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IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: 95494/2016

15/12/17

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

15 December 2017 H Constantinides
DATE SIGNATURE

In the matter between:

BATSALANI CORAL INVESTMENTS (PTY) LIMITED Applicant

and

CII RENTAL POOL COMPANY CAPE TOWN (PTY) LIMITED First Respondent
THE BODY CORPORATE OF THE SECTIONAL TITLE SCHEME SS ERF 167830 CAPE TOWN NR 188/2011 Second Respondent
HILTON INTERNATIONAL MANAGE LLC Third Respondent
CII HOTEL AND RESORTS CAPE TOWN (PTY) LTD Fourth Respondent

JUDGEMENT

Matter heard on : 30 November 2017
CONSTANTINIDES AJ:

1. This is an application in terms of which the Applicant is seeking the following relief:

> *"1. Directing the First Respondent to release the units, being sectional title units 802, 803, 808, 809, 814 and 816 ('the*

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units') operated by the First Respondent and held in the Second Respondent's Scheme from the rental pool to the Applicant within 5 (FIVE) days of the date of this order and other ancillary relief."

2. The application is opposed by the First Respondent which is the Rental Pool Company.

3. The contractual relationship between the Applicant as owner and the Rental Pool Company is governed by three rental pool agreements ('the agreements'), and addendums to the agreements.

4. Units 802 and 803 are dealt with in one agreement signed on the 16th October and the 4th November 2008[1]. The addendum to the agreements was signed on 19 April and 8 May 2012 respectively.

5. According to the Applicant only the First Respondent opposed the application and there is an allegation that therefore the other Respondent acquiesced to the relief sought insofar as it may apply to them.[2] The First Respondent has stated that in paragraphs 13.1 and 23.3 of the Answering Affidavit:

"13.1 ... For reasons which will be set out below, the First Respondent contends that the Applicant is not entitled to the release of the units from the Rental Pool. Nowhere in

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1 Annexure "FA2" – pages 34 to 47.
2 First Respondent's Answering Affidavit from pages 296 to 308.

the papers has the Applicant set out any basis for the assertion that the Third Respondent is in any way either obliged to or that it failed to release the units ...

...

23.3 The Applicant has never validly given notice of termination, nor did the relevant agreements have provisions relating to the termination in the circumstances of this Application."

6. It is common cause that the units have not been released from the rental pool. The Applicant made its units available to participate in a rental pool under *inter alia* the proviso that it will derive rental income from the units, which was used by the First Respondent and administered by the Fourth Respondent. The agreements required that there would be proper bookkeeping and accounting to the Applicant at specific time periods. However this has been placed in issue as to whether the First Respondent has in fact complied with these aforesaid undertakings.

7. On the 22nd May 2015, the Applicant's Attorney notified the First Respondent's nominated Attorney, namely Robert Driman, ("Driman") from Werksmans Attorneys that 12 months' notice, as contemplated in terms of the rental pool Agreements read with the addenda thereto, is provided. The aforesaid correspondence is attached to the

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Founding Affidavit marked annexure "FA16".[3]

8. The relevant portion of the aforesaid letter reads as follows:

"...

2. *It is our instructions to herewith provide the requisite 12 (twelve) month notice of our Client's withdrawal of its Sectional Title Units 802, 808 and 814 in the Sectional Title Scheme known as Erf 167830 Cape Town from the Rental Pool as contemplated in clause 9.3 Amended in Addendum to Rental Pool Agreements.*

3. *Kindly within 5 (five) days from date hereof provide us with written confirmation by the Hotel Operator that it has received onward notification from your Client, failing which we hold instructions to provide such notice directly to the Hotel Operator ..."*[4]

9. On the 27th May 2015, Driman responded to the Applicant's letter dated the 22nd May 2015, the relevant portion of the response is as follows:

"...

3. *In your letter you purport to give notice on behalf of your*

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3 Paragraph 5.10, page 24 FA.
4 Annexure "FA15", page 260 – Index Vol. 3.

