

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 15893/22

In the matter between

**BAL LOGISTICS (PTY) LTD T/A AFRICAN
LOGISTIC SERVICE**

APPLICANT

AND

MPACT PLASTIC CONTAINERS (PTY) LTD

1st RESPONDENT

**MPACT PLASTIC CONTAINERS CASTLEVIEW
(PTY) LTD**

2nd RESPONDENT

CORAM: THULARE J, PANGARKER J, ELLIOTT AJ

Date of Hearing : 24 January 2025

Date of Delivering : 30 May 2025

ORDER

PANGARKER, J (ELLIOTT, AJ concurring):

I would make the following order:

Clause 4 of the order of the court of first instance is substituted in whole, and replaced with the following order:

“4. The applicants pay into the trust account of the respondents’ attorneys (Account number 0[...] held at Standard Bank Windermere branch) the amount claimed to be due and payable, to wit, R19 717 827 -03, in respect whereof the respondent contends it holds a lien, to be held as security in place of such lien, subject to the following:

4.1 The applicants shall institute action in respect of its alleged claims in respect of the goods and/or in relation to the security in place of the lien or any part thereof within 21 days of the grant of this order.

4.2 Should the applicants fail to institute action in accordance with paragraph 4.1, the amount paid as security together with any interest calculated to date of payment shall be paid to the respondent.

4.3 In the event that the applicants’ action in paragraph 4.1 does not succeed, or succeeds in part, the balance of the security and interest calculated to the date of payment, shall be paid forthwith to the respondent.

4.4 In the event that the applicant’s action in paragraph 4.1 succeeds, or succeeds in part, the security or the balance thereof and the interest calculated to the date of payment, shall be repaid forthwith to the applicants.”

The respondents are to pay the costs of the appeal on a party to party costs on scale C, to be taxed, such costs to include the costs of two counsel where so employed.

DRAFT JUDGMENT

[1] In this full court appeal the appellant sought the variation of an order directing the release of goods held subject to a contractual general lien and pledge against security which was R8 million less than the claims secured. The appellant's contention was that the court should not have made final findings on the affidavits in urgent proceedings. The appellant submitted that the order should have provided for security for the full value of the amounts owing to the appellant as secured by the general lien and pledge subject to proceedings being instituted to determine whether the security be paid to the appellant or refunded.

[2] The respondents were not party to the contract between the importer (SDG) and the freight forwarder (ALS). The respondents' submission was that as owners of the materials released, they were not bound by any contractual lien or pledge in favour of the appellant. The respondents argued that they had provided security more than any enrichment claim the appellant may have. The respondents' submission was that the test to be applied in the determination of the application on the affidavits for the release of materials from the detentor's lien was different from the ordinary and usual test as the relief, if granted, was temporary in nature and not a final determination. The respondents argued that by the variation the appellant sought to relieve itself of the duty to allege and prove the basis and quantum of its claims allegedly secured by liens and a pledge and to place these duties on the respondents, and this was not permissible.

[3] Leave to appeal to the full court was granted by the Supreme Court of Appeal. In the court of first instance the appellant was a respondent in an application wherein the present respondents sought an order to make the goods held in its warehouses subject to a lien, available for collections and to deliver possession; for the respondents to pay into trust amounts claimed due and payable in respect of the contention of lien as security subject to the appellant instituting action in respect of the lien within 21 days of the order; that the respondents indemnify it against any claim in respect of such delivery and that it provide full particulars of the whereabouts of the goods if it was no longer in possession as well as costs.

[4] The goods had been delivered to the appellant's warehouses by Solomon David Group (SDG) before SDG went into business rescue. The goods were never in the

respondents' possession, and they were held in the appellant's warehouses. There was no reference to the respondents in the bills of lading which set out the shipping parties in relation to the goods. There was also no reference to the respondents in what was called an EDI notification which was issued by Customs and Excise in SARS to indicate the release of the goods imported and subject to duty. In other SARS documents SDG was the importer. The respondents did not appear anywhere in the relevant documents. The respondents had to prove their alleged ownership of the goods.

