O"** to the Founding papers and it reads:

"We enclose herewith Electrical Consultant's letter indicating the shortcomings in the installation pertaining to the abovementioned property and as a result thereof a certain amount was withheld from

the purchase price payable to Move-On-Up 56 (Pty) Ltd (Mark Carstens) in lieu of such installation."

[16] The author of the above quoted letter is Mr. Du Toit on behalf of the First Respondent. Mr. Carstens remarked that Mr. Du Toit failed to mention in **Annexure "O"** that the retention was by consent. Mr. Carstens found the First Respondent's conduct so unbecoming that he deemed it fit to have the First Respondent reported to the Cape Law Society. Mr. Carstens stated that the Applicant is entitled (as per advice he received) to proceed by way of application proceedings as, notwithstanding the First Respondent's reply to the complaint to the Cape Law Society, there is no cogent evidence upon which it can be construed that there exists a *bona fide* dispute of fact between the parties. In conclusion Mr. Carstens reiterated that in terms of the agreement of purchase and sale, the First Respondent was obliged to pay the purchase price to the Applicant as against transfer of the property into the name of the Second Respondent and/or Third Respondent. He referred me to various clauses in the Agreement of Purchase and Sale in a clear endeavour to support his contention. In conclusion Mr. Carstens unequivocally stated as follows:

"On any version of events, the R250 000,00 which is being held in Trust by the First Respondent, is the property of the Applicant. On the First Respondent's version, the Second, alternatively, the Third Respondent, has no more than a spes to that money..... In the circumstance, the applicant is entitled to an Order directing the First Respondent forthwith to pay to it the sum of R250 000,00

together with all interests that has accrued thereon since 12 August 2006."

THE ANSWERING AFFIDAVIT

[17] Mr. Herman Grobler, the Second Respondent, deposed to this Affidavit having been authorized by the Third Respondent. He admitted that an agreement was entered into by and between the Applicant and the Second Respondent, but added that he entered into the agreement in his capacity as trustee on behalf of a company to be formed. The company which was to be formed was indeed formed and it is the Third Respondent in this matter. Mr. Grobler accused the Applicant of having failed to disclose the correct description of the property purchased. He further accused the Applicant of failure to comply with the terms of the agreement in certain respects. Mr. Grobler responding to the content of paragraph 15 of the Founding Affidavit denied that there was any breach of obligations by either the Second Respondent or the Third Respondent but admitted that he is the one who instructed the First Respondent to retain an amount of Two hundred and fifty thousand rands (R250 000,00) from the purchase price. According to Mr. Grobler the Applicant being represented by Mr. Carstens, also agreed to this. He referred to Mr. Du Toit's Affidavit filed on behalf of the First Respondent. Responding to paragraph 20 of the Founding papers, Mr. Grobler stated that he instructed the First Respondent's representative to advise the Applicant that the deeds either be rejected from the Deeds Office and the transfer not be registered until the question of the services had been sorted out or alternatively that an amount of Two

hundred and fifty thousand rands (R250 000,00) be retained pending the dispute being resolved and should the Applicant consent to such retention of the monies, then the transfer can go ahead and be registered and the balance of the purchase price be retained. Mr. Grobler attached to the Answering Affidavit a letter written by Mr. Willem Du Toit (an electrical consultant consulted by the Third Respondent) indicating the lack of services and the costs to install such services, being the amount retained. The letter is **Annexure "HG8"** attached to the Answering papers. Mr. Grobler made it clear that he gathered from Mr. Du Toit of the First Respondent that the Applicant confirmed that the transactions must be continued with and that the money can be withheld until the dispute has been resolved.

[18] Mr. Grobler, for the convenience of the Court deemed it prudent to briefly sketch the sequence of events as conveyed to him by Mr. Du Toit representing the First Respondent. He stated that on 8 August 2006, the First Respondent rendered an account to the Applicant which was dated 9 August 2006 and had same sent to the latter on 8 August 2006 (at 2:04pm) and he added that at the time of the rendering of the account, the First Respondent was not aware of the problem as stated earlier on. In fact, Mr. Grobler himself was not aware of any problem. He averred that he only received confirmation that a problem actually existed after being contacted by Mr. Du Toit of the First Respondent. On 10 August 2006 at 11:49am Mr. Carstens was telephonically contacted (by secretary to Mr. Du Toit) to advise him about the problem and a message was left on his cellphone that he should contact the offices of the first Respondent urgently. Mr.

Grobler also referred to further e-mails and letters sent to the Applicant in this regard. He stated further that in order to reach the Applicant another effort undertaken by the First Respondent was to send an sms to Mr. Carstens of the Applicant from the phone owned by Mr. Du Toit.

[19] Importantly, Mr. Grobler emphasised that upon receipt of the sms, Mr. Carstens called the First Respondent and advised Ms Oosthuizen (in the employ of the First Respondent) that he had not received any of the documentation referred to by her during the telephonic conversation and requested the documents to be faxed to him at a Cape Town fax number which Mr. Carstens supplied. These were faxed to Mr. Carstens, according to Mr. Grobler. These constituted five (5) pages including the letter advising Mr. Carstens of the Two hundred and fifty thousand rands (R250 000,00) being withheld plus the engineer's reports. This had an effect that a telephonic discussion took place between Mr. Jacques Du Toit of the First Respondent and Mr. Carstens. According to Mr. Grobler this discussion took place in the presence of one Mr. Barhaschone. The discussion was about problems encountered and the option available to the Applicant. According to Mr. Grobler the Applicant elected that the transfer be proceeded with and that the Two hundred and fifty thousand rands (R250 000,00) be retained. A letter was subsequently written by the First Respondent which confirmed the telephonic discussion and invited the Applicant to set out his concerns in writing which concerns would be taken up with the Third Respondent.

[20] Mr. Grobler averred that the Third Respondent was entitled to instruct the conveyancer to withhold the monies which would then in effect constitute a breach in terms of the agreement in that the full purchase price had not been paid by the Purchaser to the Seller. Concluding his Affidavit Mr. Grobler stated the following:

"I am advised that this is a question of law and will be dealt with at the hearing of the application. I, however, again reiterate my instructions to retain the money which could then be construed as a breach of the agreement. The Applicant would have its recourse against the Third Respondent in terms of Contract Law and as such it was not a variation of the agreement. To the extent that the Applicant consented to the retention of the amount of R250 000,00 the contract does not preclude the Applicant from orally waiving any of its rights in terms of the agreement which it elected to do by consenting to the retention of a certain portion of the purchase price and which waiver was done explicitly by giving the consent, alternatively impliedly through its conduct."

Mr. Jacques Du Toit (a practising attorney and director in the First Respondent's firm) deposed to an Affidavit verifying the assertions contained in Mr. Grobler's Affidavit. Mr. Nicholas Harvey Barnschone (another attorney and as such director of the First Respondent) confirmed the correctness of the Answering Affidavit deposed to by Mr. Grobler.

THE REPLYING AFFIDAVIT

[21] Mr. Carstens in reply made it clear that what the Applicant sold to the Second Respondent was a vacant land, in respect of which there was an approved development plan for the construction of twenty five (25) residential units. He maintained that it is correct that portion 1 of Erf 215 has to be transferred to the Prince's Grant Home Owner's Association because that piece of property has on it the club house, swimming pool, tennis court and squash court which all of the residents of Prince's Grant share as a sporting and relaxation facility. Mr. Carstens enlightened the Court that the Second Respondent already owned property within prince's Grant before he came to buy the property referred to in this application and he knew very well that the club house and sporting facilities were to be shared by all residents and were not included in the property sold to him. He also brought it to the notice of the Court that an estate agent named Martin Petersen, who also lives and works at Prince's Grant, had assisted the Applicant in marketing the twenty five (25) residential units which the Applicant had intended to construct on the property. The Second Respondent (in fact) approached the Applicant through Mr. Petersen with a proposal to buy the property from the Applicant. According to Mr. Carstens the Second Respondent certainly must have known whether through Mr. Petersen or from his own observation that the club house and sporting facilities did not form part of the property sold. Mr. Carstens referred the Court to **Annexure "B1"** to the Agreement of Sale which depicts the layout of the 25 residential units and shows the club house and sporting facilities as a separate entity adjacent to the property sold.

[22] Mr. Carstens emphatically denied that the Applicant failed to comply with Clause 11 of the agreement and he added that there is an 11kv power line which runs along the boundary of the property sold to the Third Respondent and that is the bulk service of electricity which the Applicant warranted in the Agreement of Sale. Mr. Carstens reiterated that the Second and Third Respondents knew very well that the land itself was vacant and that there was electrical substation on the property. In his view, if the Second Respondent expected to see such a substation, then he would have raised the matter before contracting with the Applicant. Mr. Carstens invited my attention to the fact that Clause 11 of the Agreement of Sale makes it quite clear that the purchaser was responsible for the connection of internal services to the external services as well as the payment of connection fees. Concluding on this aspect Mr. Carstens stated categorically thus:

"The bulk electrical supply is in place and it is up to the Third Respondent to design, install, and pay for, whatever installation it needs to connect the bulk electrical supply, at the boundary, to whatever distribution network the Third Respondent requires for its development."

[23] He reiterated that he never consented to the retention of the money at all. He drew the Court's attention to what he called "the vagueness of the alleged retention agreement and pointed out that nothing is said as to what will happen if the dispute is not "resolved". He pointed out that it is clear that the parties disagree over the interpretation of the

Agreement of Sale but the Third Respondent has done nothing to have the matter decided by legal proceedings, nor has it instituted any action for damages. Mr. Carstens specifically denied that Mr. Du Toit sketched options available to the applicant in his telephone conversation with him referred to in paragraph 24.3.9 of the Answering Affidavit. According to Mr. Carstens Mr. Du Toit simply told him that he had been instructed by the buyer to withhold the sum of Two hundred and fifty thousand rands (R250 000,00) in respect of the purchase price because of the alleged electrical problem. Importantly, contended Mr. Carstens, Mr. Du Toit did not say that unless the former consented to the retention registration of transfer would not proceed. In fact (according to Mr. Carstens) the question of registration of transfer was not even discussed.

[24] Responding to paragraph 26.3 of the Answering Affidavit Mr. Carstens remarked that the Second Respondent gives the "game away" in that he seemingly suggests that the basis upon which the Two hundred and fifty thousand rands (R250 000,00) was retained was because the First Respondent was instructed to do so by the Third Respondent. Concluding on this aspect Mr. Carstens contended as follows:

"I have already said that, because the sum of R250 000,00 is being held by the First Respondent in its Trust account, in the name of the Applicant, and on its behalf, the First Respondent is obliged to repay that sum to the Applicant, simply because the First Respondent no longer has any mandate (if it ever had one), to hold that sum on behalf of the Applicant."

Mr. Carstens reiterated that in the advice he received, the whole of the purchase price of the property became due, owing and payable by the Third Respondent to the applicant, simultaneously with registration of transfer but the Respondents now allege that part of the purchase price (i.e. R250 000,00) would not be paid against registration of transfer, but would be retained in Trust pending an unspecified resolution of the electrical problem. Mr. Carstens added the following:

"I am advised that because this alleged arrangement, and the Applicant's alleged consent thereto, was never reduced to writing, it is not binding on any of the parties and the Applicant is thus entitled to payment of the purchase price, in full."

[25] In Mr. Carstens' view if it is the case of the Respondent that the sum of Two hundred and fifty thousand rands (R250 000,00) was retained by the First Respondent upon the Third Respondent's instructions, (without the need for any consent from the Applicant) then the Third Respondent is simply in breach of the contract of sale and it is obliged to pay the balance of the purchase price. Furthermore, Mr. Carstens contended that if it is the Third Respondent's case that the money was withheld in terms of the agreement to which it is said that the Applicant consented, then that is an unenforceable variation of the Agreement of Sale. Mr. Carstens denied that the Applicant waived any of its rights and hastened to add that any alleged oral waiver is not enforceable in this instance.

SUBMISSIONS AND APPLICABLE LEGAL PRINCIPLES

[26] Mr. Beyers premised his argument on the dispute of fact in this matter. He submitted that in these circumstances the well established approach is that set out in ***Plascon-Evans Paints Ldt v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A) at 634E to 635C, namely:

"The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in ***Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*** 1957 (4) SA 234 (C) at 235E-G, to be:

"...where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order...Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted. This rule has been referred to several times by this Court (see Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) G (Pty) Ltd 1976 (2) SA 930 (A) at 938A-B; Tamarillo (Pty) Ltd v BN Aitkin (Pty) Ltd 1982 (1) SA 398 (A) at 430 – 1; Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere 1982 (3) SA 893 (A) at 923G-924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief,

may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order……"

[27] I fully agree with Mr. Beyers that upto now the test normally employed to resolve issues between litigants in circumstances where there exists a dispute of fact, is the one set out in ***Plascon-Evans Paints*** partially quoted supra. It was not my understanding though that Mr. McClarty SC disputed this assertion either. His contention is not difficult to comprehend. He actually submitted that notwithstanding the dispute of fact on the papers, the Applicant is entitled to request the Court to decide the issues without resorting to oral evidence if it can and to permit the matter to go to oral evidence if it cannot. In this regard Mr. McClarty SC referred me to ***Kalil v Decotex (Pty) Ltd and Another*** 1988 (1) SA 943 (A) at 981 D-G where Corbett JA (as he then was) observed as follows:

"It has been held in a number of cases that an application to refer a matter to evidence should be made at the outset and not after argument on the merits (see Di Meo v Capri Restaurant 1961 (4) SA 614 (N) at 615H-616A; De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka 1980 (2) SA 191 (T) at 204C-206D; Spie Batignolles Société Anonyme v Van Niekerk: In re Van Niekerk v SA Yster en Staal Industriële Korporasie Bpk en Andere 1980 (2) SA 441 (NC) at 448E-G; Erasmus v Pentamed Investments (Pty) Ltd (supra at 180H); Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd 1981 (4) SA 175 (N) at 179B-E; cf Klep Valves (Pty) Ltd v Saunders Valve Co Ltd 1987 (2) SA 1 (A) at 24I-25D). This is no doubt a salutary

general rule, but I do not regard it as an inflexible one. I am inclined to agree with the following remarks of Didcott J in the Hymie Tucker case supra at 179D:

'One can conceive of cases on the other hand, exceptional perhaps, ...when to ask the Court to decide the issues without oral evidence if it can, and to permit such if it cannot, may be more convenient to it as well as the litigants. Much depends on the particular enquiry and its scope.'"