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client of its intention to give twelve months' notice to withdraw from the Rental Pool.

4. *In this regard, your letter under reply refers to clause 9.3 as amended by the Addendum Rental Pool Agreement.*

5. *We are instructed to record that your letter under reply does not purport and nor does it comply with the provisions on which your client relies. In particular, no allegation is made of any trigger referred to in Clause 9.3 (as amended).*

6. *Our client denies that your letter amounts to a notice in terms of Clause 9.3 as amended, or at all.*

..."[5]

10. On the 3rd June 2015, the Applicant's Attorneys addressed a further letter to Driman and I quote the relevant passages:

"1. We refer to the above and our client's notice of withdrawal of its unit from the rental pool.

2. We have been instructed that:

a. Our client has received no rental income from the Rental Pool Company or any other party;

b. Our client has not achieved the anticipated return on

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5 Annexure "FA17", page 262 – Vol. 3.

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investment as stated in par. 9.3.2 of the Rental Pool Agreement (as amended)

3. *Our client hereby confirms and reiterates its notice to withdraw the units from the rental pool as provided for in par. 9.3 of the Rental Pool Agreements (as amended).*

4. *We note that par 9.3.2 requires notice to the Hotel Operator and the Rental Pool Operator. We have however been instructed to afford your client the opportunity to onward provide such notice to the Hotel Operator.*

5. *Kindly within 5 (five) days from date hereof provide us with written confirmation and acknowledgement by the Hotel Operator that it has received onward notification from your client of the withdrawal of our client's units from the rental pool (rooms available for accommodation to Hotel guests), failing which we hold instructions to provide such notice directly to the Hotel Operator.*

6. *Taking into account the lengthy notice period of 12 months and the time since our client's previous notice of withdrawal, our client has no objection that the date of notice should be accepted as the date of your client's notice to the Hotel Operator subject to it be given within the period referred to in par. 5 above.*

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..."[6]

11. On the 8th July 2015 the Applicant's Attorneys addressed a further letter to Driman requesting written confirmation and acknowledgement of the onward notice to the Hotel Operator of the Applicant's withdrawal of its units from the rental pool as provided for in paragraph 9.3 of the Rental Pool Agreements (as amended). The Applicant further requested confirmation that the units would be available for the exclusive use of the Applicant as from the expiry of the 12 month notice period.[7]

12. On the 9th July 2015, Driman responded to the Applicant's Attorney stating that the notification was being attended to and that they cannot confirm the aforesaid until Monday due to the relevant executive being absent to instruct him.[8]

13. On the 6th August 2015, the Applicant instructed the Sheriff of this Court who duly served the Applicant's letter dated the 28th July 2015 on a representative of the Third Respondent.

14. On the 7th June 2016, the Applicant's Attorneys addressed a further letter to Driman wherein a request was made to arrange for access to the units and *"... other practicalities for the use of the unit."*[9]

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6 Annexure "FA18", page 264 – Vol. 3.
7 Annexure "FA19", page 267 – Vol. 3
8 Annexure "FA20", page 269,
9 Annexure "FA23", page 273.

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15. On the 8th June 2016, Driman responded wherein he recorded that:

"It has not been possible to get instructions within the self-imposed period stated by your clients."[10]

16. In terms of the Addendum to the Agreement the "Rental Pool Operator" is the Rental Pool Company.[11]

17. Clause 9.3 of the Addendum deals expressly with the termination of the participation in the rental pool. It replaced clause 9.3 of the Rental Pool Agreement in its entirety and reads as follows:

"9.3 The Owner shall be entitled to withdraw the Owner's unit from the Rental Pool, either:

...

9.3.2 at any time after 19 February 2013, by giving 12 (twelve) month's prior written notice to the Hotel Operator and Rental Pool Operator, in the event that at any time after 19 February 2013 the net Owner's income for any calendar year is less than an amount equal 7% (seven percent) of the purchase price that the Owner paid to CII Hotel and Resorts Cape Town (Pty) Ltd for the acquisition of the owner's unit ..."