[5] The appellant had undertaken to release the goods to the respondents upon payment of all the amounts due to it in respect of their forwarding, clearance, transportation and storage to the respondents' attorneys to be held in trust pending the respondents indemnifying the appellant from other claims and the fulfillment of other conditions. The appellant's opposition to the application was informed by the view that the respondents sought urgent relief under a guise of a vindictory application to which the respondents were not entitled. The appellants' case was that the case was ultimately about money, The respondents made it quite clear that they intended to use polypropylene (PP) and High-Density Polyethylene (HDPE) pellets to produce finished products. The products would be consumed in use and therefore the relief that the respondents sought was final.

[6] The appellant operated in the freight forwarding and logistics industry and provided warehousing as part of its services. The appellant was one of the forwarding and warehousing companies which the SDG used. The appellant acted as a freight forwarder and arranged for all freight forwarding, clearing and storage of goods imported by SDG which involved inter alia arranging for and paying all of the expenses relating to the ocean transport and clearing of the cargo, including the charges of the ocean carrier, all port charges, import VAT and import duties, all of which must be met before the goods will be released, and then taking possession of the goods at the port, transporting the goods to warehouses and storing goods until released or delivered on instructions of SDG. The respondents sought an urgent *rei vindicatio* in respect of goods it allegedly owned which were held by the appellant in its warehouses in Cape Town, Johannesburg and Durban. The goods consisted of raw material used by the respondents in their manufacturing processes, which goods

were about to run out and to lead to a complete shutdown of their ability to manufacture and result in irreparable financial losses. The respondents were leading suppliers of plastic containers and all of their importing and ordering were carried out from their premises in Atlantis, Cape Town. For importing raw materials from the Middle, Far East, Europe and the Americas, the respondents purchased and paid for materials from SDG at a delivered cost, in other words, the price paid included the delivery of the materials to any one of the respondents' plants. The respondents' case was that ownership of the materials passed to the respondent once the materials cleared customs into South Africa. The respondents conducted frequent audits to ensure accurate records of stock levels.

[7] The respondents conducted an audit on short notice and found large discrepancies between their records of what should have been in and what was in stock. Subsequently the respondents discovered that having paid for material in full, the respondents had yet to receive confirmation that the material was available. They had received bills of lading but were told SDG was still waiting for delivery. In another instance whilst they were told that SDG was still waiting for delivery but in fact the material had been delivered a month before. As at the date of proceedings, the respondents' total stock of material was 1 491 100 tons, of which R56 150 tons were with another warehouser. The balance was with the appellant, which on a simple mathematical calculation amounted to 1 434 950 tons. When SDG went into business rescue the respondents attempted to conduct an audit of stock in the warehouses of the appellant and were denied access. The respondents have since attempted to access and remove the stock, without success. The respondents tendered payment in respect of any valid and enforceable lien that the appellant may have over the stock that was in the appellant's warehouses, and the respondents were willing to indemnify the appellant against the release of stock, against any claim which any third party may have against the appellant in respect of the stock so released. The appellant was willing to release the stock on condition that the claimed lien over the stock was paid to it, and undertook to provide details of its claimed lien. The parties have been unable to reach agreement on the details of the claimed lien. This led to the urgent application.

[8] The appellant did not appeal against the making of such order in principle. Its appeal was directed at the amount of security stipulated in the order and the terms of the order requiring that it institute an action in respect of its alleged causes of action as secured by such lien. The appellant's submission was that the order had two adverse effects to it namely: (1) the order summarily divested it of the benefit of a debtor/lien general and special lien and pledge over goods in its possession without security at least to the extent of R8 507 111-97 and (2) the order put it at risk of being deprived of the benefit of that debtor/creditor lien and pledge and even an enrichment lien to the extent of the security ordered, that of R11 210 715-06. In terms of the contract between the appellant and the SDG, inter alia, the appellant was afforded a special and general lien and pledge over all goods either for monies due in respect of such goods or for other monies due to the appellant. The relevant provisions are as follows (Clause 38):

“LIEN

All goods and documents relating to goods including bills of lading and import permits, as well as all refunds, repayments, claims and other recoveries, shall be subject to a special and general lien and pledge either for monies due in respect of such goods or for other monies due to the company from the customer, sender, owner, consignee, importer or the holder of the bill of lading or their agents, if any.”

