IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GQEBERHA)

CASE NO.: 2986/2024

Matter heard on: 28 November 2024

Judgment delivered on: 20 March 2025

In the matter between: -

ADELE HORN Applicant

and

OVOFIELD (PTY) LTD Respondent

JUDGMENT

ROSSI AJ:

[1] This application concerns a builder's lien exercised by the respondent over the applicant's immovable property. The applicant seeks an order substituting the respondent's lien by way of furnishing security into her attorney's trust account pending the determination of an action to be instituted by the respondent. The relief is formulated as follows:

'1. That the applicant be ordered to pay into the trust account of JACQUES DU PREEZ ATTORNEYS the amount of R47 774.25, alternatively any other amount this

Honourable Court may direct, to be held as security pending final resolution of any legal proceedings to be instituted by the respondent within 20 (twenty) days of delivery of this order to claim its alleged fees for site clearing, levelling the ground, fencing, cutting of large trees and engineering fees;

2. That forthwith upon payment in terms of paragraph 1 above being furnished to the respondent's attorneys of record, the respondent be directed to deliver to the applicant all keys of the property situated on Portion 11 of Farm 4[…], V[…] S[…] R[…] G[…], Gqeberha (the "property") and allow unhindered occupation of the property to the applicant;

3. In the event of the respondent failing to comply with paragraph 2 hereof, authorising and directing the sheriff of this Honourable Court to take all necessary steps, including utilising the services of a locksmith, to take possession of the property and to deliver same to the applicant and to give unhindered occupation of the property to the applicant;

4. That, should the respondent fail to institute any legal proceedings as contemplated in paragraph 1 hereof within 20 (twenty) days after delivery of this order, the amount paid into the trust account of JACQUES DU PREEZ ATTORNEYS by the applicant as aforesaid be released;

5. That the respondent be ordered to pay the costs of this application as between attorney and client.'

<u>The application</u>

[2] Despite the prolixity of the papers filed of record, the *lis* in this application is limited. A substantial portion of the affidavits, and annexed correspondence, address issues concerning the quality of the works undertaken by the respondent in the execution of his duties as contractor, delays occasioned in the completion of the project, and remedial works to be undertaken to remedy defective workmanship. These issues are better left to the trial court in the action proceedings.

[3] At this stage what this court is called upon to determine are three interlinked issues:

(a) Whether the respondent holds a lien over the property?

(b) If so, would be just and equitable for the respondent's lien to be substituted by the payment of security?

(c) And if so, the amount of the security?

[4] Having regard to the issues as I see it, the salient facts which are gleaned from the founding affidavit are summarised below:

(a) On or about 9 February 2022 the parties concluded a written building contract in terms of which it was agreed that the respondent would construct a residential dwelling on the applicant's property for the contract amount of R1 186 847.00 including Vat.

(b) The building works were to be completed within 8 months from registration of the contract with the National Home Builders Registration Council, which registration took place in November 2022.

(c) To finance the project the applicant obtained a building facility with Nedbank Ltd. The respondent has drawn an amount of R998 951.48 from this facility – comprising 84% of the full contract sum.

(d) Prior to completion of the project and disparaged by the quality of the works already undertaken, the applicant instructed Lufeb Construction Services ('Lufeb')[1] to prepare a snag list which took place in March 2023. This snag list forms part of the papers and lists over the course of two pages works/items which do not accord with minimum building standards.

(e) The applicant's former attorneys addressed a letter to the respondent on 4 April 2023 contending an overpayment[2] for materials allegedly not used and a demand for rectification of items on the snag list. Failing compliance, the letter warned that the contract would be cancelled.

(f) On 2 May 2023 the respondent, through its former attorneys, denied that there had been defective works or an overpayment and importantly for present purposes contended that the applicant 'is indebted to our client in the amount of

[1] According to the applicant Lufeb was appointed to facilitate the installation of an electrical connection and gained access to the site through the respondent's employees.

[2] In the amount of R341 629.00.

R47 774.25 for site cleaning, levelling the ground according to the NHBRC, fencing, cutting the large trees and engineer fees. We hereby demand that your client settle the outstanding amount within 7 days hereof, failing which my client will proceed to recover same from your client.'

