REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2013/ 14605

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

12/06/2013
DATE

SIGNATURE

In the matter between:

KIRSTEN CURTIS TRUST IT 318/91	First Applicant
CURTIS: KIRSTEN N.O.	Second Applicant
ABREE : OSMAN N.O.	Third Applicant
CURTIS: NEIL N.O.	Fourth Applicant
CURTIS: LORRAINE N.O.	Fifth Applicant

and

BERKLEY DEVELOPMENT (PTY) LTD	First Respondent
HENN: ABRAHAM JOHAN	Second Respondent

JUDGMENT

MBONGWE AJ,

[1] This application serving before me was brought on the basis that same was semi urgent in nature in terms of Rule 6(12) of the Uniform Rules of this Court. After hearing preliminary argument, I decided that the circumstances presented by the applicant warranted that the matter be heard on such basis. The matter was then stood down to enable the 1st respondent to file its answering affidavit. The applicant dispensed with its right to file and serve a replying affidavit to allegations that could be contained in the 2nd respondent's answering affidavit and was prepared to proceed with the matter.

[2] At the hearing, two days later, the applicant addressed the court on the relief sought and moved application for condonation for dispensing with the forms, service and time periods prescribed by the Uniform Rules of this Court. This application was opposed. The arguments in this regard were such that they touched on the merits and points in limine raised by the 1st respondent resulting in agreement being reached that the court pronounces its rulings at the end of the hearing on all these aspects.

2.1 With regard to the application for condonation, the motivation and opposition thereto at the hearing were actually academic as a ruling to hear the matter had already been given.

[3] For purposes of order, I now describe the parties : The 1st applicant is a Trust with IT number 318/91 and duly registered with the Master of this Court according to the laws of the Republic of South Africa and is represented herein by the 2nd Respondent, its managing Trustee, who derives her powers to so act from a written resolution taken by the Trustees at a meeting held on the 20th April 2012.

[4] The 1st respondent is a company with limited liability and duly incorporated in terms of the company laws of the Republic of south Africa.

[5] The 2nd respondent, JOHANNES ABRAHAM HENN, is a rescue practioner who was appointed as such for the 1st respondent on the 4th December 2012.

[6] The facts in this matter are that the 1st applicant, duly represented by the 2nd applicant who was duly authorised to do so, entered into a vacant stand sale and building agreement (hereinafter referred to as "the agreement") with the 1st respondent. The terms of the agreement were that:

6.1 The 1st respondent would sell the vacant stand situated at 4 Homestead Manor, PTN 5 of erf 668, Bryanston, Johannesburg to and build a dwelling thereon, (hereinafter referred to as "the property") for the applicant. The purchase price of the stand and completed dwelling would be the sum of R1 745 250 - 00 and R2 140 75 - 00, respectively and the development of the property was to commence thirty days from the date of signature of the agreement. The vacant stand was paid for and subsequently registered in the name of the 1st applicant during July 2012.

6.2 The 1st applicant was to settle any progress payment claim rendered and signed by the 1st respondent within seven (7) days of the presentation of such claim.

6.3 Due to Occupational Safety Act regulations and laws, the applicant will not be permitted to visit the property without prior arrangement with the 1st respondent or his agent.

6.4 Possession of the property shall be given to the 1st applicant on the date of registration of transfer of the property into the name of the 1st applicant, from which date the 1st applicant shall be liable for all municipal charges and levies payable to the Home Owners Association.

6.5 Until the occupation date, the 1st respondent shall retain occupation of the property and the right to undisturbed use and access thereto and that any prior physical occupation of the property by the 1st applicant with or without

the consent of the 1st respondent shall not interfere with the builder's/ 1st respondent's lien over the property.

6.6 applicant shall not be entitled to occupy the property or the building unless all amounts due to the 1st respondent have been paid in full in accordance with the provisions of the agreement.