[9] The appellant's case was that when SDG entered business rescue in October 2023, SDG owed the appellant R28 160 413-51. As at 20 October 2023 and in relation to goods imported by SDG for the respondents, SDG was indebted to the appellant for such freight forwarding charges in a total amount of R19 717 827-03 which comprised of R8 507 111-97 for goods already released and R11 210 725-06 including storage charges calculated to the end of October in relation to goods still in the appellant's possession and under its control. The respondents demanded delivery of goods from the appellant and the appellant's response referred to the general and special lien and pledge and required payment of the full amount of R19 717 827-03 and an indemnity. The respondents brought an urgent application issued on 18 October 2023 and heard on 20 October 2023 in which they sought delivery of the goods in possession of the appellant and in the event that the appellant asserted

a lien, that the goods be released to the respondents against a tender to provide security in place of any valid lien which the appellant was able to establish. No amount of the proposed security was set out in the draft order prayed for.

[10] The appellant's case was that the respondents claimed ownership of the goods on clearing customs into South Africa, which was a bald statement. The respondents did not describe the process of delivery as required under South African law for the transfer of ownership of movables and did not include any evidence of the transfer of ownership from SDG to the respondents. The appellant's case was further that the evidence relied on by the respondents indicated, *prima facie*, that there was no opportunity for delivery in any form meeting the requirements of South African law necessary to effect the transfer of ownership. The bills of lading were non-negotiable identifying SDG as the named consignee. This consequently precluded the bills of lading operating as a document of title and transferring ownership of the cargo by virtue of negotiation or transfer of the bills of lading, and the bills of lading recorded this expressly. The appellant cleared the cargo, took physical delivery and possession thereof from the shipping line and retained physical possession thereof on the basis that it was SDG which was the owner of the cargo and on whose behalf it received and held the goods. The respondents did not and could not contend that the appellant had agreed to hold the goods on behalf of the respondents as that might constitute the requisite delivery in the form of attornment. In the answering affidavit, the appellant clearly set out that the respondents had to allege and prove that they were the owners of the goods. The appellant indicated its challenge to ownership and amongst others indicated that the goods were held in its warehouses, have never been in the respondents' possession, there was no reference whatsoever to the respondents in the bills of lading, there was no reference to the respondents on the clearing instructions, which evidenced the owner, *prima facie*, as SDG. The respondents' details did not appear on the Customs and Excise documents. In the business rescue application for SDG, the affidavit indicated that SDG had substantial stock in reserve stored at its transporter's warehouses, signalling that according to SDG the respondents did not own stock to which it lay claim.

[11] On the other hand, the respondents explained the process. The respondents would request SDG to provide a quotation for a specific grade of raw material and SDG would provide a pro forma invoice on which the respondents would pay a deposit of between 30% and 50%. SDG would secure the material from its international exporters which would then be shipped to South Africa. SDG would provide the respondents with a bill of lading which ordinarily recorded SDG as consignee. The respondents would pay the remaining balance due. Upon clearing of the materials through customs, SDG would inform the respondents that the materials were available for consumption and thereafter SDG would provide a final invoice to the applicants. The respondents would pay a delivered price and SDG would see to the warehousing of the raw material until such time as it was required by the respondents for manufacturing and at which time and on request it would provide material in the quantities required by the respondents at one or other of their manufacturing plants. As between the respondents and SDG delivery of the material would be effected upon the release of the material and the housing thereof in warehouses. According to the respondents, by the time the raw material was warehoused, having cleared customs into South Africa, the applicants have paid in full for such material and are the owners thereof.

[12] The respondents' case was that the appellant's statement appeared to relate to consignments beyond simply those relevant to the application. It dated back to June 2023 and the respondents had continued to draw down on the stock held in the appellant's warehouses since June 2023 until they were refused access in October 2023. It was thus not clear on what basis the appellant now asserted any lien over the respondents' property or at all. According to the respondents, in simplified form the argument was that the respondents should be ordered to provide security to the full amount allegedly owed by SDG to the appellant in respect of a debtor-creditor lien and pledge pursuant to a contract, whereof the respondents was not a party, and should the respondents seek to recover the security in whole or in part it shall within a stipulated time institute action against the appellant challenging the liens or the amount of the claims, failing which the security was to be paid to the appellant. According to the respondents the order now sought showed that the appellant misunderstood the nature of a lien. A lien did not entitle the holder thereof to payment of the holder's claim without the need for it to establish such claim by

means of court procedure. In effect, so the argument went, the appellant sought an order that the respondents had to disprove the existence of any lien as well as the quantum of the appellant's claim. The respondents would have the onus to disprove a claim and the quantum thereof failing which the appellant would be entitled to payment without it having to prove the existence and quantum of its alleged claims.