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10 Annexure "FA24", page 276.
11 Annexure "FA5", clause 2.3.4, page 79; Annexure "FA2, clause 1.1, page 34.

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18. The First Respondent pointed out that the letter dated the 28th July 2015, some nine weeks after the first letter (dated the 22nd May 2017) the Applicant caused a letter to be addressed to the Hotel Operator of Hilton Cape Town wherein it was stated that:

> *"2. We confirm as per our letter dated 22 May 2015 to Norton Rose Fulbright on behalf of CII Rental Pool Company Cape Town (Pty) Ltd, our client withdraws from sectional title unit 802, 808 and 814 in Sectional Title Scheme known as Erf 167830 Cape Town from the Rental Pool as contemplated in clause 9.3 as amended in the Addendum to the Rental Pool Agreements effective from 22 May 2015.*
>
> ...
>
> *4. Our client therefore provides 12 months' written notice with effect from 22 May 2015...."*

19. It was submitted by the Respondent's Counsel that the Applicant unilaterally reduced the notice period to the Hotel Operator to only 10 months, by backdating the notice period to 22 May 2015.

20. Therefore it was argued that:

20.1 The letter dated 22 May 2015 did not constitute notice, in terms of clause 9.3 of the addendum.

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20.2 The letter of 3 June 2015 was only addressed to the Rental Pool Company. It also did not comply with the provisions of clause 9.3 of the addendum to the agreement. It purported to cure the inadequacy of the termination letter of the 22nd May 2015, by adding the so-called 'trigger' for the termination, in paragraph 2 thereof, but did not change the commencement date of the notice period to 3 June 2015;

20.3 The letter dated 28 July 2015 constituted the unilateral amendment of the addendum. The Applicant purported to reduce the notice period by approximately 10 weeks, backdating it to 22 May 2015, from 28th July 2015. The 22 May 2015 letter had become redundant. This letter was in turn also not sent to the Rental Pool Company."[12]

21. The Applicants argued that the twelve months period had now run its course when the application was launched and therefore I should consider that the twelve month notice had now been complied with.

22. The Applicant bases its claim on the fact that the Respondent allegedly committed a breach of the agreements (as amended), due to the fact that the Applicant not receiving the anticipated return of investment for the period from 1 April 2012 to date.

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12 See page 7 of the First Respondent's Heads of Argument.

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23. This is countered by the Respondent where it is stated that the quantum of any arrears or amounts due to the Applicant. This remains in dispute.

24. In paragraph 37.4 of the Applicant's Replying Affidavit the following is stated:

> *"37.4 The fact remains that the Applicant has to date not received payment of any of the other periods post March 2012 as indicated earlier. To this degree, to contend that the First Respondent is still entitled to retain the units on one or other level whilst it is busy computing those amounts are clearly obfuscating the Applicant's rights to the use and enjoyment of its premises. ..."*[13]

25. In paragraph 24.5 of the First Respondent's Answering Affidavit the following is stated:

> *"...*
>
> *24.5 The First Respondent has never refused to pay any amount which may due to the Applicant. However, there is a longstanding dispute between the Applicant and the First and Fourth Respondents (and without prejudice attempts to resolve the dispute, partly referred to certain*

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13 paragraph 37.4, page 328.

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of the Annexures to the Founding Affidavit) regarding the Owner's income and its extent. This is an accounting exercise.

24.6 In this regard –

24.7 Under Case Number 24667/2014 in the above Honourable Court (the Action), the Applicant is suing the Fourth Respondent for the equivalent of Owner's income as a guaranteed amount in terms of clause 8 of the Sale Agreement.