6.7 The 1st applicant irrevocably and in rem suam appoints the 1st respondent as its agent to apply for and obtain such approval, consent or authority as may be required for approval of the building plans.

[7] The building plans were drawn and altered and the construction commenced in May 2012.

[8] On the 24th July 2012, the 1st applicant paid the deposit of R50 000-00 (fifty thousand rand) as per the agreement as well as the sum of R24 000-00 (twenty four thousand rand) for the enrolment of the property at NHBRC by the 1st respondent on behalf of the 1st applicant.

[9] The 1st applicant had concerns during August 2012 which are listed thus: during August 2012 the 1st respondent's manager resigned and 1st applicant was advised that the 1st respondent was in some financial trouble; that a replacement appointed during July 2012, the draftsman and the financial manager of the 1st respondent resigned shortly thereafter due to non

payment of salaries. The typographical error in the last statement in which the word 'non' is excluded is noted. The applicant further alleged that due to its concern for the speedy completion of the building an addendum to the agreement was made in terms of which the development and construction was to be completed by 28th February 2013.

[10] The 1st applicant states further that during the period April and September 2012, the 1st respondent continued to submit progress payment claims and applicant lists the payments made and the date of each payment. The total amount paid to the 1st respondent as at the 27th September 2012 amounts to R1 690 000-00. This amount is borne by attached payment schedules. A payment schedule presented to the 1st applicant by the 2nd responden (page 56 of the bundle) shows that the work done as at the 10 October 2012 was in the order of 58 percent and that the value thereof was the sum of R1 668 000-00. At this stage applicant had paid R1 690 000-00 in settlement of payment certificate. This suggests that applicant had been made to pay more for less. Hence applicant's request later for a reconcilled statement.

[11] Without giving the dates and times, the 2nd applicant alleges to have found, during his visits to the construction site, that he had been paying for work that had either not been done or was shockingly substandard. Concerned with the moneys the 1st applicant was paying to the 1st respondent he then engaged the services of two property valuators for the purpose of obtaining advice, namely; Zarkia Gregorowski, a professional

valuator and consultant with over twenty five years of experience in evaluating buildings and Ben Prinsloo, also a professional valuator and consultant who is also contracted to the NHBRC.

[12] A report by the said expert, annexure "H", with photos of the building concerned is attached to the 2nd applicant's founding affidavit and shows inspections as having been done as follow: 10th, 16th and 20th October 2012 (Zirkia Gregorowski), 17th October 2012 (Ben Prinsloo) and the report, signed by Zirkia, is dated 20th October 2012. The opening two paragraphs of this report read as follow: " The purpose of this report is to advise client on the progress, legal conditions and quality of work as instructed by the client. We emphasise that we performed building inspections but have not carried out a structural survey of the improvements. Mrs Mouton (employee at Berkeley's Development, the 2nd respondent) contacted us on behalf of the client to inform us that the reason for the inspection is to determine the percentage of progress. It was agreed to that the client gets independent advice. The developer insists on a progress payment and the client questions the percentage of work done and the quality of workmanship."

[13] According to this report, page 4, " there are usually three to four progress payments that must be made before the house is complete. Payments are subject to certain documentation to be submitted. In this matter the following documentation is outstanding or not submitted on our request:

- NHBRC Enrolment certificate
- Engineer Clearance Certificate for:

- Foundation
- Roof
- Concrete slab
- Stairs/ Balconies
- Revised approved plans
- Plumbing- (soil drains) Clearance certificate.

The percentage as per developer (58%) by the 10th October 2012 exceeds the actual work completed which was only (52.25%). Pictures taken at date of inspection: 10/10/2012 (with reference to plaster work, gutters and flashings, facia and barge boards, fire place and heating) " have been attached. In relation to the said pictures the following comments are made:

- Most of the wooden door and window frames are skew and some damaged or contaminated by mortar during plastering. The quality of window frames is not strong and as noted within plans, client to choose the type of frames, inter alia.

