IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 30/9/2016 SIGNATURE

CASE NO: 55004/2012
DATE: 30/9/2016

IN THE MATTER BETWEEN:

SLIP KNOT INVESTMENTS 777 (PTY) LTD **Applicant**

AND

MARTYCEL PROPERTIES CC **Respondent**

JUDGMENT

KOLLAPEN J:

1. The trial in this matter was set down for the 9th of May 2016 and was scheduled to conclude on the 20th of May 2016 following a directive issued by the Deputy Judge President of this Division. Following a directive issued by me in my capacity as the designated Case Manager on the 22nd April 2016, the respondent (the defendant in the main action), launched proceedings seeking an

order to the effect that a Judge in chambers did not have the jurisdiction to issue an order that limited the rights of access by a party to inspect documents and obtain copies thereof, alternatively that in the event it be found that a Judge in chambers had such jurisdiction, then the directive of the 22nd of April 2016 unreasonably infringed the rights of the defendant to a fair trial.

2. The applicant opposed the application and instituted a conditional counter-application in which it sought relief in the event of the main application being granted and/or any delay eventuating in the conclusion of the trial set down to commence on the 9th of May 2016 .

3. In such event the relief sought in the conditional counter-claim is the following:

1. That the judgment granted by the Honourable Judge Prinsloo on 11 June 2013 under case number 51915/2012 be varied by the addition of the following order:

1.1 That pending finalization of the action instituted under case no 55004/12 ("the main action"):

1.1.1 The defendant is ordered to pay or to ensure payment of the net rental income as described in this order ("the net rental income") earned during any particular month by the last day of that month into the interest bearing trust account of an independent firm of attorneys, being [to be identified by the court or agreed upon by the parties];

1.1.2 That the term "net rental income" referred to in paragraph 1.1.1 will mean the following:

1.1.2.1 All income of any nature whatsoever earned from the properties described as Erven 316 and 317, Clarina, Extension 19, Registration Division JR, Province of Gauteng ("the properties");

1.1.2.2 Less all rates, taxes, costs in respect of water and electricity consumption, refuse removal and other imposts, maintenance costs, management agent fees and any other reasonable costs arising out of any obligation to any tenant in particular in terms of any lease agreement and any common law duty to provide peaceful and undisturbed possession to any tenant ("the expenses");

1.1.3 "owners' statements reflecting the detail of all income in respect of the properties and all expenses and accordingly the calculation of the net rental income will be provided by no later than the end of each month in respect of each payment of net rental to the plaintiff's attorneys and to the independent attorney;

2. That the defendant pay the costs for this application, including the costs of two counsel.

4. The dispute in so far as it related to the main application was resolved between the parties resulting in a consent order being made an order of Court on the 9th of May 2016. However it became evident that the trial would not conclude within the time allocated and the plaintiff proceeded with the counter-application which had become opposed and which was then argued on the 15th of June 2016.

5. In order to understand where and how the interim relief sought fits into the broader dispute between the parties, it may be necessary to provide some background to both the key features that characterise the dispute the parties are engaged in and then to provide some detail of the history of the litigation between the parties to the extent that it is necessary for the purpose of adjudicating this matter.

The nature of the dispute between the parties

6. It is common cause that the defendant entered into an agreement to purchase the properties known as Erven 316 and 317 Clarina Extension 19 Registration Division J R Province Gauteng ('the properties') and that the plaintiff advanced or caused to be advanced to the defendant the sum of R49,5 million for the purpose of paying the purchase consideration and obtaining transfer. This duly happened.

7. It is also common cause that on the 28th of April 2008, what has been described as a letter of intent was signed between the parties. It sets out *inter alia* the terms of the intended loan agreement to be concluded, the interest to be attached to the loan as well as how the parties would share in the profits of the sale of the property upon it being sold. The letter of intent contemplated a Memorandum of Agreement being entered into between the parties to give effect to the terms of the letter of intent but this never occurred. As I understand it the relief sought in the main action between the parties by the plaintiff is for an order of repayment of the loan together with interest which the plaintiff alleges became due one hundred and twenty days after the grant of the loan

8. The defendant, while admitting its signature on the letter of intent contends that it signed the letter of intent under duress in that the plaintiff took the position that the guarantee in respect of the purchase consideration that the defendant was required to deliver to acquire the property, would only be made available against signature of the letter of intent.

9. Its stance is that it entered into an oral agreement with the plaintiff in terms of which the plaintiff would make available to it the sum of R49.5 million to purchase the properties, that the defendant would sell the properties as soon as reasonably possible and that the parties would divide the net profits on the basis that the plaintiff would receive 60% of the net profit and the defendant would receive 40%.

10. The financing to purchase the property was provided in part by the plaintiff and in part by Investec from whom the plaintiff secured a loan in the sum of R35 million in return for which Investec caused a mortgage bond to be registered over the properties. In addition the defendant signed a suretyship in favour of Investec in respect of the indebtedness of the plaintiff arising out of the loan. The balance of the purchase consideration of R14.5 million was put up by the plaintiff from its own resources.

11. Following the transfer of the property into the name of the defendant the net rental income derived from the property was paid over by the defendant to the plaintiff. This commenced in or about August 2008 and continued until May 2012 and the total sum of some R27 million was paid over during this period.

12. Late in 2011, Investec, as it was entitled to, called up the loan it had made to the plaintiff and in response thereto the plaintiff paid the sum of approximately R29 million to Investec being the then-outstanding balance on the loan. The bond registered over the property in favour of Investec was cancelled and it appears that the defendant thereafter discontinued paying over the net rental income resulting in the issue of summons in the main action. It is not in dispute that the defendant continues to derive rental income from the property in excess

of R1 million per month and that it has retained for itself those monies from about June 2012 until the present time.

13. The parties offer different reasons as to why the rental income in respect of the property was paid over to the plaintiff. The stance of the plaintiff was that in return for it agreeing to hold over the repayment of the capital amount and interest on the loan due by the defendant, the defendant agreed to pay over the net rental income. The defendant on the other hand takes the position that it made those payments voluntarily while it was at risk in respect of the bond over the property and the suretyship it signed and that once the bond was cancelled, its exposure had ceased and it stopped making the payments.

14. In summary the plaintiff in seeking the relief in these proceedings contends firstly that it has a right to payment of the loan amount together with interest which it estimates to be in excess of R80 million at the current time. In addition it argues that as long at the capital and interest remains outstanding, it is entitled to receive the net rental income. It is on this basis that it advances its case for interim relief.

15. The defendant on the other hand denies the existence of a loan agreement contending that what occurred was an investment agreement and that the plaintiff is only entitled to payment upon the sale of the property. In addition it contends that the net rental payments were only made while it was at risk and accordingly the plaintiff has no right to such payment.

16. While the property is currently occupied it appears that it is on the basis of a monthly tenancy, there being no written lease agreement for a fixed period. In

addition the property has not been sold and there are no offers pending or any negotiations underway for its alienation.

The litigation between the parties

17. In about September 2012, the plaintiff launched an application out of this Court seeking interim relief pending the institution of an action that would *inter alia* interdict the defendant from cancelling the bond over the property with Investec and transferring or encumbering the property. The matter served before PRINSLOO J who was of the view that 'some protection ought to be granted to the applicant in the form of interdictory relief'. He ultimately granted an order interdicting the defendant from encumbering the property, and ordered that in the event of the sale of the property, the defendant was directed to pay the sum of R50 million into an interest-bearing trust account. He also directed that an appropriate *caveat* be registered against the property.

18. The main action was enrolled for trial during September 2014 and served before me. The trial did not proceed, the Court acceding to a request by the defendant for a postponement. The issue that triggered the request for a postponement was the defendant's request to have access to the financial statements of the plaintiff. In granting the postponement I took the view that the conduct of the defendant was unreasonable in how it responded to a suggestion by the plaintiff to allow access upon certain terms and conditions. I also expressed the view that had the defendant not summarily rejected the offer by the plaintiff but engaged with it, the issue could have been resolved and the trial could well have proceeded. Under those circumstances I ordered the defendant to pay the costs occasioned by the postponement.

19. The matter was thereafter enrolled for two weeks commencing on the 9th of May 2016 and I was appointed as case manager. I issued a directive on the 22nd of April 2016 that sought to regulate the defendant's access to documents it sought in the possession of the plaintiff. In doing so my directive included conditions pertaining to confidentiality, which prompted the launch of an application which was enrolled for the 9th of May 2016 (the first day of trial) seeking a declaratory order relating to the legality of the directive. That application triggered the counter-application and as previously indicated the main application was resolved in terms of a consent order made on the 9th of May 2016.

20. The ten days that were allocated for the hearing of the matter were taken up in the following manner:

    a) The order of the 9th of May 2016 which dealt with the logistics of access to the plaintiff's financial statements provided that the matter would stand down provisionally until the 11th of May 2016. The order also provided for the hearing of the conditional counter-application by no later than the 20th of May 2016.

    b) On the 10th of May 2016 the parties agreed that the defendant would revert to the plaintiff by 14h00 on the 11th of May 2016 on any issues arising out of the inspection. The matter did not proceed on the 11th of May 2016.

c) On the 12th of May 2016 the parties met me in chambers and the defendant indicated it would be ready to proceed with the trial on the 13th of May 2016 at 9h00 and that it would deliver its amendment to its plea by 16h00 on the 12th of May 2016 introducing a special plea.

d) On the 13th of May 2016 and after the amendment was filed, the issue of the special plea being dealt with as a separated issue arose and the court after hearing argument on the matter ordered that it be dealt with as a separated issue. The trial in respect of the separated issue was ordered to commence on the 16th of May 2016.

e) On the morning of the 16th of May 2016, the defendant gave notice that it intended to bring a substantive application for my recusal. The rest of the week was taken up with the exchange of affidavits and the hearing of the recusal application on the 19th of May 2016.

f) On the 20th of May 2016 the Court dismissed the recusal application. The defendant then brought an application to strike certain matter from the plaintiff's replying affidavit in the counter-application. The matter was argued and an order was made. By then it was too late in the day to hear the counter-application and a date was agreed upon between the parties resulting in the postponement of the hearing of the counter-application to the 15th of June 2016.

21. The consequence of all of these events, interventions and applications was that the trial in the matter was postponed and a date for the hearing of the matter is

still to be allocated. It is not clear when this will occur and when the matter will be re-enrolled. It is against this background that the application for interim relief stands to be adjudicated. In advancing the case for the relief it seeks, the plaintiff contends that:

a) The circumstances that prevailed when the order of PRINSLOO J was granted on the 11th of June 2013 have changed and justify the need for the variation of the order.

b) That the changed circumstances justify and support the need for the grant of the interim relief it seeks.

I will deal with these issues and in doing so will also deal with whether the requirements for the grant of interim relief have been satisfied.

Have circumstances changed that justify a reconsideration of the order of PRINSLOO J?

21. At the time the matter served before PRINSLOO J it was certainly in the contemplation of the parties that a trial date was likely to be allocated shortly. As things transpired a date was allocated for the 12th of September 2014 and I have already dealt with the circumstances that resulted in the postponement of the matter then. Three years have passed since the order of PRINSLOO J and there is no indication as to when the matter will proceed to trial.

22. At the time of the order of PRINSLOO J the occupation of the property was not regulated by a written lease agreement but it appears that the defendant was

awarded a tender in April 2014, but to date no lease agreement has been concluded and it is unclear whether such an agreement will be concluded. The defendant points out that it will be required to refurbish the property at a cost of R3 million to secure such a lease but in any event it appears uncertain at best whether a lease under any circumstances will be concluded.

22. In May 2013, the defendant was of the view that the sale of the property was 'overwhelmingly probable' and was in the final stages of being finalised. A sale was, however, not concluded and it does appear that the prospect of a sale at the current time is even more elusive. The defendant states, probably correctly so, that without a written lease for a fixed period, potential purchasers would not invest in the properties concerned. The consequence of this must also necessarily mean that the value of the property, in the absence of a written lease, would have diminished as opposed to the situation in May 2013 when a sale was imminent.

23. The above does, in my view, indicate that the circumstances that now prevail are considerably different from those that prevailed in June 2013 and that if the plaintiff is ultimately successful, its ability to recover what may be found to be due to it will certainly be impacted upon by these circumstances. In my view they justify at the very least a reconsideration of the order made by PRINSLOO J.

24. In ***ZONDI v MEC TRADITIONAL AND LOCAL GOVT AFFAIRS*** **2006 (3) SA 1 (CC)** the Court expressed itself in the following terms with regard to the power to vary interlocutory orders:

"Simple interlocutory orders stand on a different footing. These are open to reconsideration, variation or rescission on good cause shown. Courts have exercised the power to vary simple interlocutory orders when the facts on which the orders were based have changed or where the orders were based on an incorrect interpretation of a statute which only became apparent later. The rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action."

The application to strike

25. Before dealing with the relief sought, I need to provide reasons for the order made on the 20th of May 2016 in respect of the application to strike.

The application to strike was premised largely on the complaint that the replying affidavit contained new matter, contained legal argument, vexatious matter, and attacks on credibility. My view is that apart from the matters dealt with in paragraph 31 of the affidavit (which clearly on the face of it dealt with developments since the launch of the application, was new matter and warranted an opportunity being given to the defendant to respond), the other matters complained of were not objectionable. Paragraphs 7 to 30 dealt with the urgency of the matter and given that it was in the contemplation of the parties that the matter was to be argued by no later than the 20th of May 2016, I do not consider these paragraphs as necessarily new in that sense. Insofar as the other paragraphs under attack are concerned my view is that there was no proper case made out to strike and the only prejudice in totality which the defendant may have been justified in complaining about was the contents of

paragraph 31. In this regard an order was made on the 20th of May 2016 affording the defendant the opportunity to respond thereto.

I now proceed to deal with the requirements that have to be established before the Court may grant interim relief

The requirements for interim relief

I. A *prima facie* right (even one open to some doubt)

26. When one has regard to the factual matrix then the following facts are not in dispute:

i. The plaintiff has to date paid approximately R43.5 million which was used to acquire and then secure the property, being R14.5 million at the time of the sale and a further approximately R30 million to settle the Investec bond.

ii. The defendant did not make any payment in respect of the purchase price at the time the property was acquired.

iii. Despite what appears to have been the common contemplation of the parties that the property would be resold, some eight years later the property remains unsold and the prospect of a sale in the near future remains at best uncertain.

iv. During the period August 2008 until May 2012 the defendant paid the net rental income derived from the property over to the plaintiff. The total amount of such payments was R27 million.

v. From June 2012 until the present time, the defendant continues to receive and retain all rentals received in respect of the property.

27. It is clear that even on the defendant's version the plaintiff would upon the resale of the property become entitled to the purchase consideration it laid out together with its share of the profits thereon. This amount would have been R49.5 million at the time the property was acquired. Even if one does not consider for now the question of interest which the plaintiff says would have accrued on that amount, then the inescapable mathematical conclusion is that the plaintiff would be entitled to payment. The amount of the payment due to it is in dispute and while the stance of the defendant is that the R27million it paid over four years should be deducted from the capital amount, it does appear from the defendant's own version that it paid these monies as it was on risk (having signed a suretyship in favour of Investec) and that it 'paid as much as it could to settle the indebtedness to Investec'. In my view it would have been apparent to the defendant that its risk or exposure was in respect of the capital and interest of the Investec loan, that the monies it paid to the plaintiff for onward payment to Investec was to be utilised to pay the capital and interest of the Investec loan, and therefore in my view its stance that such payments were intended to reduce the amount of R49.5 million is not consistent with its own version as to why it paid the net rental income.

28. In ***GOOL v MINISTER OF JUSTICE*** **1955 (2) SA 682 (C)**, the Court accepted, with some qualification, the approach adopted in ***WEBSTER v MITCHELL*** **1948(1) SA 1186 (W)** wherein it was held that:

> *'In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any*

facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of the applicant, he could not succeed.'

29. When I apply the test to the factual matrix that I have outlined, even on the undisputed facts, namely the monies advanced to acquire the property and the obligation to repay it as well as the conduct of the defendant in paying over the net rental income for about four years, then I am satisfied that the plaintiff has established the existence of a *prima facie* right. In addition it warrants mention that the interim relief that was granted by PRINSLOO J could only have been premised upon him being satisfied as to the existence of a *prima facie* right.

II. <u>A well-grounded apprehension of irreparable harm if the relief is not granted</u>

30. In ***NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION OF CRUELTY TO ANIMALS v OPENSHAW*** **2008 (5) SA 339 (SCA)** the Supreme court of Appeal in dealing with this requirement captured it as follows:

"*The test in regard to the second requirement is objective and the question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm. The following explanation of the meaning of 'reasonable apprehension' was quoted with approval in* Minister of Law and Order and Others v Nordien and Another (1987 (2) SA 894 (A)):

> *A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result. However the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.*"

31. On what is before me, I must have regard to the reality that the property has not been sold after eight years, and that there is no written lease which in the defendant's view, makes a possible sale even more elusive. This must impact on the value of the property and if the plaintiff is ultimately successful would the recovery of what may then be due to it be impossible or improbable?

32. Whatever the value of the property may be it appears that attempts to sell it at for as low R70 million have not been successful. There must thus, objectively speaking, be a real risk that the resale of the property may well bring in an insufficient yield to cover what the plaintiff may be entitled to in respect of the capital and interest of its claim. Beyond the proceeds of the sale, it also does not appear that the defendant is possessed of any other assets or income to enable it to satisfy such a claim.

33. In these proceedings the defendant takes the position that it does not have the resources to cushion non-payment or late payment by its main tenant and in

addition it does not have the estimated R3 million required to refurbish the property. Against that, and if one has regard to the financial statements of the defendant for the period 2010 to 2014 it reveals a total income of some R43 million. It is not clear what had happened to the profits generated from largely the property over the past few years and the defendant has not furnished any explanation in this regard. That being the case this, in my view, is another factor which contributes to my conclusion that indeed there is a well-grounded apprehension of irreparable harm if the interim relief is not granted .

III. The balance of convenience

34. What is sought to be preserved is the profit that is being earned every month from the property – in reality what prevailed for the period August 2008 to May 2012. When in addition I have regard to the defendant's version that the true transaction between the parties was in the nature of an investment, then on what is before me, the defendant has already (from May 2012 to the present) derived the benefits of the arrangement without having paid any monies from its own resources (the R27 million being rental income) while the plaintiff on the other hand has laid out at least R43.5 million from its own funds and is yet to see any benefit from the investment .

The balance of convenience favours the granting of the relief.

No alternate remedy

35. There is no alternate remedy which is available to the plaintiff.

The relief

36. My view is that the net rental income should be preserved pending the finalisation of the trial. That income should be arrived at by taking the gross rental income received and deducting all the reasonable and necessary expenses associated with the property. This would include the payment of services and rates, insurance, security and general maintenance.

37. Beyond the expenses associated with the property, the defendant has an obligation towards the South African Revenue Services ('SARS') in respect of arrear tax and will also be required to pay provisional tax twice a year (in August and February) as well as Value Added Tax. These amounts should also be paid from the net rental income.

Costs

38. Reserving costs for future determination may be the most appropriate order to make. If the plaintiff is ultimately successful it may strengthen its claim for costs in respect of this application and likewise on the part of the defendant if it is to emerge with a successful outcome in the main action. I accordingly intend to reserve costs.

39. **ORDER**

It is ordered:

1. That the judgment granted by the Honourable Judge Prinsloo on 11 June 2013 under case number 51915/2012 be varied by the addition of the following order:

1.1 That pending finalization of the action instituted under case no 55004/12 ("the main action"):

1.1.1 The defendant is ordered to pay or to ensure payment of the net rental income as described in this order ("the net rental income") earned during any particular month by the last day of that month into the interest bearing trust account of an independent firm of attorneys, being Adams and Adams Attorneys (Pretoria);

1.1.2 That the term "net rental income" referred to in paragraph 1.1.1 will mean the following:

1.1.2.1 All income of any nature whatsoever received from the properties described as Erven 316 and 317, Clarina, Extension 19, Registration Division JR, Province of Gauteng ("the properties");

1.1.2.2 Less all rates, taxes, costs in respect of water and electricity consumption, refuse removal and other imposts, maintenance costs, management agent fees and any other reasonable costs arising out of any obligation to any tenant in particular in terms of any lease agreement and any common law duty to provide peaceful and undisturbed possession to any tenant ("the expenses");

1.1.3 Owners' statements reflecting the detail of all income in respect of the properties and all expenses and accordingly the calculation of the net rental income will be provided by no later than the end of each month in respect of each payment of net rental to the plaintiff's attorneys and to the independent attorney;

1.1.4 The defendant shall in addition be entitled to deduct from the income earned (described in 1.1.2.1 above) all payments made in terms of any valid tax obligation that the defendant owes to the South African Revenue Service including accrued or past taxes, provisional tax and Value Added Tax and shall provide the independent attorney with documentary proof of all such payments made in deducting such payments from the income received.

1.1.5 This order shall be effective immediately and will commence applying to income received for the month of October 2016 and every month thereafter pending finalisation of the action under case number 55004/2012.

1.1.6 The costs of the independent attorney will be paid out of the proceeds of the net income received by the independent attorney in terms of this order.

1.1.7 The independent attorney shall on a monthly basis provide the parties through their legal representatives, with a statement reflecting the details of all income received and expenses deducted, with the necessary supporting documentation, owners' statements, as well as the fees of the independent attorney, and the balance standing in the fund.

2. The costs of the application are reserved for future determination.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

55004/2012

HEARD ON: 15 JUNE 2016

FOR THE PLAINTIFF: ADV. A C BOTHA & ADV. J F PRETORIUS

INSTRUCTED BY: SIM & BOTSI ATTORNEYS INC. (ref.:SD/MN)

FOR THE DEFENDANT: ADV. S D WAGNER SC

INSTRUCTED BY: COETZER & PARTNERS (ref.: F COETZER/FM0157)