24.8 This Action is defended and the Fourth Respondent is counter-claiming payment from the Applicant.

24.9 Accordingly the Applicant is both seeking to enforce the Rental Pool and Sale Agreements, and to resile from the rental pool, which is inconsistent and amounts to a duplication of alternative remedies. If the Applicant succeeds in the Action, then it cannot rely on clause 9.3.2 of the Rental Pool Agreement ..."[14]

26. Due to what is stated herein *supra*, it has become evident that the question as to whether proper notice was given to the Second Respondent and the Fourth Respondent in respect of the intention of

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[14] See pages 303 and 304 of the First Respondent's Answering Affidavit – Vol. 3.

the Applicant to withdraw the units from the Rental Pool Scheme has become academic. According to the First Respondent:

> "*24.5 ... there is a long-standing dispute between the Applicant and the First and Fourth Respondents ... regarding the owner's income and its extent.*
>
> ...
>
> *24.11 Accordingly it is clear that there is a dispute between the Applicant (on the one hand) and the First and Fourth Respondents (on the other) in regard to the quantification of Owner's income. Whilst this dispute persists, nothing in the Applicant's papers or the relief which it seeks herein, or in the agreements, entitles the Applicant to withdraw its units from the Rental Pool. The First and Fourth Respondents have never failed or refused to pay any amount which has been found to be due to the Applicant."*[15]

THE LAW

27. In the aforesaid matter the material facts are in dispute and this application appears to have been prematurely launched as there are outstanding issues in relation to the pending trial under Case Number

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15 Paragraph 24.11, page 304 and 305 of the Respondents' Answering Affidavit – Vol. 3.

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24667/2014 in this Court.

28. The aforesaid calculations and accounting exercise will have to be presented to the Trial Court in regard to the aforesaid pending case.

29. In terms of Rule 6(5)(g) of the Uniform Rules of Court the following is stated:

> *"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed and to be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise. ...*

The Supreme Court of Appeal has cautioned that a Court should be astute to prevent an abuse of its process in such a situation by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is

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one."[16]

30. It has been said that the Court must take a "robust, common-sense approach" to a dispute on motion and not hesitate to decide an issue on Affidavit merely because it may be difficult to do so.[17]

> *"As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the Court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or so clearly untenable or so palpably implausible so as to warrant their rejection merely on the papers, or that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits."*[18]

31. There appear to be fundamental disputes of fact which may not be able to be resolved on these papers.

32. The Applicant should have realized when launching this application that a series of disputes of fact, incapable of resolution on the papers was bound to arise.[19]

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16 **Minister of Land Affairs and Agriculture v D&F Wevell Trust 20008 (2) SA 184 (SCA) at 205 B-C**

17 **Soffiatini v. Mould 1956 (4) SA 150 (E) at 154 F;**

18 Service 2, [2016] Superior Court Practice Vol 2.

19 **Room Hire C (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd 1949 (3) SA (3) SA 1155 (T) at 1162 and 1168;**
Adbro Investment Co Ltd v. Minister of Interior 1956 (3) SA 345 (A) at 350A;

33. The general rule in matters of costs is that the successful party should be given his costs and this should not be departed from except where there are good grounds for doing so.[20]

34. There are far too many material disputes of fact and this matter cannot be decided on the papers. The Applicant has not made out a proper case for the relief it seeks on the papers.

35. I accordingly make the following order:

This application is dismissed with costs.

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H CONSTANTINIDES
Acting Judge of the High Court
Gauteng Division
Pretoria
8 December 2017

Standard Bank of SA Ltd v. Neugarten 1987 (3) SA 695 (W) at 699 A;
Tamarillo (Pty) Ltd v. B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 430 G – 431 A;
Gounder v. Top Spec Investments (Pty) Ltd 2008 (5) SA 151 (SCA) at 154 B – C.
See: Erasmus-Superior Court Practice Vol. 2 D1 – 76. [Service 2-2016]

[20] See: Superior Court Practice Vol. 2 [Original service 2015] D5 – 7.