[14] I was referred to and seen the pictures and the comments following each picture. I now list the closing comments and conclusions of this report, page 9 - 10 which read as follow:

14.1 "I Zirkia Gregorowski , Professional Property Valuer and Building inspector can confirm, without fear of contradiction, that the building in question has visible defects, compounded by poor workmanship.

14.2 Evidence found of bad workmanship. Some of the trade/work was done very poorly or incorrectly. The workmanship contributed to the unsatisfactory condition of the house at this point in time.

14.3 Some of the workmanship appears to be a result of sub-standard work or lack of expertise at the time construction. The lists of problems contained in this report are substantial and considered a result of poor workmanship and negligence on the part of the contractor/ developer.

14.4 Photographs offer evidence of some of the defects.

14.5 Both the common law and the National Building Regulations and Building Standards Act, require a contractor to work in a competent and professional manner, that sound and proper materials should be supplied and that the structure should be fit for the purpose for which it was intended.

14.6 Concern regarding the omission of legal docomentation, this may result into difficulty to obtain an occupancy certificate and the concern for the possibility of an unsafe property.

14.7 An Occupation Certificate is a document that is issued by the Building Control sub-directorate in accordance with the National Building Regulations to certify that a building has been completed in accordance with the approved building plan and all other relevant city

council requirements. In order to get an Occupation Certificate from the City Council, you will need:

(a) approved building plans plus any other documentation from Town Planning regarding rezoning, building line relaxation, consent etc and, if necessary, an approved Site Development Plan.

(b) Completion Certificate from a registered structural / civil engineer - this is for the foundations, concrete slabs, staircases, wooden/suspended floors, steel work, roofs, freestanding walls over 2.1 m high, swimming pools and all structures built without prior planning permission.

(c) Certificate (Roof Truss) - your truss supplier / installer should provide with a certification, alternatively, consult with the engineer concerned.

(d) IOPSA Certificate of Compliance (Institute of Plumbing South Africa) - this is required for all plumbing / drainage/ sewer work. It can only be issued by a registered plumber.

(e) Glazing Certificate of Compliance which can only be issued by a glazier.

(f) Electrical Certificate of Compliance issued only by a registered Electrician

(g) Fire Certificate.

14.8 No building, new building and/ or additions to existing buildings may be occupied or put to use before the local authority has issued an occupational certificate.

14.9 The percentage of work actually done as at 10th October 2012 is less than the percentage of work already charged and paid for as determined on 10th - 20th October 2012.

14.10 Enrolling a new home with the NHBRC is not only a statutory requirement but also affords consumers protection against contractors who deliver substandard design, workmanship and poor quality materials.

14.11 The primary concern of the NHBRC IS "major structural defects" caused by poor workmanship."

14.12 This report concludes by stating " the client paid for the enrolment certificate but no certificate has been issued. With enquiries

it came to our attention that the correct procedures were not followed by the developer and penalty fees are to be paid."

[15] It appears from the annexures to the 2nd applicant's founding affidavit that numerous correspondence was exchanged between the attorneys of both parties and meetings held subsequent to this report to try to resolve the matter, but the 1st respondent had been reluctant to furnish repeatedly requested documentation culminating in the applicant's attorneys writing to and advising the 1st respondent's attorneys in a letter dated 11th February 2013 that as a result of the 1st respondent's persistent failure or refusal to enrol the property with the NHBRC despite demand for him to do so, 1st respondent's failure to provide proof that variations to the building plans were submitted to and approved by the municipality, 1st respondent's failure/ refusal to provide a completed signed agreement inclusive of all annexures/addendums and to provide a reconciled statement of account comparing amounts paid to the 1st respondent with the building progress records, the contract was being cancelled from the date of the said letter. In response, the 1st respondent's attorneys advised the applicants' attorneys, in a letter dated 13th March 2013 that the 1st respondent had obtained an enrolment certificate and the bank guarantee called for by the NHBRC due to the property not having been enrolled timeously ; that the 1st respondent does not accept 1st applicant's cancellation of the building agreement and that, in any event, if the 1st applicant proceeded with the threatened application for the eviction of the 1st respondent from the building site, such

application will take at least three months to finalise and that the 1st respondent could complete the building work within such period.