Ownership

[13] The most important derivative mode of acquisition of ownership in the case of movables is delivery. To transfer ownership from the predecessor to the successor, there must be agreement between the parties to transfer ownership and there must be a form of conveyance, which is delivery in movables. These two requirements, the mental element and the physical element must be satisfied for the transfer of ownership [*Wille's Principles of South African Law*, 9th ed, General Editor: F du Bois, 2007 at p 519 -520]. Attornment is a method of delivery which occurs when the property to be transferred is in the physical control of a third party who holds it on behalf of the owner. Attornment is effected by a tripartite agreement between the parties concerned that the holder will henceforth no longer hold the property on behalf of the transferor but on behalf of the transferee. It requires a tripartite agreement or mental concurrence on the part of all three interested parties that the holder henceforth will hold the property on behalf of the transferee and not on behalf of the transferor [*Wille's Principles* p 530 under para (f); *The Law of Property*, Silberberg and Schoeman, 3rd ed p 263-269]. The person who has detention of the goods must attorn the new owner, in other words, the person who has detention must agree to hold the property on behalf of the transferee. The unison of the transferor and the transferee alone is not sufficient. The transferor must instruct the person who has detention with the concurrence of the transferee, and the person in detention must with such concurrence agree to follow the instructions. Then and then only is the delivery complete [*Caledon & SWD Eksekuteurskamer Bpk v Wentzel en Andere* [1972 (1) SA 270 (A) at 273A-C].

[14] I am unable to agree with the court of first instance that the appellant did not put up any facts to refute ownership. The appellant pointed out that there was no evidence of delivery of the goods to the respondents. The appellant argued that

delivery was required by South African law, for the transfer of ownership in movables from SDG to the respondents. I am not persuaded that the facts set out by the appellant as to the movements of the goods from international suppliers to the appellant's warehouses, and the appellant specifically setting out that there was no role and even mention of the respondents in the whole process, qualified as opportunistic contentions. They were facts which excluded the possibility of the requisite delivery required by South African law to transfer ownership of movables. The facts are countervailing evidence as regards the respondents' alleged ownership. These required ventilation through judicial processing before a determination on the respondents' ownership could be made. The question of disputed ownership was not a matter which could be finally decided in favour of the respondents on the papers, as the court of first instance did. The allegations in the answering affidavits of ALS were sufficiently detailed to stand as an answer to an inference of ownership being made.

[15] It seems that SDG claimed to have retained control of the stock and acknowledged that the respondents at some stage, still to be proved, owned the stock and SDG retained the stock on behalf of the respondents (*constitutum possessorium*) [*Goldfinger's Trustee v Whitelaw & Son* 1917 AD 66 at 74]. This form of transfer of ownership might be used to cloak the real nature of the transaction and as a result there is no issue when it involves no prejudice to third parties. However in instances like the present where there is potential prejudice to ALS, both SDG and the respondents still had to establish bona fides [*Goldfinger* p 74]. In circumstances like the present where the rights of ALS are concerned, where this form of delivery is established by intention alone, it must be closely scrutinized to guard against the danger of legal fraud in such dealings [*Prinsloo v Venter* 1964 (3) SA 626 (O) at 628-629]. In this case, against the background of the disputed transfer of ownership, the court of first instance could not simply overlook the danger and disregard its obligations to ensure scrutiny of the constructive delivery suggested, with specific regard to the prejudice to the detentor, ALS. It is not necessary, on the facts of this case, to enter the debate as to whether the transfer may be susceptible to another form of constructive delivery, whether as an extension of *constitutum possessorium* or independent, referred to as cession of the right of vindication [*Barclays Western Bank Ltd v Ernst* [1988 (1) SA 243 (A) at 255A; *Page Automation (Pty) Ltd v Profusa*

CC t/a Homenet OR Tambo 2013 (4) SA 37 (GSJ) at para 16 to 29. ALS did not only hold the stock. It also had a lien over the stock and had a material interest in the transfer of ownership. The transfer had serious implications for ALS, and such transfer had to take into account such interest. SDG could not simply ignore ALS' s lien and constructively pass ownership to the respondents to the detriment of ALS.

