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**CONSTRUCTION LAW BULLETIN**

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**SUBSTITUTION OF SECURITY FOR LIEN<sup>1</sup>**

It frequently occurs that a contractor exercises a lien over construction works because of non-payment by an employer.

The court has a discretion, if it considers that it is equitable to do so, to compel the contractor to deliver the works provided that the contractor's rights are safeguarded by means of adequate security being provided for payment of his claim.

Employers in this scenario have no right to possession as against a tender of security. In deciding whether or not it is appropriate to give an employer possession, the court will look at the balance of prejudice.

Other relevant principles are:

1. A court will not give the employer greater rights of possession than he has according to law. For example, if the contract specifically states that possession will only be given as against payment, the court will not order delivery.
2. In granting an order for possession, the court will not diminish the contractor's rights viz by ordering the giving of security for less than the amount of the contractor's claim.

3. Any objections raised by the contractor will be seriously considered by the court.

**PAYMENT INTERDICT**

Subcontractors often find themselves in the unenviable position of having performed their subcontract works but not having received payment from the main contractor. This despite the main contractor having itself received payment from the client *inter alia* for the subcontract works.

Just such a case arose in the Free State<sup>2</sup> recently. A paving subcontractor who had performed paving works was not paid although the main contractor had been paid for the paving works and had received all but 1% of the full main contract price from the client.

Fearful that, if the client paid the final balance of the main contract price to the contractor, the main contractor would dissipate the money on unworthy causes rather than the worthy cause of paying the subcontractor, the subcontractor applied to court for relief. The subcontractor applied for an interim interdict restraining the client from making any further payments to the main contractor pending the outcome of an action to be instituted by the subcontractor against the main contractor for payment.

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<sup>1</sup> Mancisco & Sons CC (in liquidation) v Stone 2001(1) SA 168W.

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<sup>2</sup> Nieuwoudt v Maswabi N.O. & Others 2002(6) SA 96 OPD.

The legal requirements for an interim interdict are:

1. a prima facie right;
2. an infringement of that right or an apprehension of harm;
3. no other remedy; and
4. the balance of convenience favouring the applicant.

The main contractor contended that the application should not be granted because:

1. the subcontractor's work was defective;
2. unless it received the money, it would be unable to pay its other subcontractors; and
3. the subcontractor had an alternative remedy, namely to sue in the ordinary course for payment.

The court came to the subcontractor's rescue. It granted an order in favour of the subcontractor interdicting the client from making any further payments to the main contractor pending the outcome of the action to be instituted against the main contractor. The court held that:

1. The subcontractor was not required to prove an absolute right to payment (i.e. that his work was not defective) but only a prima facie right to payment for the work he had done.
2. If the main contractor required the remaining 1% of the contract price to pay other subcontractors, this impecuniosity supported the subcontractor's fear that he might never be paid if the main contractor received the money.
3. Whilst enforcing a claim by way of ordinary action might be an appropriate remedy in certain cases, it was not always the most effective procedure. Where there was a reasonable fear that a claimant might end up with a hollow judgment, then there was much to be said for granting an interim interdict such as that sought by the subcontractor.
4. There was no other remedy available to the subcontractor to protect his prima facie right in

as meaningful and effective a manner as an interim interdict and it was fair to both parties to grant it in light of the reciprocal performances owed by them under their contract.

It bears noting that the main contractor did not put up any evidence to the effect that the client had complained about or condemned the subcontractor's work and/or had not paid for that work.

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