[16] The applicant has also attached an affidavit dated 17th March 2013 by a resident of a property adjacent to the house concerned stating that the 1st respondent had abandoned the applicant's house under construction during September 2012 and only returned mid February 2013. According to the applicant, the 1st respondent had in fact sent another contractor to the property and at some stage such contractor began with the construction of the border walls and refused to vacate the property despite the applicants' demand for the new contractor to do so.

[17] The applicant further raises concern that, with the changing of the season, rainy weather and the open shell of the building and the substandard construction of the building, the property is sustaining severe damages. The applicant, having failed to gain access to the property, once again commissioned Zirkia to perform a further report on the building. According to the resultant report dated 2nd April 2013 (Annexures "w"), the damp has become a real problem in that the wooden frames have started to rot or are in the process of rotting. Pictures depicting damaged areas of the building are attached to the report.

[18] The applicant then launched this application in terms of Rule 6 (12) on the 26th April 2013 and caused the same to be served on the respondents on the same day. In this application the applicant seeks the following orders:

declaring that the agreement between it and the 1st respondent was validly cancelled in the letter to 1st respondent's attorneys dated 11th February 2013; that the 1st respondent be interdicted from continuing the construction on the property pending the applicant instituting an action against the 1st respondent within 30 day from the date of the order and that the 1st respondents are to vacate the property within five days of receiving the order directing them to do so. For some unknown reasons the same application was again issued on the 9th May 2013 and an application for the allocation of a date of hearing submitted the same day. The 14th May 2013 was the date allocated by the Registrar of this court. The 1st respondent had emailed its notice of opposition on the 2nd May 2013 onstensibly in response to the original application served on it on the 26th April 2013.

[19] At the hearing on the 16h May 2013 the 1st respondent handed in an answering affidavit consisting of about 182 pages, including annexures. The affidavit was dated 9 May 2013. In its answering affidavit, the 1st respondent raised the certain point in limine basically challenging :

19.1 the authority of the 2nd applicant to institute these proceedings against the 2nd respondent. It is noted that the 2nd respondent is the managing Trustee of the 1st applicant who was authorised in writing to enter into the relevant agreement with the 1st respondent. The written authorisation was attached to the founding affidavit. I cannot find lack of authority as alleged on two grounds; firstly, these proceedings concern the very agreement the 2nd applicant was authorised to conclude on behalf of the 1st applicant and,

secondly, as the managing Trustee, there is an obligation on the 2nd applicant to safeguard the interests of the 1st applicant. The 1st respondent's contention is, therefore, rejected

19.2 The validity of the founding affidavit as it stands. 1st 2nd respondent's argument was to the effect that the full names of the commissioner of oaths have, by law, to appear when such officer commissions the oath. It is noted that the founding affidavit was commissioned at a police station. The signature as well as the police force number of the police official who commissioned the oath are visible on the affidavit, and so is the SAPS stamp. This manner of commissioning an oath by police officers is common practice, as opposed to that executed by lawyers. I do not think that the founding affidavit can be said to be non compliant with the law simply on the ground raised by the 1st respondent and accordingly reject the 1st respondent's contention.

19.3 Qualification of applicant's experts. The 1st respondent argued that Zirkia and Prinsloo, the experts commissioned by the 2nd applicant to assess the quality of workmanship and assess percentage of work done by the 1st respondent, do not possess the necessary qualifications to discharge the mandate given to them and, tfherefore, to express expert opinions on the building. I note that the academic qualifications of these experts are not as elaborate as those of Munday. However, the experience they each have, according to the description of who they are on the papers, suggests that they have been involved in the business of valuating buildings for many years

each. I do not believe that institutions such as banks would engage the services of Zirkia to do valuations on their behalf, unless she possessed the necessary knowledge - see the resume of Zirkia attached to her report. The same applies to Prinsloo who is said to be serving as a consult for the NHBRC as well. The standard of reporting as seen in the report forming part of the file is impressive and leaves no doubt as to the experience of the author. I therefore accept the report for the purpose it is meant to serve and reject the 1st respondent's challenge in that regard.