Lien

[16] The contract between ALS and SDG, inter alia, afforded ALS a special and general lien and pledge over all goods either for monies due in respect of such goods or for other monies due to ALS. The terms of the lien were already set out earlier in this judgment. ALS alleged that SDG owed it a total of R28 160 413-51 when SDG entered business rescue in October, and that in relation to goods imported by SDG for the respondents, SDG was indebted to ALS for such freight forwarding charges in a total of R19 717 827-03 comprising of R8 507 111-97 in relation to goods which had already been released to R11 210 715-06 including storage charges calculated to the end of October in relation to goods still in ALS possession and under its control. These amounts, comprising R19 717 827-03 of the R28 160 413-51 referred specifically to goods imported for sale by SDG to the respondents, and excluded other customers of SDG for whom the same or similar product was obtained.

[17] The lien, *jus retentionis*, was explained as follows in *The Law of Agency in South Africa*, Silke, 3rd edition, p 263:

“It consists in a right to retain property whether immovable or movable, and including money, which is in one’s possession, until once’s claim is satisfied. If the right is to retain only against satisfaction of claims for expenses or liabilities incurred in respect of the particular property held, it corresponds to what is called in English law a ‘particular lien’. If it is a right to retain property against payment of claims not connected with that property, it corresponds to the English ‘general lien’. Further, the right may exist as against the world (in rem), or as against a particular individual and his contractual successors (in personam).”

At p 265 it was said:

“It is quite clear that a ‘general right of retention’, when it exists, covers payment of the general balance of account; but only the balance due in the particular employment (ie a factor cannot retain against debts due to him in some other capacity). And surely it must cover too release from, or indemnity against, obligations and liabilities incurred in that employment - ...

Though there appears to be no crisp statement to the effect that an agent as such has no general lien, it is the irresistible inference to be drawn from the fact that while some agents, notably the factor, do enjoy such a lien, others, eg a forwarding agent, have only a special lien. Voet is, however, not unambiguous, for he does not state in express terms that the goods entrusted to the agent can only be retained by him in respect of money owing on those particular goods.”

The lien agreed to between ALS and SDG provides expressly for a general and special lien, which entitled ALS to retain property against payment of a general balance of account and not limited to amounts owing in respect of the property held only. The express agreement and ALS’ physical possession of the goods effectively constituted and established the lien [*Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (AD) at 611H]. ALS’ case was that the lien afforded it the protection of a right of retention for the full amount of R19 717 827-03 effective against all parties with the sole exception of a true owner of the goods who was not bound by the terms of the agreement creating a debtor/creditor lien and pledge. According to ALS, the value of the commodity required in South Africa and having to be imported from China must naturally include the costs of bringing the commodity to South Africa and the costs of clearing the goods, including charges and duties, which are generally described in that business environment as ‘arrived sound market value’. All the useful and necessary expenses in relation to the imported goods directly increased the ‘landed value’ beyond the original purchase price in China. They provided protection in the form of the lien and right of retention. ALS cleared the cargo, took physical delivery and possession thereof from the shipping line and retained physical possession thereof on the basis that SDG was the owner of the cargo. The papers suggest that the respondents were to be the ultimate recipient of the goods, and qualified to be

the consignee, and ultimately financially responsible for the receipt of the shipment. The lien was applicable to the respondents [LAWSA 2nd ed (3rd re-issue), para 293].

[18] The submission by ALS that the court of first instance, under the circumstances, was in no position to make factual findings, on the amount of security in favour of the respondents, was well founded. If the facts set out by ALS were proven, the effect of the order of the court of first instance would be that ALS was deprived of its right of retention conferred by the general and special lien without security for the R8 507 111-97 owed by SDG in respect of the goods already released. The amount reflected in the order of the court of first instance meant that the security was limited to the protection provided by the enrichment lien, and did not refer to the contractual lien. The reduction is unexplained in the judgment, more so because according to ALS, the reduction was a very significant deviation from what had been tendered in the notice of application, which tender was in the following terms:

“5. That in the event that respondent may contend that it has a lien over the material or any part thereof the applicants pay into the trust account of respondent’s attorneys the amount claimed to be due and payable in respect whereof respondent contends it holds such lien, to be held as security in place of such lien before paragraphs 2 to 4 become effective, subject to the following:

5.1 the respondent shall institute action in respect of its lien within 21 calendar days of the grant of this order; and

5.2 Failing which the amounts paid as security shall be immediately repaid to the applicant’s attorneys.”

Paragraphs 2 to 4 referred to in the tender related to prayers for making the goods available for collection, delivery thereof to the respondents failing which the sheriff was authorized to attach, remove and deliver the goods to the respondents.

