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Reportable JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

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CASE NO: 1416/2007

DATE: 18 FEBRUARY 2008

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED — Applicant

and

D FLORENTINO CONSTRUCTION CC — 1ST Respondent

ALEX VERNIER — 2ND Respondent

THE MASTER OF THE HIGH COURT — 3RD Respondent

JUDGMENT

DAVIS, J:

Introduction

[1] The applicant held first and second mortgage bonds over the property situated at 14 Bakker Street, Welgemoed, Cape Town ("the property"). The bond secured loans in the amount of R2 462 500.00 which were advanced to the owner of the property, Mr Douw Wessels ("Wessels") during 2004. Wessels has since passed away with the

result that he is now represented in the application by second respondent in his capacity as the duly appointed executor of Wessels' estate. It would appear that other than to confirm the contents of the founding affidavit and to express support for the relief sought, second respondent has not been active in any way in this application.

[2] Around the time of the registration of the first of the mortgage bonds on 2 July 2004, Wessels concluded a JBCC minor works agreement with first respondent in terms of which first respondent agreed to complete substantial alterations to the home situated on Wessels' property ("the JBCC contract"). In terms of 2.5 and 2.6 of that contract it was expressly stated that first respondent would retain a right of retention over the building works as security for payment under the contract unless a JBCC payment guarantee was provided by Wessels within 14 days of the conclusion of the contract. It appears to be common cause that no such payment guarantee was ever provided.

[3] Between July and October 2004, first respondent completed a large portion of the building work required of it in terms of the contract. Notwithstanding first

respondent's performance of these obligations, Wessels failed to honour obligations to pay first respondent the sum of R123 561,07 which was owed in respect of the completed improvements to the property. On 1 October 2004, first respondent exercised a builder's *lien* over the property in an effort to secure payment of the amounts owing to it.

[4] Attached to the founding affidavit is an Annexure "I" which incorporates a calculation of first respondent's claims against Wessels' estate as at December 2006. According to this calculation, respondent claims to have incurred further losses since the calculations undertaken but the amounts reflected there, in his view, suffice for the purposes of the *liens* which he claims over the property. In terms of the calculation he has alleged that he has the following rights in respect of the property:

1. A debtor/creditor *lien* in respect of the following amounts:

1.1 R123 561.07 owing to first respondent for the building work undertaken to Wessels' home under the JBCC contract;

1.2 R111 282.22 in respect of interest that has accrued on overdue amounts owing

under the JBCC contract between October 2004 and December 2006.

2. A common law salvage and improvement *lien* (*jus retentionis*) in respect of the following amounts:

2.1 R123 561,07 being the market value of the improvements effected by first respondent to Wessels' property during the building works. First respondent submits that it is legally entitled to claim both an improvement *lien* and a debtor and creditor *lien* in respect of this amount and as authority therefor cites D Glaser & Sons v The Master & Another N.O. 1979(4) SA 780 (C) at 788G-H;

2.2 R254 448,00 in respect of necessary expenses (*impensae necessariae*) incurred by first respondent in maintaining the property on Wessels' behalf and in respect of the value of Wessels' enrichment as a result thereof;

2.3 R123 120 in respect of necessary expenses incurred by first respondent in ensuring the security of the property

during the period October 2004 and December 2006.

[5] Applicant, as a bond-holder, has now come to court seeking an order "that the property be relinquished to the second respondent subject to the preservation of such rights and/or entitlements as to *liens* and/or rights of retention as the first respondent may enjoy prior to relinquishing the property to the second respondent". In addition, applicant seeks an order compelling first respondent to institute proceedings against second respondent for the recovery of its claims within a period of one month from the date of the final order, failing which the preservation of the first respondent's rights in and to the property shall lapse.

[6] Mr Van Helden, who appeared on behalf of the first respondent, raised a series of reasons as to why this Court should not grant the relief so sought. In particular, he raised the following:

1. There is in his view no authority in South African law which condones the common law substitution of *lien*-holders rights of retention at the instance of anyone other than the registered owner of the property concerned.

2. The applicant has no contractual entitlement to insist that the possession of the property be relinquished and its rights under the mortgage bonds be ranked below those of the first respondent.

3. Rights of retention which are conferred by salvage or improvement *liens* cannot be substituted by the provision of alternative security. The discretion is only capable of being exercised to substitute rights of retention conferred by a debtor/creditor *lien*.

4. The substitution of a right to retention conferred by the express terms of the contract cannot under any circumstances be substituted by application of the common law discretion to order the provision of alternative security. First respondent's JBCC contract expressly confers upon it an express contractual right to retain possession of the property until it has received full payment.

[7] It would appear in examining the authorities cited in support of these arguments that in every decided case in South African law in which substitution of the right to retention has been ordered, the applicant appeared to be

the owner of the property in issue. It is correct, as Mr Sievers, who appeared on behalf of the applicant said, the authors of LAWSA Vol. 15 paragraph 85 contend:

> "The owner of the property over which a right of retention is exercised may defeat the *lien* by furnishing adequate security for payment of the debt secured and in principle so may any debtor who has a possessory right to the *res* action held. Whether the court will exercise its discretion to order restoration of the property to its owner (or the person with the right to possession) will depend on the particular facts of each case. The security need not cover the costs of a possible action by the *lien* holder since the security is regarded as a mere substitution for the *lien* and not as an additional security".

[8] No authority is cited by the authors for the extension of the proposition beyond that which appears to have been decided in the courts. The judgment in Hoch Metals Africa Ltd v Otavi Mining Company Ltd 1968(1) SA 571 (A) at 582 is therefore of particular importance in a dispute of this kind. It therefore necessitates some comprehensive treatment. Ogilvie-Thompson, JA (as he then was) said at 582-583:

"In every one of the above long line of cases relied upon by counsel for applicant, the question was whether the Court should, in its discretion, release – against the provision of adequate security – the property in issue from a right of retention which had arisen over the property by operation of law. With one possible exception...the applicant in all these cases was the owner of the property in issue.

In the present case, if – as was submitted by counsel for applicant, but concerning which I express no opinion – it would be correct that in the events that have happened the bills of lading in the hands of respondent constitute no more than a security equivalent to a right of retention over the flint clay, it is nevertheless indisputable that such security derives not from operation of law but from the very agreement between the parties whereunder the bills of lading were made out in the name of and delivered to the respondent. Accordingly in attempting to invoke the Spitz v Kesting principle, counsel for applicant thus seeks to extend the operation principle to cover the case of a party (applicant) who repudiates ownership in the article (the flint clay) over which the security (the bills of lading) is claimed to exist, even although such

security is not an ordinary right of retention arising by operation of law but the rights of an express agreement between the parties. The only authority cited in support of such an extension was Van Leeuwen...That passage, dealing as it does with the rights of a pledgor, does not appear to me to relate to the subject of the present enquiry which, as already indicated, is specifically dealt with by Van Leeuwen in 1.4.37.13...

In terms of the contract between the parties the bills of lading were, as explained at the outset of this judgment, to be handed over by the respondent to applicant against payment by the latter of the purchase price in full. In short, this was a contractual stipulation. The general rule of course is that in a contract of purchase and sale the party who seeks to enforce performance must first fulfil or be ready and able to fulfil his own contractual obligations...To accede to applicant's present demand for delivery of the bills of lading, not against payment in full but against partial payment plus security, would be to run directly counter to the express agreement of the parties and in effect to make a new contract for them".

[9] In the present case the relevant passages of the agreement become important for the same reason that in the Hoch Metals' case it was the agreement which formed much of the basis of the reasoning of Ogilvie-Thompson, JA as is apparent from the passage that I have just read. The relevant parts of the agreement for the purpose of this dispute are:

> "2.5 The employer (second respondent) shall provide a JBCC payment guarantee to the contractor (first respondent) for the due fulfilment of his liability in terms of this agreement within 14 calendar days of his acceptance of the tender. Such guarantee shall be issued by a guarantor to the reasonable approval of the contractor;
>
> 2.6 the contractor shall provide a JBCC waiver of *lien* to the employer on receipt of the JBCC payment guarantee".

It is clear in this case that, as the guarantee was not provided, it is the common law *lien* that continues to operate. There is no provision in this contract for any *lien* of a kind which was not a common law *lien*. In other words, this case is distinguishable from the reasoning in Hoch Metals because in this case, were a JBCC payment guarantee not to have been provided, the default position

was that the common law continued to operate. Therefore, were the owner (second respondent) in this case to offer security, the Court would have been able to exercise a discretion and grant relief. That much is clear from the authorities which have been cited to me as well as from the Hoch Metals' case.

[10] That conclusion leads to the second objection raised by second respondent. Mr van Helden submitted that the applicant has failed to establish on the papers that it has any contractual right enforceable against the first respondent to claim the substitution of the first respondent's rights as a *lien* holder. Notwithstanding this fact, applicant alleged at paragraph 7.4 of its replying affidavit that:

> "The applicant's application is an independent application wherein the applicant seeks to give effects to its rights".

Mr van Helden contended that the applicant does not rely on any rights of ownership in respect of the property but rather has attempted to make out a cause of action on the basis of its rights under the mortgage bond registered over the property. He further submitted that a bond holder has no common law rights to claim substitution of a *lien* holder's security. It is therefore evident, in his

view, that the applicant can have only such rights in respect of the property as are contained in the mortgage bond.

[11] Insofar as it was relevant to the current application, Mr van Helden submitted that the applicant's rights in terms of the mortgage bond registered over the property were limited to the following. In the event of a default in the payment of the monthly instalments owing under the bond the applicant was entitled to claim the full outstanding balance and to take legal steps for a court order declaring the property executable. Once it has successfully obtained an order declaring the property to be executable, the applicant was entitled to demand that Wessels vacate the property if requested to do so by applicant. In his view it was immediately apparent that neither of these rights afforded the applicant an entitlement to the relief which had been sought in the current application. In particular, there had been no order obtained declaring the property executable and, even if such an order had been obtained, first respondent's retention of its possession of the property would not prevent a sale in execution and would accordingly not frustrate applicant's rights under the mortgage bond to execute against the property.

[12] The applicant complained that the first respondent's continued occupation of the property would diminish the value at which the property could be sold. However, mortgage bonds confer a right to execute against the property not a right to sell the property in ideal conditions and for the best attainable selling price. While the mortgage bonds afforded the applicant the right to request that Wessels vacate the property, Mr van Helden submitted that no such right was created with reference to the first respondent.

[13] This application is, however, brought in a particular fashion which is somewhat different from the arguments which I have summarised and which were raised by Mr van Helden. The application is brought by applicant as a bond holder to compel first respondent to relinquish the property to second respondent, which supports the relief. If successful, second respondent will then be restored to ownership. What applicant has effectively sought to achieve in this application as an interested party is to assist second respondent to obtain restoration of the estate property. From the papers, it appears that the object is to enable second respondent to sell the property and with the proceeds discharge the estate's obligations.

[14] Although the determination of the *lien* and the claims which underpin the *lien* are not for decision in this application, it should be noted that Wessels disputed, and second respondent continue to dispute, first respondent is entitled to a *lien* over the property on the basis of a counter-claim of approximately the same amount. As Mr Sievers noted, the longer that first respondent continues to refuse to hand over control and possession of the property, the greater the prejudice to applicant as the value of the applicant's security will be eroded by ever-amounting finance charges which are evident from the papers, both insofar as applicant and the first respondent are concerned.

[15] A further point pressed by Mr Sievers was that even should the first respondent have a *lien*, which is denied by the applicant and second respondent, such *lien* would only outrank applicant's security to the extent that it was a *lien* for improvements to the property.

[16] In my view, this is a case where the Court needs to consider an exercise of a discretion. In Spitz v Kesting 1983 WLD 45 at 49, Tindall, J (as he then was) said the following in regard to the nature of the discretion:

"The weight of authority seems to me to be in favour of the view that even where the claim in respect of which the use *ius retentionis* is asserted is made in good faith, the Court has the power to order delivery to the owner against adequate security. Each case will depend on its particular facts and the Court in exercising its discretion, will have regard to what is equitable under all the circumstances bearing in mind that the owner should not be left out of his property unreasonably and, on the other hand, should not be given possession if his object is, after getting possession, to delay the claimant's recovery of expenses".

In Sandton Square Finance Ltd v Vigliotti 1997(1) SA 826 (W) at 833, De Villiers, J considered that this approach to discretion should also be applied in respect of improvement *liens* and not only with regard to debtor and creditor *liens*.

[17] In the present case the following pro-pointers exist in favour of an exercise of discretion by this Court in favour of the applicant:

1. Relief can be crafted to provide adequate security for first respondent. Ultimately a *lien* is a form of security for the claim. If first

respondent satisfies his claim he must be in the position where the claim is paid in full and therefore that his right is not rendered illusory.

2. The only asset insofar as I could infer from these papers is erf 753 Bellville. If the *impasse* which presently exists continues between a determined *lien* holder (being first respondent) and an estate (being second respondent) which disputes the claim and it can only discharge its obligation if it sells the property, interest charges against the property will continue to escalate to the detriment of the estate and, indeed, all the parties concerned.

3. By means of a sale the various claims can be paid to best advantage of all.

4. The claim is clearly disputed, both in respect of a counter-claim and on prescription grounds, which were raised by Mr Sievers and which I do not intend to traverse save to mention that they have been cogently argued before this Court.

[18] What are the counter-pointers? The only counter-pointer is that if the first respondent relinquishes his *lien* he may find that part thereof is not ranked above the bond and that further he may not have quite the level of pressure which continues to exist to date. In my view, once it is accepted that the present dispute ranks in similar fashion to an owner and a *lien* holder for the reasons that I have already advanced, and once it is accepted that this Court can exercise a discretion, both in relation to debtor and creditor *liens* and improvement *liens*, the Court is at large to exercise its discretion.

[19] In the exercise of this discretion, the doctrine of proportionality always offers guidance. When the Court sets out the pro-pointers against the counter-pointers, it is manifest that this is a case which calls for judicial intervention. The balance is therefore in favour of the applicant. Accordingly this Court will exercise its discretion to make the following order.

[20] I must raise the question of costs which was hotly disputed. Given the order that I am about to make is one not dissimilar from an offer which was made by the attorney for applicants some while ago (19 December 2005) there appears to be no reason why costs should

not follow the result. Had that offer been accepted this case would never have reached court, interest charges would not have escalated and the matter could have been settled.

The following order is therefore made:

1. First respondent is to forthwith relinquish possession and control of erf 753 Bellville in the City of Cape Town, Cape Division, Western Cape Province in extent 1833m² and situate at 14 Bakker Street, Welgemoed (the property) to second respondent subject to the preservation of such rights as the first respondent may presently enjoy in law as to security, rankings and preference.
2. To the extent that the first respondent's claim outranks applicant's claim, that applicant jointly and severally with second respondent guarantees payment of the first respondent's claim as may be proved in the action contemplated in paragraph 4 below.
3. To the extent that the proceeds of the realisation of the property exceed that portion of any of the first respondent's claim outranking applicant's claim plus the

applicant's claim, the second respondent shall retain in trust such surplus (less applicable costs of realisation and administration) to the satisfaction of any claim preferent to other creditors which may be proved by the first respondent in terms of clause 4 below.

4. First respondent is granted leave to institute proceedings against the second respondent joining applicant as a party by virtue of its interest therein for recovery of the claim it alleges are secured/preferred as aforesaid within a period of one month from the date of this order. In such action the first respondent shall be required to prove to what extent, if any, its claim:

4.1 Outranks that of the applicant; and/or

4.2 enjoys any preference over the claims of any other creditors.

5. The guarantee and preservation of rights detailed there under shall lapse in the event of the first respondent failing to institute action as aforesaid.

6. First respondent shall pay the costs of this application.

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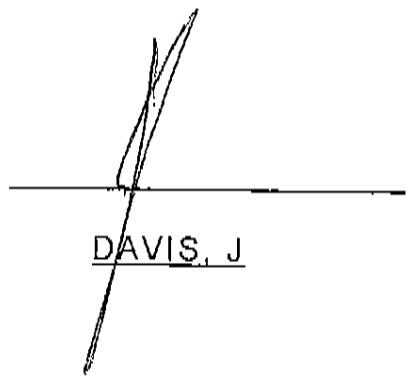

DAVIS, J

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

Reportable

Case No: 1416/2007

In the matter between:

The Standard Bank of South Africa Limited	Applicant
and	
D Florentino Construction CC	First Respondent
Alex Venter N O	Second Respondent
The Master of the High Court	Third Respondent

CORAM	:	**D M DAVIS J**
JUDGMENT BY	:	**DAVIS J**
FOR THE APPLICANT	:	**ADV. F S G SIEVERS**
INSTRUCTED BY	:	**WILLIAM INGLIS ATT.**
FOR THE RESPONDENTS	:	**ADV. R VAN HELDEN**
INSTRUCTED BY	:	**MAURICE PHILLIPS WEISENBERG**
DATE OF HEARINGS	:	**11 FEBRUARY 2008**
DATE OF JUDGMENT	:	**18 FEBRUARY 2008**