[20] The 1st respondent then alleges that the applicant is itself is in breach of the agreement in that the applicant, having paid for and had the vacant stand registered in its name, had failed to deposit the full building price with the 1st respondent's conveyancers in terms of the agreement and that, as a result, the contract had to proceed by way of draws made in advance for work to be performed and payments were to be requested from the applicant on the basis of progress reports submitted by the respondent. In my view and in the 1st respondent's own version, this breach by the applicant was cured by, and the parties proceeded on the the basis of advance payments being made by the 1st applicant on request by the respondent as aforementioned. Consequently, the 1st respondent's contention of breach is opportunistic and accordingly rejected.

[21] The 1st respondent also alleges that the problem with regard to the enrolment certificate was caused by the applicant's failure to pay the

enrolment fee timeously despite timeous lodgement of the relevant application by the 1st respondent. The 1st respondent further alleges that applicant is responsible for the NHBRC's classification of the enrolment as " late enrolment" which resulted in the requirement that the 1st respondent furnishes guarantees. This argument is flawed: firstly, the 1st respondent nowhere denies that it received R24 000-00 on the 24th July 2012 from the 2nd applicant for the enrolment of the property with the NHBRC, and, secondly, according to the 1st respondent, construction work commenced in that very month, July 2012 (page 106, par 13 of 1st respondent's answering affidavit). Having given the enrolment amount to the 1st respondent and the respondent commencing with the building operations, the applicant was entitled to believe that the 1st respondent had enrolled the property, bearing in mind that the NHBRC requires that the property be enrolled prior to the commencement of the building operations. I cannot make sense of the 1st respondent's acceptance of the enrolment amount, his allegation of timeous enrolment of the property and later his denial of the duty or obligation to enrol the property. However, according to the report by Zirkia and correspondence with the NHBRC, the latter had no record of the enrolment of this property as at 16 October 2012. Disciplinary action was taken against the 1st respondent for his failure to enrol the property. For these reasons the 1st respondent's argument stands to be rejected.

[22] The 1st respondent further alleges breach of the agreement by the 1st applicant for failure to make payment of the sum of R471 771-00, being in respect of a payment certificate submitted to the 1st applicant "or any part

thereof", for work to be carried out during the month of October 2012. It is to be noted that at this stage the 1st applicant had already expressed the view that it had discovered that it had paid for work that had not been done and engaged the services of Zirkia and Prinsloo for advice as well as the assessment of the percentage of work already done vis a vis the 1st respondent's indication that 58% of the work was already done. I have already referred to the report and comments of Zirkia above in this regard. It is important to point out that, among Zirkia's findings, "the percentage as per developer (58%) by the 10th October 2012 exceeds the actual work completed which was only (52.25%)", page 4 of the report.

[23] During argument this court was referred specifically to specific areas of contention: Among these was the undated certificate for payment, page 53 of the bundle from which certain items that were charged and paid for, namely; facia and barge boards (R28 7700, window seals (R14385), internal plaster (R71 925), gutters and flashing (R43 155), inter alia. However, pictures by Zirkia show the areas concerned and the items paid for had not been installed. Further, pictures showing some of the defects complained about were referred to. Skewed window/door frames are apparent from these pictures. The report commissioned by 1st respondent, despite it having been compiled later, does not address and/or refute applicant's evidence in this respect. The 1st respondent's allegation that the defects have been fixed confirms the existence of Applicant's source of complaints at least as at the time the inspection was conducted and pictures taken.

