IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1982/2006

In the case between:

NEDBANK LIMITED Applicant

and

WOLMARANS, JOHANN N.O. 1st Respondent
FAURE, ABRAHAM IZAK N.O. 2nd Respondent
PHOTO COPIERS 3rd Respondent
THE DOCUMENT EXCHANGE (EDMS) BPK 4th Respondent
AP PRETORIUS & VENNOTE 5th Respondent
THE AFRICAN NATIONAL CONGRESS,
BLOEMFONTEIN REGIONAL OFFICE 6th Respondent
DIE MINISTER VAN SPORT, KUNS, KULTUUR
WETENSKAP & TEGNOLOGIE, VRYSTAAT
PROVINSIE 7th Respondent
CAPITEC BANK BEPERK 8th Respondent
HOME TECH INTERNATIONAL 9th Respondent
ROYAL ATHEM INVESTMENTS 16 (EDMS) BPK 10th Respondent

In re:

Case No.: 2150/2006

J WOLMARANS N.O. 1st Applicant
A I FAURE N.O. 2nd Applicant
ROYAL ANTHEM INVESTMENTS 16 (PTY) LIMITED 3rd Applicant

and

NEDBANK LIMITED 1st Respondent
REGISTRAR OF DEEDS, BLOEMFONTEIN 2nd Respondent

JUDGMENT: MILTON, AJ

HEARD ON: 15 JUNE 2006

DELIVERED ON: 14 SEPTEMBER 2006

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[1] **INTRODUCTION**

1.1 Nedbank Limited, hereafter referred to as Nedbank, is the applicant in case number 1982/2006 and the 1st respondent in case number 2150/2006. Messrs Wolmarans and Faure are cited as trustees of the Forum Trust II ("the Trust") and are 1st and 2nd respondents, and Royal Anthem Investments 16 (Pty) Ltd ("Royal Anthem") cited as 10th respondent in the first application. Hereafter refer to as "Nedbank", "the Trust" and "Royal Anthem" for the sake of clarity to avoid confusion.

Respondents 3 to 9, tenants of the Trust are all cited herein since specific relief is also sought against them. These respondents did not however file any notice of opposition.

1.2 Respondents 1, 2 and 10 thereafter lodged an urgent counter application against Nedbank in case number 2150/2006, Nedbank being the respondent in that matter.

1.3 On the 25th May 2006 an interim order was given by agreement applicable to both cases whereby the tenants of the property of the Trust, were ordered, in short, to forthwith pay over all rentals directly into the account of the appellant's attorney, pending the date on which the two applications could be argued.

1.4 Nedbank also instituted action by means of summons in this court under case number 32491/2004 against 1st and 2nd respondents in their representative capacity of the Forum Trust II as well as against them in their private capacity and a J M Pretorius, for payment of the amount of R4 234 869,28.

[2] **RELIEF SOUGHT**

2.1 Application 1982/2006

Nedbank seeks the following orders *pendente lite,* of the outcome of the action instituted in case number 3249/2004:

2.1.1 An order entitling them to collect the rentals and other revenues due by the tenants, respondents 3 to 9 who occupy the property known as Saambou Building, Maintland Street, Bloemfontein hereafter referred to as "the Property" and

2.1.2 A mandatory order whereby 3rd to 9th respondents be ordered to pay to the applicant the rentals and other revenues pursuant to their occupancy of the property.

2.1.3 A mandatory order whereby applicant may appropriate such rentals to the indebtedness of the trust.

2.1.4 An order interdicting the 1st, 2nd and 10th respondents and/or their agents/servants from receiving or collecting any rental revenue from the 3rd to 9th respondents or any other occupant.

2.2 Applicant seeks further mandatory orders namely:

2.2.1 that 1st, 2nd and 10th respondents' account to applicant in respect of all rental and other revenues collected or received by them or any other tenant in occupation of the property (including 3rd to 9th respondents) after 1 January 2006 and to pay such rentals and revenues forthwith over to the applicant.

2.2.2 That 1st, 2nd and 10th respondent furnish applicant with copies of all leases entered into by the tenants in occupation (including 3rd to 9th respondents).

2.2.3 Condonation be granted for the con-compliance of the rules relating to the service and time periods.

2.3 Application 2150/2006

2.3.1 In the counter application herein the respondents 1, 2 and 10 as the applicants seek on an urgent basis the following mandatory orders:

2.3.1.1 whereby Nedbank's attorney be ordered to prepare all documents to cancel the three bonds registered in favour of Nedbank and pertaining to the Saambou Building loan.

2.3.2.2 whereby Nedbank be ordered, within 15 days of receiving the order to sign all documents to cancel the said mortgage bonds, in absence whereof the Registrar be ordered to do so on their behalf;

2.3.2.3 whereby Nedbank be ordered to see to it that all the necessary documents etc. be lodged, at the offices of the Registrar to effect transfer of the property into the name of the 10th respondent, (Royal Anthem).