[28] In Mr. Beyers' submission the Applicant seeks, (as against the Third Respondent) an order for specific performance of the Agreement of Sale, and (in the alternative) as against the First Respondent, an order that the retained amount be paid to it. In his submission after having accepted the benefits of the agreement of 11 August 2006, namely, receipt of the purchase price (less retention), cancellation of its bonds and defective performance in terms of the Deed of Sale, the Applicant now refuses to comply with the only rider attached thereto, being the retention of the purchase price. Mr. Beyers described the Applicant's conduct as manifest inequity. I consider these submissions later-on in this Judgment.

[29] According to Mr. Beyers, it is of decisive importance in this matter to properly distinguish between, on the one hand, the rights and obligations which arise as between the parties to the Agreement of Sale, (that is as between the Applicant and the Third Respondent) and on the other hand, the rights and obligations which arise in respect of the agreement of what he called mandate which subsisted between

the Applicant and the First Respondent, and the latter and the Third Respondent respectively. He emphasised that whilst the First Respondent may have been nominated by the parties to act as conveyancer in terms of the Agreement of Sale (the First Respondent was not a party to the Agreement of Sale) it could not be burdened with any contractual obligations which may have arisen from the said Agreement of Sale. I accept that the First Respondent was not party to the Agreement of Purchase and Sale. But I hasten to add that the First Respondent knew or should be taken to have known what the agreement between the parties is because it is armed with the copy of such agreement. I take note of Mr. Beyers' submission that whether the Applicant is entitled to payment by the Third Respondent of the balance of the purchase price in terms of the Agreement of Sale stands to be determined with reference to the provisions of the Agreement of Sale.

[30] In Mr. Beyers' submission even if the events of 11 August 2006 were to be given no relevance, the Applicant would still be barred from exacting full performance from the Third Respondent until it had itself complied fully with its obligations in terms of the Agreement of Sale or tendered to do so. In this regard I was referred to ***BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*** 1979 (1) SA 391 (A) at 418-419. According to Mr. Beyers what the parties are said to have agreed to on 11 August 2006 does not amount to variation of the Agreement of Purchase and Sale. In his view there is no reason why in the instant case the agreement of 11 August 2006 could not have had the effect of a waiver or estoppel. He referred me

to ***Van Der Watt v Minnaar*** 1954 (3) SA OPD 932 at 937A-938F where the following formulation appears:

"As enige afleiding van die gemelde beslissings gedoen kan word, dan skyn dit die volgende te wees: Waar die betrokke partye in staat en gewillig is om die bepalings van die geskrewe kontrak stiptelik na te kom en waar enige van sodanige bepalings, op versoek van een van die partye daartoe en deur vergunning van die ander party, op 'n ander as die voorgeskrewe wyse ten volle nagekom is, dan kan die feit van geskrewe kontrak-bepalings gewysing word in die sin dat 'n bepaling daaronder opgehef en 'n mondelinge verpligting in die plek daarvan gestel word, dan bestaan daar geen geskrewe kontrak wat sowel die oorspronklike ooreenkoms en die wysiging dek nie en derhalwe voldoen sodanige gewysigde kontrak nie aan die beplaings van art. 49 van die Ordonnansie nie. Hierdie afleiding skyn ook geregverdig te word deur die inhoud van paragrawe 593 en 595 van Williston Contracts (verbeterde uitgawe, deel 2) waar die geleerde skrywer aandui dat waar die geskrewe ooreenkoms, soos deur die daaropvolgende mondelinge kontrak gewysig, ten volle nagekom is, sodanige nakoming die uitwerking het.

"...as a satisfaction of the liability on the original contract. The Statute of Frauds does not apply to fully executed contracts, so that when the oral agreement has been performed its performance has the effect the parties agreed it should have."

In die laasgenoemde paragraaf kom die volgende voor:

"If an oral agreement were made it would not be enforceable as a contract, but might nevertheless operate as a continuing cause for non-performance of the written agreement. It seems essential, however, that B"

(d.w.s. die party wat die gewysigde bepaling nagekom het op versoek van die ander party, A)

"...could, and presumably would have performed the condition or obligation on his part, had it not been for A's action. Otherwise A has not caused B's failure to perform. ...On theories of waiver or estoppel it is generally held that to the extent that a failure to perform has been caused by either party, he cannot take advantage of the non-performance."

Minder bevredigend is die verklaring van Cheshire en Fifoot, Law of Contracts, bl. 363, tot die volgende effek:

"The answer to this question depends upon a distinction which in certain circumstances may be a little subtle. We have to ask ourselves whether the parties have supplanted or made a specific alteration in the original contract, or whether what has happened is that one party, without in any sense binding himself, has agreed to wait longer for performance by the other."

In die Restatement of the Law (Contracts, para. 224) word die volgende neergelê:

"The performance of a condition qualifying a promise in a contract within the Statute may be excused by an oral agreement or permission of the promisor that the condition need not be performed,

if the agreement or permission is given while performance of the condition is possible, and in reliance on the agreement or permission, while it is unrevoked, the promise materially changes his position."

In die Permanent Edition tot hierdie opus word die saak van Lampasona v Capriotti, 296 Mass. 34, 38, aangehaal waar die beslissing op estoppel gegrond is. Die opsomming van die saak van Gulf Production Co. V Continental Oil Co., 139 Tex, 183, 191, is soos volg:

"Conditions in written oil and gas lease that lessee must pay certain sums in cash may be orally changed by lessor who agreed to accept lessee's syndicate certificates".

Sien verder Leake, Contracts (8ste uitgawe, bll. 616-617).

Op bl. 585 van Phipson, op cit., kom die volgende voor:

"A agrees in writing to sell land to B. An oral agreement made at the time that B might set off a debt owed him by A against the purchase money is (probably) admissible".

Die saak van In re Taylor: Ex parte Norvell, 1910 (1) K.B. 562 op bl. 569, bevat die volgende woorde van PHILLIMORE, R., ten opsigte van 'n saak waar die koper onderneem het om £800 vir vier huise te betaal en waar die verkoper aan hom 'n bedrag van £257 12s. 4d. geskuld het:

"We are aware of opinion that the appellant Norvell has to the extent of £257 12s. 4d. Performed all that was on his part to be done, and that he is entitled to say that the sum which he had to pay arose from an obligation on his part which to the extent of £257 12s. 4d. Has

been extinguished by a set-off against the obligation of the bankrupt to pay him that sum."

Sovêr my beken is, het ons Howe nog nie direk die punt hier in geskil, beslis nie. Die Engelse sake word egter in die algemeen as leidrade in soortgelyke vraagstukke aanvaar. (Sien bv du Plessis v Nel, 1952 (1) SA 513 (A.A)). In die pasaangehaalde saak het VAN DEN HEEVER, R.A., op bl. 539 die algemene stelling soos volg uitgedruk: "Where the written contract purports to reflect the whole contract on a particular subject matter between the parties, where the pleadings aver that it is the whole contract or the Court is satisfied that it is, no additional or conflicting oral terms may be proved: in that manner greater and lesser performances than those promised in the written contract may not be proved".

Na my beskeie mening bevat hierdie stelling geen weerspreking van die afleiding uit die Engelse en Amerikaanse beslissings, hierbo uiteengesit, nie. As in ag geneem word dat in terme van Le Grange v Pretorius, 1943 T.P.A. 223, 'n ooreenkoms wat onder die bepalings van die Transvaalse Proklamasie 8 van 1902, art. 30, in geskrif opgestel moet word, geldig deur 'n mondelinge ooreenkoms tussen die partye ingetrek of kanselleer word, dan kan dit na my mening met eweveel regverdiging konstateer word dat 'n enkel oorblywende verpligting onder sodanige skriftelike ooreenkoms ook by wyse van mondelinge kontrak geheel-en-al gedelg kan word of by wyse van afstandoening daarvan of by wyse van nakoming deur vervangde

prestasie wat deur die teenparty aanvaar word as prestasie onder die geskrewe kontrak of deur skuldvergelyking."

[31] Mr. McClarty SC submitted that for the purposes of this application the merits of the disputed facts are irrelevant by reason of the fact that in terms of the Agreement of Sale the First Respondent was obliged to pay the purchase price to the Applicant against registration of the property into the name of the Third Respondent. This submission must necessarily be understood in the context of Clause 22 of the agreement which provides as follows:

"22. General

22.1 Sole record of agreement

This agreement constitutes the sole record of the agreement between the parties with regard to the subject matter hereof. No party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein.

22.2 No amendments except in writing

No addition to, variation of, or agreed cancellation of, this agreement, including this clause 22.2, shall be of any force or effect unless in writing and signed by or on behalf of the parties.

22.3 Waivers

No relaxation or indulgence which any party may grant to any other shall constitute a waiver of the rights of that party and

shall not preclude that party from exercising any rights which may have arisen in the past or which may arise in the future.

22.4 ……

22.5 Approvals and Consents

An approval or consent given by a party under the agreement shall only be valid if in writing and shall not relieve the other party from responsibility for complying with the requirements of this agreements nor shall it be construed as a waiver of any rights under this agreement except as and to the extent otherwise expressly provided in such approval or consent, or elsewhere in this agreement."

[32] From the above quoted Clause it is abundantly clear that for any consent (as alleged by the First Respondent) to be of any force and effect, it would have had to have been in writing and appropriately signed by the parties because it would constitute a variation of Clause 7.4 read with Clauses 8.1 and 8.2 of the agreement above referred to. The provisions of Clauses 7.4, 8.1 and 8.2 of the Agreement of Sale are relevant in my determination of this application. It is prudent that I set them out infra for purposes of easy reference. These clauses contain the following provisions:

"7.4 The guarantee shall be payable upon written notification by the Attorneys to the bank which issued the guarantee (the "guarantor") of (sic) registration of transfer with simultaneous registration of cancellation of any existing mortgage bonds registered over the Property and, if required

by the Purchaser, the simultaneous registration of a first mortgage bond over the Property."

"8.1 Registration of transfer of the Property in the name of the Purchaser shall be effected by the Attorneys as soon as is reasonably possible, but shall in any event not occur before the deposit has been paid to the Attorneys and the bank guarantee referred to in clause 8 has been provided to the Attorneys.

8.2 The Seller will not be required to transfer the Property into the name of the Purchaser unless the Purchaser has complied with all its obligations due for fulfilment in terms hereof."

Clearly on a proper construction of Clauses 7.4, 8.1 and 8.2 *supra* payment of the purchase price is to be made on transfer. There is no provision indeed in the agreement under consideration for the retention of any monies pending the resolution of disputes concerning performance by either party. See also: ***SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere*** 1964 (4) SA 760 (A); ***Brisley v Drotsky*** 2002 (4) SA 1 (SCA); ***HNR Properties CC and Another v Standard Bank of South Africa Ltd*** 2004 (4) SA 471 (SCA); ***Cecil Nurse (Pty) Ltd v Nkola*** 2008 (2) SA 441 (SCA); ***De Villiers v McKay NO and Another*** 2008 (4) SA 161 (SCA).

[33] The above cited authorities definitely held that the effect of a non-variation clause such as the one in the instant matter is that an oral variation of the agreement must be left out of account and is irrelevant in law in proceedings to enforce the terms of the contract. See particularly: ***De Villiers v McKay*** *supra* at 163E.

On the basis of *inter alia* the above authorities Mr. McClarty SC contended that the alleged oral agreement is irrelevant and the Applicant is entitled to payment of the full purchase price without any retention. I am inclined to identify myself with this contention by Mr. McClarty SC. Mr. Beyers did his best in painting a picture that what is alleged purportedly happened (i.e. the alleged oral agreement for the retention of the portion of the purchase price) did not amount to the variation of the contract of sale. I find this to be nothing but naked variation of the contract of sale. This is unlawful and thus would have no force and effect in law particularly in proceedings aimed at enforcing the terms of the contract between two (2) litigants who bound themselves contractually. In any event, the alleged oral agreement conflicts with the provisions of Clause 22.3 *supra* of the Agreement of Sale which stipulate that no addition to, variation of, or agreed cancellation of this agreement shall be of any force or effect unless in writing and signed by or on behalf of the parties. Mr. Beyers was critical about any reference to the Alienation of Land Act 68 of 1981. This is the legislation which, in my view, falls to be considered as well. We are undeniably dealing with the landed property in the instant matter. Because the subject matter of the Agreement of Sale as such concerns landed property, the alienation of land and the formalities prescribed by the provisions of that Act are applicable. See: **Section 2 (1) of the Alienation of Land Act**. The general object of the Act is directed against the uncertainty, disputes and possible malpractices. See: ***Clements v Simpson*** 1971 (3) SA 1 (A) at 7 where the following appears:

"1. The section is directed against uncertainty, disputes and possible malpractices.

"Dit kan aangeneem word, meen ek, dat die oogmerk van hierdie artikel is om, sover doenlike altans, onsekerheid en geskille omtrent die inhoud van sulke kontrakte te voorkom en moontlike wanpraktyke teen te werk. ...Die Wetgewer kon nouliks gemeen het dat dit alle onsekerheid, alle geskille en alle wanpraktyke sou besweer, en dit kan wees dat die mate waarin die oogmerk bereik is en bereik word, heelwat te wense oorlaat, maar dit neem nie weg nie dat bogenoemde wel die oogmerk is.: - per STEYN, C.J. in Neethling v Klopper en Andere, 1967 (4) SA 459 (A.D.) at p.464E……."

See also: **Christie – The Law of Contract in South Africa** (5th edition page 111).

[34] In the above regard, Mr. McClarty SC referred me to ***Jones v Wykland Properties*** 1998 (2) SA 355 (C) at 358-359 where Knoll AJ (as she then was) stated the following concerning the issue of whether a term in a contract is material:

"In my judgment, in order to decide whether a term of a contract is 'material' for the purposes of s2(1) of the Act, the following questions require to be answered positively:

(a) did the parties apply their minds to the term?

(b) Did they agree, either expressly or impliedly,

(i) that the term should form part of their contract; and

(ii) be binding on them?

It should be noted that this only applies to those terms which are not naturalia, i.e. flowing by law from the essential terms of the contract. Naturalia are not required to be reduced to writing."

There is no dispute whatsoever that in an Agreement of Sale of land such as the one pertaining to this case, the purchase price and the payment thereof are most certainly the essential/material terms of the contract. Hence there are clauses of the agreement that are devoted to such essential/material terms. Quite apart from the relevant provision in the agreement in this regard (referred to earlier on) Section 2 (1) of the Alienation of Land Act provides that any oral variation thereof which is not reduced to writing and signed by the parties is of no force and effect.

[35] With regard to what is perceived to constitute disputed facts in this matter, I hold the view that it falls outside the ambit of what I must determine. The parties bound themselves in the Agreement of Sale. This agreement constitutes the sole record of the agreement between the parties with regard to the subject matter at hand. It is not comprehendible to now accuse the Applicant of having breached the agreement. The Agreement of Sale has its own built-in mechanism which stipulates how the breaches are to be dealt with. For an example, Clause 15 of the Agreement of Sale provides as follows:

"15.1 Should either party fail to perform any obligations in terms of this Agreement on due date or fail to comply with any other term or condition of this Agreement for a period of seven (7) days after delivery of a written notice whereby he is required to comply with such terms or conditions, the aggrieved party shall be entitled,

without any further notice and without prejudice to any other rights, to cancel this Agreement, and claim damages from the defaulting party.

15.2 In any event of a default by the Purchaser and consequent cancellation of this Agreement, the Seller shall be entitled, without prejudice to any of its rights, to retain as a pre-estimate of its damages, any deposit paid in terms hereof."

The two (2) contracting parties who have bound themselves contractually cannot be allowed to simply ignore the written agreement and agree differently orally about the subject matter of the written agreement. According to the written agreement if the Applicant had breached the agreement, there simply would have been no registration of transfer. The Third Respondent cannot be allowed to have its own way. Registration of transfer takes place simultaneously with the payment of the purchase price. That, in simple terms, means that landed property is sold for cash. For the Third Respondent to receive transfer and instructs that a portion of the purchase price be withheld from the seller is simply acting not only *mala fide*, but also unlawfully vis-à-vis the other contracting party. One only needs to read **Annexure "F"** to know how it came about that a portion of the purchase price in this matter was withheld. The First Respondent made it clear that *"on instruction of the purchaser, we are instructed to hold such monies in trust...".* It is, in my Judgment, unlawful to have withheld the Applicant's money on the basis of instruction by the purchaser. If the contents of **Annexure "F"** quoted above are anything at all to go by, then the First Respondent suffered from an error of Judgment in this regard. I want

to state it categorically that the Agreement of Sale which constitutes the subject matter of this litigation is written in a clear and unambiguous language. I cannot accept that there is any possibility of a dispute of fact as to the interpretation of the clauses thereof. In terms of Clause 3.3 of the Agreement of Sale the First Respondent are the Attorneys for purposes of payment of the deposit and delivery of the guarantees and thereafter are dutied to effect registration of transfer of the property into the name of the purchaser (See: Clauses 7 and 8 of the Agreement). It is common cause that the Applicant furnished the First Respondent with a power of attorney to pass transfer of the property from the Applicant to the Third Respondent.

[36] From the aforegoing alone it is fair to say that "for purposes of passing transfer and dealing with the deposit and guarantee, the First Respondent was acting as the Applicant's attorney and agent. This remains the position despite the fact that the purchaser (the Third Respondent in this matter) pays the First Respondent's fees for attending to transfer and all ancillary matters. It is a questionable practice (to say the least) on the part of the First Respondent whether or not it could take instructions from the Second or Third Respondent with regard to the payment of the purchase price as alleged by the Second Respondent. In its capacity as the Applicant's conveyancing attorneys, the First Respondent was certainly obliged at all times to deal with the deposit and guarantee as provided for in the Agreement of Sale. This, the First Respondent acknowledged in **Annexure "F"** attached to the Founding papers wherein it recorded that it was instructed to hold the sum of Two hundred and fifty thousand rands

(R250 000,00) in trust "in your name". Indeed the First Respondent is holding the money in trust for and on behalf of the Applicant. Even the interests earned by this money are for the account of the Applicant. It does not matter from what angle one looks at this money. On any version of the events the sum of Two hundred and fifty thousand rands (R250 000,00), the subject matter of this application is and it remains the property of the Applicant. It can only be further kept in the First Respondent's trust account if its owner, the Applicant, so instructs. It would appear from the papers in this matter, that the Applicant never gave instruction that the Two hundred and fifty thousand rands (R250 000,00) be kept in trust. If I accept the latter position to be the true state of affairs, then this means that the First Respondent is acting unlawfully by withholding this money. The money should have been dealt with in terms of the written Agreement of Sale signed by the parties. Trust money in the possession of an attorney should be available to his client the instant it becomes payable. Trust money is generally payable before and not after demand.

See in this regard: ***Incorporated Law Society, Transvaal v Visser and Others; Incorporated Law Society, Transvaal v Viljoen*** 1958 (4) SA 115 (T) at 118F-H where the following important formulation appears:

"When trust money is handed to a firm it is the duty of the firm to keep it in its possession and to use it for no other purpose than that of the trust. The position is, however, not the same in a case where a specific article is handed over which must subsequently be returned or accounted for. The firm fulfils its duty if it accounts for or returns

an equivalent amount. It is inherent in such a trust that the firm should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. I am in respectful agreement with HATHORN, J, where he states in the case of ***Incorporated Law Society v Stalker****, 1932 N.P.D. 594 (at p.606), that it is imperative that trust moneys in the possession of an attorney should be available to his clients the instant they become payable and that they are generally payable before and not after demand. If a deficit existed in respect of trust moneys for which the respondents were not responsible but for which they were liable, they had no right to use moneys entrusted to them for a particular purpose, to satisfy trust creditors in respect of whose moneys the deficit existed. If they did use it in this manner they would be guilty of theft because they would then be using moneys of their clients to satisfy their own obligations towards other clients."*

In ***Law Society, Transvaal v Matthews*** 1989 (4) SA 389 (T) at 394 Kirk-Cohen J *inter alia* observed as follows in this regard:

"I deal now with the duty of an attorney in regard to trust money. Section 78 (1) of the Attorneys Act obliges an attorney to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable. Trust

money is generally payable before and not after demand. See Incorporated Law Society, Transvaal v Visser and Others; Incorporated Law Society, Transvaal v Viljoen 1958 (4) SA 115 (T) at 118F-H. An attorney's duty in regard to the preservation of trust money is a fundamental, positive and unqualified duty."

[37] For purposes of completeness I must also have regard to the following observation of note in ***Goodriche and Son v Auto Protection Insurance Company Ltd*** (in liquidation) 1967 (2) SA 501 (W) at 504E:

"Although the client may, broadly speaking, not prescribe the manner in which the services are to be rendered, the attorney must at all stages of the matter act according to the instructions of the client (subject to the limitation that he must not carry out improper instructions). That is why he has a duty to report to his client when it is reasonable and necessary."

I undoubtedly fully associate myself with the above sentiments from our case law. They properly and in the most eloquent language make it clear what the true legal position is when it comes to moneys held in trust by attorneys for and on behalf of their clients. This applies with full force in the instant matter. See also: **LAWSA First Re-issue Vol. 14**, para 450 page 402-403).

Therefore, even if I accept that there was an oral agreement (I do not accept this) to retain the money in trust, the First Respondent's mandate to do so has been terminated and it has been instructed to repay the sum of Two hundred and fifty thousand rands (R250 000,00). How can it refuse to do so?

COSTS

[38] Mr. Beyers submitted that this Court should resort to a punitive cost order against the Applicant in that it proceeded to bring this matter to Court by way of motion when it knew or ought to have known that inherent in the matter was a dispute of fact. According to Mr. Beyers the matter should have been initiated by way of action in view of the dispute of fact. On the other hand Mr. McClarty SC submitted that having regard to the provisions of the non-variation clause in the Agreement of Sale, the provisions of the Alienation of Lands Act and the duties of the First Respondent as conveyancers towards the Applicant, it was reasonable for the Applicant to have sought relief by way of application proceedings rather than by way of action. The general rule is that a successful party is entitled to its costs. In view of the conclusion I have reached on the merits of this matter, it is not necessary to consider Mr. Beyer's submission in this regard. The Applicant is, in my view, entitled to its costs in this matter.

ORDER

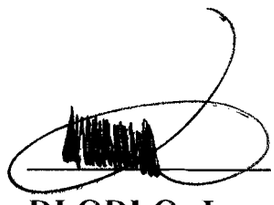
[39] In the circumstances I make the following order:

(a) The First Respondent, alternatively the Third Respondent be and is hereby directed forthwith to pay to the Applicant the sum of Two hundred and fifty thousand rands (R250 000.00) presently being held in Trust.

(b) The First Respondent, alternatively the Third Respondent, is directed to pay interest on the aforesaid sum of Two hundred and

fifty thousand rands (R250 000.00) calculated at the rate of 15.5% from 12 August 2006 to date of payment, both dates inclusive.

(c) The First Respondent, alternatively the Second Respondent, alternatively the First, Second and Third Respondents jointly and severally, are directed to pay the costs of this application on the attorney and client scale.



DLODLO, J