[24] It is to be noted that the report by Munday Consulting, on behalf of the 1st respondent, is silent with regard to the percentage of work done as at the date of the report, being November 2012. Besides, this report lacks useful detail regarding the issues between the parties compared to that of Zirkia. One would have expected it, in light of the applicant's complaints, to refute any unfounded negative assertions made by applicant and confirmed in the report of Zirkia. After all, the purpose of this report must have been to refute applicant's claims that the 1st respondent considered to be unfounded. This has not been done.

[25] It is to be noted further that despite the averment by the 1st respondent's engineers that they have issued the various relevant certificates in respect of the building, the 1st respondent has repeatedly failed to provide any certificates despite repeated requests from him to do so by the 1st applicant's attorneys and by the experts engaged by the applicant to assess the complaints as agreed between the parties. The 1st respondent's sustained failures led to 1st applicant's attorneys cancelling the agreement on the 11th February 2013. I cannot understand why the 1st respondent would not provide a reconciled statement of the amounts paid to him *vis a vis* the work he claimed to have performed and had been paid for, particularly in circumstances where he was specifically being challenged in that regard. With regard to the further documentation that was requested from the 1st respondent, I find that such documents were critical in the circumstances of this case and should have been produced by a person entrusted with the duty to obtain them. The provision of such documents would also have removed

any doubt and reassure the homeowner of the compliance of his investment with the various statutory prescripts and the safety of his investment, inter alia. After all, these documents belong to the homeowner. One cannot, but draw an adverse inference from the conduct of the 1st respondent in these circumstances.

[26] On these grounds alone this court is of the view that the 1st respondent, despite having been given opportunities subsequent to the meeting between the parties, persistently failed to meet reasonable requests. Consequently, I find that the 1st applicant was justified in ultimately cancelling the agreement. Further, it is also impossible to find prejudice that the 1st respondent will suffer as a result of the cancellation of this agreement by the 1st applicant as the 1st respondent was being paid in advance throughout the building operations. The 1st respondent is, in any event, responsible for the premature termination of the agreement. Furthermore, it cannot be denied that the relations between the parties have become severely strained and the required co-operation and trust between the parties unfathomable. The applicant has declared its intention to institute action for damages against the 1st respondent should the relief sought herein be granted. This indicates the extent to which the relations between the parties have deteriorated and cannot be interpreted as breathing life to such relations. It is, therefore, clear that the parties are not in any position to continue to work together as submitted in argument on behalf of the 1st respondent.

[27] There is no doubt that the agreement lends a lien to the 1st respondent against the property. However, a lien goes with responsibility on the part of its holder. There was an obligation on the respondent to perform in terms of the agreement for him to sustain the lien. A failure by the holder of the lien to perform in terms of the contract giving rise to the lien necessarily adversely affect a justification for entitlement to the lien. A justified termination of such contract by the owner of the property invariably marks the end of the lien, particularly in the circumstances of this case where payment was being made in advance. The 1st respondent's contention that cancellation of the agreement does not affect the 1st respondent's lien is rejected.

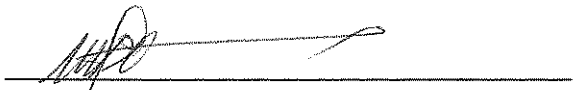
[28] In the light of the above findings, the following order is given:

1. The building agreement portion of the stand sale and building agreement between the parties is declared to have been validly cancelled by the 1st applicant on the 11th February 2013.

2. The 1st respondent is ordered to vacate the property within five days from the date of this order.

3. The 1st respondent is ordered to pay the costs of this application.

MBONGWE, AJ



ACTING JUDGE OF THE HIGH COURT

Dates of hearing	: 14 & 16 May 2013
Date of judgment	: 12 June 2013
Counsel for the Applicant	: V Olivier
Instructed by	: Meijer Attorneys, Johannesburg
Counsel for the 1st Respondent	: R Goslett
Instructed by	: Peter Sapire Attorneys, Johannesburg