[19] The tender itself, made in the application, did not make any reference to the amount of security. The amount claimed to be due and payable in respect of the lien, was R19 717 827-03. The parties had a dispute as to the amount of ALS’s claim enforceable against the respondents based on the lien. In such circumstances,

justice demanded that the court exercises its discretion in favour of the provision of suitable and adequate security for the payment of the lien claimant's legitimate expenses [*Avfin Industrial Finance (Pty) Ltd v Interject Maintenance (Pty) Ltd* 1997 (1) SA 807 (TPD) at p 815A-C; *Hochmetals Africa Ltd v Otavi Mining Co Ltd* 1968 (1) SA 571 (AD) at 581A, 582E-F]. The order of the court of first instance was not sufficient to discharge ALS's lien. An action had to follow in order to determine the respondents' ownership and ALS's legitimate expenses. In the face of a dispute a court will not make an order which in another way diminishes the right to retention, to be exact, by ordering the giving of security for less than the amount of the detentor's claim [*Mancisco & Sons CC (In liquidation) v Stone* 2001 (1) SA 168 (WLD) at 175B-C].

[20] A lien should be met by a tender which is substantially adequate, not what a court deemed fair [*Mancisco* p 175G and 175C]. A court's discretion must be informed by fairness and practicality, bearing in mind that a lien, in circumstances like the present, would have been an effective and cost-effective remedy which if the court did not provide adequate security for, the court order will be depriving the detentor thereof. Where the transferee established ownership, the approach was set out as follows:

“A lienholder cannot simply insist on a guarantee for the full amount of its claim. In deciding the adequacy of a guarantee, the Court has to decide whether the lienholder's claim is *prima facie* excessive without resolving factual disputes unless there are incontrovertible allegations. The court has to weigh up the strength of the arguments advanced by the owner to challenge the claim and arrive at what seems to be a realistic best-case scenario for the lienholder.” [*Mancisco* p 189B-C].

The order for the owner to get possession of the goods once adequate security was given carried with it the basic truth that the interests of neither party will be harmed [*Mancisco* p 182D].

As already indicated, it is not established on the papers in this matter that the respondents were the owners of the goods which were in possession of ALS. There was no agreement between the respondents and ALS established on the papers,

and that lack of privity which existed meant that they had no contractual obligations to one another, thereby eliminating liabilities and access to contractual rights. The general and special lien of ALS was established. ALS had incurred expenditure on the goods in pursuance of a contractual obligation existing between itself and SDG, and ALS had a right of retention against SDG and a person in the position of the respondents until it was compensated for its expenditure on that property [*Land Bank v Mans* 1933 CPD 16 at p 22; *Naidoo v Sanbonani Express Freight and Another* 2008 (5) SA 530 (D & CLD) para 11]. On the other hand, the ownership of the goods was still to be established by the respondents.

[21] The respondents approached the court in urgent motion proceedings. The approach to the dispute in relation to the amount of security to be provided should have been guided by what was said in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 12 where it was said:

“[12] Recognising that the truth almost always lied beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of the 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 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree.”

There was no legitimate basis to exercise a discretion and decide the amount of security upon the assumption that the respondents’ account of the events was substantially true and correct. *Wightman* also emphasised that the security put up to recover possession must be satisfactory [para 31]. It was the respondents who approached the courts for interim relief, and it is only natural that it be the respondents who take the matter to its finality. The respondents cannot seek interim relief, and once they have the court’s indulgence in hand, then expect the other party to be the one to seek final relief, on the same dispute where they sought an interim

indulgence from the courts. I am unable to agree with the court of first instance on who had to institute an action. The respondents cannot elevate the position provided by the interim relief granted to them as final.

[22] The parties agreed that the goods were already released pursuant the order of the court of first instance. The released goods meant that certain provisions of the order were no longer material. A successful appeal means that the respondents will be obliged to provide additional security. For these reasons I am persuaded that the appeal should succeed.

DM THULARE
JUDGE OF THE HIGH COURT

I agree

M PANGARKER
JUDGE OF THE HIGH COURT

I agree

G ELLIOTT
ACTING JUDGE OF THE HIGH COURT

Appearances

For applicant: Adv. SR Mullins SC
Instructed by: Ms H Teubes
For respondent: Adv. L Olivier
Instructed by:

