

SOUTH AFRICA / JUDGMENT

Martysel Properties CC v Slip Knot Investments 777 (Pty) Ltd; In re: Slip Knot Investments 777 (Pty) Ltd v Martysel Properties CC (55004/2012) [2016] ZAGPPHC 1214 (6 December 2016)

[2016] ZAGPPHC 1214

COURT

North Gauteng High Court, Pretoria

BEFORE

Kollapen

CASE / FILE NUMBER

55004/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION PRETORIA)

CASE

NO: 55004/2012

DATE:

6/12/2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

IN

THE MATTER BETWEEN:

MARTYCEL

PROPERTIES

CC Applicant

and

SLIP

KNOT INVESTMENTS 777 (PTY)

LTD Respondent

In

re: SLIP
KNOT INVESTMENTS 777 (PTY)
LTD Plaintiff
MARTYCEL
PROPERTIES
CC Defendant

JUDGMENT

(In respect of the plaintiff's counter-application)

KOLLAPEN J:

1. This is judgment in the leave to appeal against the Court's judgment and order in the conditional counter-application where the Court on the 29th of September 2016 granted the respondent's conditional counter-application which had the effect of varying the order of PRINSLOO J of the 11th of June 2013.
 2. The applicant seeks leave to appeal against the whole of the judgment of the 29th of September 2016 and the grounds upon which the application for leave to appeal is premised are set out in the written notice of application for leave to appeal.
 3. In this matter and before determining the necessity or otherwise of having regard to the grounds of appeal, the first question for determination is the appealability or otherwise of the order made. It is not in dispute that the order was made 'pending the finalisation of the action under case no 55004/12' and it is the stance of the respondent that the judgment and order are not appealable.
 4. Our Courts have over time developed the law with regard to the appealability of interim or interlocutory orders and in *ATKIN v BOTES* 2011
- (6) SA 231 (SCA) the Supreme Court of Appeal held as follows at 234B to C:

'In *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* 2005 (3) SA I (SCA) (2004) JTLR 73; [2004] 4 All SA 410) this court held that an interim interdict is appealable if it is final in effect and not susceptible to alteration by the court of first instance. The decision also emphasised that in determining whether an order is final in effect, it is important to bear in mind that 'not merely the form of the order must be considered but also, and predominantly, its effect. The crucial question in the appeal is therefore whether the granting of the interim interdict was final in effect.'

5. As to what would constitute an interlocutory order *CORBETT JA in SOUTH CAPE CORP. (PTY) LTD v ENGINEERING MANAGEMENT SERVICES (PTY) LTD* 1977
- (3) SA 534 (AD) said the following at 5490:

'In a wide and general sense the term 'interlocutory' refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes:

- (i) those which have a final and definitive effect on the main action; and (ii) those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper which do not.'
6. Secondly in determining whether the order that is sought to be appealed against is final in effect, the Constitutional Court in *INTERNATIONAL TRADE ADMINISTRATION COMMISSION v SCAW SOUTH AFRICA (PTY) LTD* 2012

(4) SA 618 (CC) said the following at 639F to 640A:

'The 'policy considerations' that underlie these principles are self-- evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined. Also allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes.'

7. The Court added at 640G to 641C:

'As we have seen, the Supreme Court of Appeal has adapted the general principles on the appealability of interim orders, in my respectful view, correctly so, to accord with the equitable and the more context-sensitive standard of the interests of justice, favoured by our Constitution. In any event the Zweni requirements on when a decision may be appealed against were never without qualification. For instance, it has been correctly held that in determining whether an interim order may be appealed against regard must be had to the effect of the order rather than its mere appellation or form. In *Metlika Trading Ltd & Others vs Commissioner, South African Revenue Service* the court held, correctly so, that where an interim order is intended to have an immediate effect and will not be reconsidered on the same facts in the main proceedings it will generally be final in effect.'

8. On this score alone it is evident that the order of the 29th of September 2016 is susceptible to reconsideration by the Court when final relief is determined or for that matter, at any earlier stage given that such orders can be varied on good cause shown (see

ZONDI v MEC, TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS 2006 (3) SA 1 CC).

9. However the Constitutional Court in *TSHWANE CITY v AFRIFORUM AND ANOTHER* 2016 (2) SA 279 (CC) dealt with the appealability of interim orders and expressed the position as follows at 294B to C:

'Unlike before appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is no subsumed under the constitutional interests of justice standard. The overarching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability.'

10. In taking the position it did, the Court also referred with approval to the stance taken in the matter of NATIONAL TREASURY AND OTHERS v OPPOSITION TO URBAN TOLLING ALLIANCE AND OTHERS 2012 (6) SA 223 (CC) as follows at 231D:

'This court has granted leave to appeal in relation to interim orders before. It has made clear that the operative standard is the 'interests of justice'. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relative and important consideration ...It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.'

11. Thus while the interests of justice standard becomes the operative standard, it is clear that the question as to whether the order is final in effect or disposes of a substantial portion of the dispute continues to remain relevant . In this regard in alluding to the interest of justice standard the Constitutional Court in OUTA and in AFRIFORUM made specific reference to the question of whether the order has immediate and substantial effect including whether the harm that flows from it is serious, immediate, ongoing and irreparable.
12. Applying this standard it is in my view clear that the order of the 29th of September 2016 is firstly interim in nature in that it is not final in effect and is susceptible to variation either by the Court that will hear the main dispute, or by any other Court prior to that upon good cause shown .
13. As to whether the order results in irreparable harm, this court concluded in granting interim relief that there was a well-grounded apprehension of irreparable harm if relief was not granted. The applicant contends that the interim order will result in irreparable harm in that it will contribute to the financial demise of the applicant if were required to implement the order. In considering this submission it may be important to refer to paragraph 33 of the judgment in respect of which leave to appeal is sought where I pointed out that despite the applicant's stance that it does not have financial resources at its disposal, it has on its own version and from its own financial statements reflected an income of some R43 million over the period 2010 to 2014 and has not provided

any explanation as to what has become of the profits that it earned during that time. Thus it's assertion that it will face financial

ruin must be considered in the light of the broader facts and the context of its operations taken largely, as indicated, from its own financial statements.

14. Finally on this aspect it must be emphasised that the nature of the interim relief granted is simply to preserve the net rental derived from the property until the determination of the trial Court on the main issue in dispute. As to who ultimately is entitled

to those monies, will be a question for future determination.

15. Accordingly I have not been convinced that the interests of justice standard comes to the assistance of the applicant as there is with respect nothing in substance advanced as to why the circumstances attendant upon the granting of interim relief will result in irreparable harm to the applicant .

16. For these reasons I must conclude that the order of the 29th of September 2016 is not appealable. However even if I am wrong on this conclusion then when I have regard to the grounds of appeal advanced by the applicant, they do not convince me that the appeal

would have a reasonable prospect of success.

17. In this regard some of those grounds relate to:

11. In the circumstances and even if it is contended that the matter is appealable my view is that the appeal would not have a reasonable prospect of success and would have been dismissed on this basis as well.

12. ORDER

In the circumstances I make the following order:

1. The application for leave to appeal is dismissed with costs.

NKOLLAPEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Heard on: 30 November 2016

APPEARANCES:

For the applicant: Adv.SD Wagner SC

Instructed by: Coetzer & Partners (ref.: F Coetzer/FM0157)

For the respondent: Adv. J F Pretorius

Instructed by: Sim & Botsi Attorneys Inc. (ref.:SD/MN)

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