(g) In May 2023, and in circumstances not readily apparent from the papers, a second report on the purported defective works was prepared by Independent Building Consultants ('IDC').

(h) Correspondence ensued between the legal representatives. Ultimately, the applicant cancelled the agreement on 6 May 2024. Although liability to the respondent in the sum of R47 774.25 was denied, the amount was tendered by way of substituted security for the respondent's lien. In the same letter the applicant's attorneys conveyed that the applicant required the keys and occupation of the property forthwith and was being prejudiced by the respondent's conduct.[3]

(i) Time was again expended[4] by the legal representatives in an effort to reach agreement on mediation and/or arbitration. No consensus was reached. The applicant, eager to gain occupation, repeated her tender by way of letter dated 9 July 2024.[5] In paragraph 4 of the letter it is stated '(U)nless your client's written acceptance is received by close of business 16 July 2024, our client will proceed with the necessary application for occupation of the property and delivery of the keys'. The response by the respondent's attorney dated 11 July 2024 does not address the tender. At no time does the respondent's attorneys contend that the respondent does not have possession of her property.[6] An important aspect to which I shall return.

(j) This application was launched in early August 2024.

[5] The crux of the respondent's defence is the following:

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[3] The applicant was paying the bond and paying a rental expense.
[4] During the period late-May until mid-July 2024.
[5] The applicant's attorneys also addressed correspondence dated 10 June 2024 indicating that they required an answer to the applicant request for occupation and the tender (annexure K). This issue is again canvassed in her attorney's letters dated 21 June 2024 (annexure M) and 28 June 2024 (annexure N).
[6] The respondent's attorney's letters of 15 May 2024 (annexure J), 12 June 2024 (annexure L) and 11 July 2024 (annexure P) are silent on these issues.

(a) A denial that the works undertaken did not comply with minimum building standards. The respondent contended that a material dispute of fact arose as early as 2 May 2023.[7] The respondent further admitted its attorney's demand for the sum of R47 774.25.[8]

(b) The respondent queried the non-joinder of the Bondholder (Nedbank) to the proceedings.[9]

(c) The applicant repudiated the contract, which repudiation was accepted by the respondent and entitled it to claim damages against the applicant, i.e., the balance of the purchase price as well as special damages.[10]

(d) The respondent contended that the applicant has had possession of her property (albeit unlawfully) since 3 February 2024 when the respondent's deponent and his employee were chased off site by the applicant.[11] To bolster this allegation, the respondent referenced the two experts instructed by the applicant to prepare reports.[12]

(e) The respondent asserted that it holds a builder's lien over the property stating, '(T)he mere fact that the applicant has repudiated and subsequently purported to cancel the agreement does not release the property from the builder's lien <u>which the respondent exercises over the property</u>.'[13]

(f) The tendered security in the amount of R47 774.25 is inadequate.

(g) Given the material disputes in the matter, the matter should be determined in action proceedings or expedited arbitration.

[6] In reply, the applicant denied that she has possession of the property and further explained 'I have access to the property itself as the exterior gate to the

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[7] This date ties in with the respondent's former attorney's letter of 2 May 2023, which I have discussed in paragraph [4](f) above.

[8] Conveyed in the same letter of 2 May 2023.

[9] This argument was not advanced by the respondent's counsel in argument before me.

[10] In this regard the respondent obliquely alludes to a claim of over R9 million which it intends to institute by way of counter-claim against the applicant which is premised on its inability to meet its financial commitments.

[11] The respondent's deponent referred to an altercation where he arrived on site to undertake a site inspection. The applicant arrived at the property and set her dog on the deponent and his employee and demanded that they leave the premises. They did so in order to avoid further conflict. Pictures of the applicant's 'large, fierce dog' form part of the papers. In reply, the applicant denied that she set her dog on the respondent's deponent and contended that he approached her in an aggressive manner and threatened to shoot her dog. She asked him to leave the property.

[12] In regard to the second report dated 31 May 2023, the respondent postulates that the applicant gained access by changing the locks on the property.

[13] My own emphasis is added.

property does not lock but I do not have keys to the house itself. I submit that if I was in possession of the site, the entire application would be a waste of the court's time as the respondent would not have a lien.'

General legal principles

[7] Before I advert to the argument before me, it would be convenient to refer to certain applicable legal principles. A lien (also known as a right of retention or *ius retentionis*) arises when a person in possession of another's property performs work or expends money with reference to that thing.[14] The basic idea is that the person in possession (the lien holder or the retentor) can retain possession of the property until he or she is reimbursed for the relevant work or expenditure.[15] Therefore, the lien serves as security for the payment of the debt owed to the retentor.[16] A lien is fundamentally a weapon of defence against a *rei vindicatio* or similar remedy of the person who tries to retrieve it from the retentor, hence it does not, as a general rule, give rise to a cause of action.[17]

[8] A debtor and creditor lien[18] or lien *ex contractu* secures the amount owing to a creditor in terms of a contract.[19] This personal right extends to cover all the expenses incurred by the retentor upon the property in pursuance of the contract.[20]

[9] The so-called builder's lien, such as in the present instance, is a common example of a debtor and creditor lien encountered by our courts. The lien holder may retain the property as against the contracting party until he has been compensated for the work and costs incurred. [21]

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[14] *United Building Society v Smookler's Trustees and Golombick's Trustees* 1906 TS 623 at 627-628.
[15] G Muller et al, Silberberg and Schoeman's The Law of Property, 6ed ('Silberberg'), 487.
[16] Ibid.
[17] *Reed Bros v Ford* 1923 TPD 150 at 154.
[18] The distinction between enrichment and debtor-and-creditor liens has been subject to academic scrutiny and debate – see Silberberg supra 488. This debate, although interesting, plays no role in this matter as the enforcement of a debtor-and-creditor liens has been uniformly applied by our courts – see generally *Pheiffer v Van Wyk* 2015 (5) SA 464 (SCA).
[19] TJ Scott, The Law of South Africa ('LAWSA'), Vol 26(1), 3ed, para 311.
[20] Ibid.
[21] *Pheiffer v Van Wyk* 2015 (5) SA 464 (SCA) para 11.

[10] A lien exists only if the lien holder is in possession of the thing to which his or her claim relates for as long as he or she retains possession thereof.[22] The concept of possession, as an essential element, was elucidated by Innes CJ more than a century ago in *Scholtz v Faifer*[23] '(H)ere the possession which must be proved in the ordinary sense of the term – that is, possession by a man who holds *pro domino*, and to assert his rights as owner. It is enough if the holding is with the intention of securing some benefit for himself as against the owner…But to this natural possession, as to all possession, two elements are essential, one physical, and the other mental. First there must be physical control or occupation – the *detentio* of the thing; and there must be the *animus possidendi* – the intention of holding and exercising that possession.'

Discussion

a) Does the respondent hold a lien over the property?

[11] With these principles in mind, I now approach the issues as defined in paragraph [3] above.

[12] The applicant contends that she does not have possession of her property and is currently being prejudiced in that she is paying for the bond over the property[24] as well as rental for alternative accommodation. The applicant attached to her founding affidavit her bond statement as at end of May 2024 and a month-to-month lease agreement which commenced on 1 June 2024.[25]

[13] The applicant's attorneys have on several occasions called for the applicant's possession to be restored and for the keys to the property. This is coupled with the tender for security. At no stage did the respondent contend that it was not in possession of the property or did not have the keys to the property. At a time when the threat of litigation was looming, the failure to correct the applicant's misconception (if one were to accept the respondent's version) is, to my mind, inexplicable. In this

[22] *Scholtz v Faifer* 1910 TPD 243. The case retains judicial favour and was quoted with approval in *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 26.
[23] *Scholtz v Faifer* supra 246.
[24] A monthly instalment of R15 856.30 being payable.
[25] The lease agreement attached to the papers is unsigned.

regard I find the dictum expressed in *McWilliams v First Consolidated Holdings*[26] apposite.

[14] To reinforce the respondent's contention that the applicant is in possession, the respondent referred to her appointment of Lufeb and IDC, who had access to the property to prepare their reports. The Lufeb snag list can be disposed of easily. Lufeb, who was meant to work in conjunction with the respondent, gained access to the site through the respondent's staff. Although the respondent complained that the snag list was prepared surreptitiously it does not dispute Lufeb's method of access. In fact, the respondent admitted that the site was under its control at the time. The appointment of Lufeb is thus a non-starter.

[15] The circumstances under which IDC came to inspect the property and prepare its report dated 31 May 2023[27] is slightly more cumbersome are not addressed in founding. In reply the applicant explained that although she has access to the property (the erf as I understand it) as the exterior gate does not lock, she does not have keys to the house itself. In the IDC report it is not expressly stated whether its agent entered the house or not. The report does refer to the interior in meticulous detail. The author of the report commented that he was unable to inspect the garage as it was locked. One would not have expected this distinction to be made if he did not have access to the inside of the property. On this issue, I shall assume that IDC accessed the inside of the property in May 2023. But does this mean that the applicant had possession of the property from such date? I find that it does not. I say so for five reasons.

[16] Firstly, I have already mentioned that the respondent failed to repudiate the applicant's contention that she did not have possession of her property. This to me is inexplicable, and more consistent with an admission by it of the truth of such assertion.[28]

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[26] *McWilliams v First Consolidated Holdings ('McWilliams')* 1982 (2) SA 1 (A) 10E-H: 'But in general where according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained may be taken to constituting an admission by him of the truth of the assertion or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute.'

[27] Some 2 months after the Lufeb snag list.

[28] The fact that the letter contains the statement that the failure to deal with any issue should not be construed as an admission is, to my mind, insufficient to dispel the application of the McWilliams

[17] Secondly, the respondent seeks to rely in its answer to a spoliation which occurred on 3 February 2024, not that it was dispossessed several months earlier (as of May 2023).[29]

[18] Thirdly, the reason for the respondent's attendance on the site on 3 February 2024 was to conduct a 'site follow up check'. It would not be necessary, or required of it, to conduct a site check if it had already been dispossessed in May 2023. To my mind this is consistent with what is conveyed by the respondent's attorney in her letter of 12 June 2024, 'our client has previously recorded interference [by] your client when they visited the site to ensure that it was safe and had not been vandalised. Please note that any interference with the appointed engineer or quantity surveyor in carrying out their task[30] will not be tolerated and will be met with interdictory proceedings at which time this letter will be disclosed to the court'. As I read this paragraph, if the respondent did not have possession of the site and the applicant had indeed changed the locks, it would have asked for access to the property. It would have asked for the property to be opened. It does not, presumably because it can enter the property. It has possession – the physical possession and the intention. It simply asks that the applicant not to interfere with the inspection.

[19] Fourthly, there are contradictions on the respondent's own version regarding the existence of a builder's lien. I have already mentioned that it alleged that the applicant has possession. However, elsewhere in its affidavit, the respondent's deponent states:

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principle. The positive assertion is raised on several occasions by the applicant's attorneys. Litigation was repeatedly being threatened. A prudent attorney would grapple with the issues at stake, take proper instructions, and communicate its client's stance in response to such communication. If the respondent was not possessed of the property, why not say so. After all it is an accepted principle of in our law that litigation is not a game – see for example *Cadac (Pty) Ltd v Weber-Stephen Products Company and Others* 2011 (3) SA 570 (SCA) para 10.

[29] At the time when IDC prepared its report.

[30] The task here is the assessment of works in relation to the following clause in the building contract – 'In respect of progress draws where a dispute arises in respect of the amount that the builder is entitled to draw, or payment is not made timeously, a certificate by an engineer or quantity surveyor to the effect that the building construction works to the value indicated on the said certificate have been erected on the property shall be final and binding on both parties. The cost of issuing such certificate shall be for the owner's account and shall be payable on demand.'

‘42.1 The mere fact that the applicant has repudiated and subsequently purported to cancel the agreement does not release the property from the builder’s lien which the respondent exercises over the property.

…

43.4 In the circumstances, the lien attaches, and the mere fact of a repudiation and subsequently a purported cancellation the applicant does not extinguish a lien. There is damages claim which the applicant conveniently overlooks which damages claim arises as a result of the precipitous conduct.’ [31]

[20] On the respondent’s own version, it is exercising a lien over the property, which it would not be able to do so if it did not have possession of the property.

[21] Lastly, I find it particularly implausible that the applicant would go to the expense of bringing this application, and if successful, pay an amount of R47 774.25[32] into trust in anticipation of an action being instituted against her, if she had possession of her property.

[22] Accordingly, I am inclined to reject the version of the respondent and adopt the robust approach advanced in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[33] which incidentally also concerned a spoliation by an owner against a contractor:

‘[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO* [2005] ZAWCHC 6; 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree…[34]

[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously

[31] My own emphasis.
[32] Or such amount to be determined by the court.
[33] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA).
[34] My own emphasis.

addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'[35]

[23] Lastly on the issue of possession Mr Lambrechts for the respondent placed reliance on *Scholtz v Faifer*[36] where the court remarked that it not easy to define what constitutes possession (or physical control) where a building is incomplete or partly completed, and that where the works are suspended for a considerable time 'then it seems to me that if the builder desires to preserve the possession he must take some special step, such as placing a representative in charge or the work or putting a hoarding round it, or doing something to enforce his right to its physical control.'[37] Mr Lambrechts argued that no special steps have been taken by the respondent.

[24] I agree, however, such rationale is distinguishable in instances where the property (albeit incomplete) is capable of being locked.[38] On the papers before me, it

[35] My own emphasis.
[36] *Scholtz v Faifer* 1910 TS 243 at 247.
[37] Ibid 248.
[38] Ibid at 247 it is stated 'When the house has advanced so far as to completion that the doors are placed in position it may be locked up, and possession of the key would be equivalent to possession of the building.'

is common cause that the property can be locked as both parties talk of the keys to the property.

[25] For the aforesaid reasons, I find that the respondent is in possession of the keys.

b) <u>Should the respondent's lien be substituted by the payment of security?</u>

[26] In light of my finding, the second question now falls to be answered.

[27] Whether a court will exercise its discretion to order restoration of the property to its owner depends on the particular facts of each case.[39] In *Spitz v Kesting,*[40] after considering the authorities, Tindall J stated the law as follows:

'The weight of the authority seems to me to be in favour of the view that even where the claim in respect of which the *jus 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 the present case it is clear to me that the applicant is acting in good faith. His attitude has been reasonable throughout and shows that he has no intention of keeping the respondent out of any money that may be due to him. The circumstances set out above show, I think, that the equitable course for the court to adopt is to come to the assistance of the applicant.'

[28] The dictum by Tindall J has been described as the generally accepted view of our courts.[41] It is open to a court to order the return of the owner's property against the provision of security. This relief is granted, not as a right, but as a matter of discretion,[42] although our courts have persistently followed the approach of releasing

[39] Silberberg supra pp 494-495.
[40] 1923 WLD 45 at 49.
[41] *Peter Cooper & Company v De Vos; Peter Cooper & Company v Magistrate for the District of Humansdorp and another* [1998] JOL 2016 (E) at 12.
[42] Ibid – and the authorities cited therein.

goods under attachment against payment of a sum claimed by a third party or the furnishing of an adequate and proper guarantee.[43]

[29] I have had regard to the authorities cited above, and those referred to me by counsel. In my view the court should exercise its discretion in favour of the applicant and accordingly does so. I have arrived at my conclusion based on *inter alia* the following:

(a) The parties agreed that the building works would be completed within 8 months from registration of the building contract (i.e., completion during or about July 2023).
(b) The applicant has not had possession of her property for an extended period.
(c) Building works have ceased due to the impasse between the parties.
(d) The applicant has had to lease alternative accommodation while the dispute is ongoing. She is having to pay her bond instalment and rental expenses.
(e) The applicant has endeavoured, through her attorneys, to resolve the dispute.[44] Security in respect of the respondent's lien was tendered on several occasions; the earliest tender being on 6 May 2024.
(f) The respondent has not proffered any acceptable explanation in law why he has not accepted the tender. The respondent does not contend that the method of security[45] is not proper. The only attack is that the amount is insufficient, which will be addressed below.
(g) Contrary to the respondent's contention, I do not believe that the applicant has unnecessarily protracted this matter. To my mind the applicant's bona fides, and attempts at resolution, are evident from her attorney's letters. She has acted reasonably throughout. On what is before me, the altercation on 3 February 2024 (the nature of which is disputed),[46] although undesirable, is insufficient to tarnish the applicant as coming to court with 'dirty hands'.[47]

[30] Accordingly, I answer the second question in the affirmative.

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[43] *Myers v Gearbox Centre (Pty) Ltd* [1977] 4 All SA 163 (W) 166.
[44] Several attempts at resolving the matter by way of mediation and/or arbitration were made.
[45] By way of payment into the trust account of the applicant's attorney.
[46] Referred to in paragraph [5](c) above.
[47] This is raised by the respondent in its heads of argument.

c) <u>The amount of the security</u>

[31] I have already mentioned that the respondent does not take issue with the form of security. The formulation of precise wording contained in paragraph [1] of the notice of motion is derived from what was conveyed to the applicant by the respondent's attorney in the letter of 2 May 2023 concerning the nature of the respondent's lien and the amount (being R47 774.25).[48] This is the amount tendered.

[32] The question which now falls to be answered is whether this amount is sufficient?

[33] At no point after the letter of 2 May 2023 does the respondent's attorney contend that the amount is no longer sufficient. Based on what is before me, the respondent did not take steps to appoint an engineer or quantity surveyor to undertake a valuation of its works. I shall return to this shortly.

[34] It is only in the respondent's answering affidavit that it is contended that the amount of R47 774.25 is insufficient and that it is entitled to security in the amount R237 669.77. I presume that this amount comprises the balance of the contract price plus R47 774.25. Unfortunately, I am left to speculate as the respondent does not expressly explain how it arrived at this figure.[49] The cogency of its evidence is therefore inadequate.

[35] I have further difficulties with this contention. The respondent's lien encompasses all the expenses actually incurred by it in pursuance of the contract.[50] The balance of the contract price is not an expense incurred by the respondent. This would be in respect of future works or works not yet undertaken. On the respondent's own version, the construction is not complete and a further 16% construction effort is required on the project. It may well have a damages claim for this amount but that is altogether a different issue.

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[48] Additionally, the respondent demands this amount by way of letter dated 20 June 2023 (annexure F).
[49] On my calculation these amounts do not add up to R237 669.77.
[50] *United Building Society v Smookler's Trustees and Golombick's Trustees* 1906 TS 623 at 628

[36] Had the valuation been undertaken, and the amount of works certified to be in excess of the amount initially conveyed by the respondent, the argument of inadequacy would be more persuasive. But a valuation is not before me. What is before me is the figure of R47 774.25 which emanates from the respondent.

[37] The respondent's bona fides are not assisted by its bland manner of dealing with factual matter, such as the amount of its lien, which lies within its peculiar knowledge. It proffers no explanation why it initially asserted the initial amount and now seeks to rely on a significantly higher figure. Lest it not be forgotten that prior to the institution of these proceedings, lengthy correspondence was exchanged between the attorneys. At no point did the respondent disavow the figure of R47 774.25. It is only raised for the first time in its answering affidavit without explanation.

[38] Accordingly, and for the aforesaid reasons, I find the amount of R47 774.25 to comprise of adequate security. I exercise my discretion, based on what I have set out above, in awarding security in this amount.

[39] Lastly, although reversed in sequence, and applying the now well-known test formulated by the Supreme Court of Appeal concerning the issue of non-joinder,[51] I do not find that Nedbank has a direct or substantial interest in the subject matter nor this order.

Costs

[40] The applicant has been successful in her application and is entitled to her costs.[52] At the hearing of the application, I raised with counsel whether the Magistrate's Court scale should be applicable, if the applicant were to succeed, given the amount of the security. Counsel requested an opportunity to present further submissions to me on this issue, which I acceded to.

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[51] *Golden Dividend v Absa Bank* (569/2015) [2016] ZASCA 78 (30 May 2016) para 10.

[52] The general rule is that the successful party ought to be awarded his or her costs. See *Ferreira v Levin N.O.; Vryenhoek v Powell N.O*. 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) para 3; *Abbott v Von Theleman* 1997 (2) SA 848 (C) 854B; and *Mahlangu v De Jager* 1996 (3) SA 235 (LCC) 246C-E.

[41] Ms Morris on behalf of the applicant filed additional submissions.[53] Counsel for the respondent opted not to file additional submissions.

[42] The amount of the security falls within the jurisdiction of the Magistrate's Court. Counsel for the applicant submitted that as the value of the property exceeds the jurisdictional limits of the Magistrate's Court, costs on the High Court tariff should be awarded. In this regard reliance was placed on the local decision of Goosen J in *Andries v Mango Moon Trading 1122 CC*[54] where High Court costs were awarded despite that security fell within the district court's jurisdiction. Unfortunately, as this aspect was not squarely addressed in the judgment, I do not find it to be authority.

[43] I do, however, find merit in Ms Morris' submission concerning the value of the property. The applicant's relief is framed in terms of a *mandament van spolie*. The applicant seeks an order directing the respondent to hand over 'all keys of the property…and allow unhindered occupation of the property.'

[44] Section 30(1) of the Magistrates' Court Act[55] reads '(S)ubject to the limits of jurisdiction prescribed by this Act, the court may grant against persons and things orders for attachments, interdicts and *mandament van spolie*.' The 'limits of jurisdiction' referred to in this subsection are those contained in ss 28 and 29 of the Magistrates' Court Act. As the value of property indeed exceeds the current threshold promulgated in terms of s 29, the Magistrates' Court would not have had jurisdiction.

[45] It is so that the application could have been shorter given the issues for determination. However, I do not believe that this, in and of itself, is sufficient to deprive the applicant of 30% of her costs, as suggested by the respondent. Accordingly, costs on the High Court Scale B are awarded.

[46] The applicant seeks an attorney and client cost against the respondent. The award of costs is a matter in respect of which courts exercise a true discretion.[56] A true discretion exists where the court has a number of equally permissible options

[53] Dated 3 December 2024.
[54] *Andries v Mango Moon Trading 1122 CC t/a V & R Auto Collision Repair Specialists* [2014] ZAECPEHC 42 (18 June 2014).
[55] Act No. 32 of 1944.
[56] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 144.

available to it.[57] The imposition of costs on an attorney and client scale is a punitive measure.[58] In *Public Protector v South African Reserve Bank***,** the Constitutional Court cited with approval the explanation adopted by the Labour Appeal Court in *Limpopo Legal Solutions v Vhembe District Municipality:*[59]

"[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

[47] Put differently, where the conduct concerned is 'extraordinary' and worthy of a court's rebuke.[60] Applying these principles to the matter at hand, I am not persuaded that the respondent's conduct, albeit open to criticism, warrants a punitive cost order.

[48] In the result, the following order is issued:

1. **The applicant is ordered to pay into the trust account of JACQUES DU PREEZ ATTORNEYS the amount of R47 774.25 to be held as security pending final resolution of any legal proceedings to be instituted by the respondent within 20 (twenty) days of delivery of this order to claim its alleged fees for site clearing, levelling the ground, fencing, cutting of large trees and engineering fees.**

2. **The respondent shall, within a period of 7 (seven) days of proof of payment in terms of paragraph 1 above having been furnished to its attorneys of record, deliver to the applicant all keys of the property situated on Portion 11 of Farm 4[…], V[…] S[…] R[…] G[…], Gqeberha (the "property") and allow unhindered occupation of the property to the applicant.**

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[57] Ibid.
[58] Ibid para 220.
[59] *Limpopo Legal Solutions v Vhembe District Municipality* 2017 (9) BCLR 1216 (CC) para 17.
[60] *SS v VV-S* 2018 (6) BCLR 671 (CC) para 41.

3. **In the event of the respondent failing to comply with paragraph 2 above, the sheriff of this Honourable Court shall be authorised and directed to take all necessary steps, including utilising the services of a locksmith, to take possession of the property and to deliver same to the applicant and to give unhindered occupation of the property to the applicant.**

4. **Should the respondent fail to timeously institute the legal proceedings contemplated in paragraph 1 above, the amount paid into the trust account of JACQUES DU PREEZ ATTORNEYS by the applicant as aforesaid shall be released.**

5. **The respondent is ordered to pay the costs of this application on the High Court Scale B.**

T ROSSI
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant:	Ms Morris Counsel for the applicant Instructed by: Jacques Du Preez Attorneys 96 Mangold Street Newton Park Gqeberha Ref: Mr J Du Preez
For the respondent:	Mr I Lambrechts (Heads of argument prepared by Mr B Dyke SC) Counsel for the respondent Instructed by: D Gouws Inc.

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