[3] The issue in case 1982/2006 is whether Nedbank is entitled to all the interim relief set out above, the main object being to enforce the receipt of the rental income in terms of the cession contained in the mortgage documents, pending the finalisation of the main action in 3249/2004, instituted against the present registered owner, the Forum Trust II.

[4] The issue in case number 2150/2006 is whether the Trust and Royal Anthem is entitled to an order directing Nedbank to consent to cancellation of the mortgage bonds in terms of Nedbank and to do whatever ancillary steps necessary to achieve the transfer of the property into the Trust's name.

[5] **<u>COMMON CAUSE</u>**

5.1 The Forum Trust II (the Trust) represented by 1st and 2nd respondents in their capacity as trustees, is the registered owner of the immovable property, remaining extent of erf 24898, Bloemfontein, situated at the Saambou Building (the property).

5.2 Three agreements of loan were concluded between Nedbank and the Trust for the advancement of certain amounts of money. The total amount due and owing on 1 January 2006 was R4 585 236,57 the amounts having been advanced between December 1994 and in 1996. Three mortgage bonds were registered in favour of Nedbank, namely B19407/94, B19408/94 and B16353/1996 respectively, as security thereof.

5.3 That the Trust breached its obligations in terms of its agreements with Nedbank as far back as March 2002 and fell into arrears with the instalments payable.

5.4 Between 2002 and January 2006 various attempts ensued to negotiate a settlement which entailed various purchase agreements whereby the 10th respondent would purchase the said property. I do not deem it necessary to expand on the detail of each settlement agreement.

5.5 Needless to say, the various agreements which were all dependant on the sale of the property but were not successful, one of the reasons being that the Trust owed a substantial amount to the local authority for outstanding rates and taxes and services and a clearance certificate for the transfer of the property could not be obtained for purposes of the transfer.

5.6 Eventually an agreement was concluded on the 24th January 2006 after roundtable discussions between the representatives of the Trust and the applicant. The discussions were followed with written letters of confirmation, "JMV6" and "JMV7" to the founding affidavit. JMV6, a letter from applicant's attorney specifically contained conditions for the settlement to be successful:

5.6.1 The outstanding loans were to be settled for the amount of R1,8 million (the letter incorrectly reflects R1,4 million) for cancellation of the first bond, B16353/96.

5.6.2 The amount is specifically accepted on condition payment be receive by Messrs Honey & Partners on or before the 28th February 2006.

5.7 That Messrs Honey & Partners requested the original title deed and bond documents on the 26th January 2006 to enable them to attend to the cancellation of the bonds and simultaneously the registration of the property in 10th respondent's name.

5.8 That Messrs Krohn on behalf of the Trust and 10th respondent requested a copy of the title deed to enable their office to attend to the transfer on the 26 January 2006, 8 February 2006, 17 February 2006 and 21 February 2006 ("AI", "AC", "AM" and "AN" to the replying affidavit). No reply was ever received from Messrs Honey.

5.9 The applicant did not receive payment on or before the 28th February 2006.

5.10 The copies of the guarantee were delivered by the Trust to Nedbank's attorneys on the 28th February 2006 and the original on the 3rd March 2006 in respect of B19407/94 and B16353/1996 and B19408/94.

5.11 That Nedbank's attorney indicated to Messrs Honey that their mandate to continue with the settlement arrangement was being cancelled and this on the 23rd February 2006 seemingly prematurely ("AQ1" and "AQ2" to the replying affidavit).

5.12 The mortgage bonds relevant hereto both contain an identical clause 13 which makes provision that the mortgagor cedes his rights, title and interest in all the rents and other revenues that may accrue from the property to the bank (Nedbank). This is an additional security for any amount claimable by the bank and may not be acted on without consent of the mortgagor if the mortgager has complied with the bond conditions. However, should the mortgagor be in default – the bank may act immediately to receive rent etc.

5.13 During 2002 when the 1st and 2nd respondents were in default, the applicant acted in terms of clause 13, instructed attorneys to collect the rentals.

5.14 During 2005 more tenants occupied the building and letters were also written to them in an attempt to also receive their rental payments. Later a further letter was sent during March 2006. These tenants did not react.

5.15 Payments received were not sufficient to service the bond payments and the Trust made no payments either.

5.16 Applicant in the absence of receiving lease payments - advised the tenants in writing that action would be taken against them.

5.17 Respondents thereafter demanded in writing that the applicant cease to demand and collect rentals from the tenants and the respondent instructed an attorney firm to also inform the tenants that they were not obliged to make the payments to the applicant and that they must make all payments to Royal Anthem Investments in terms of their lease agreements.

5.18 After the above letters only 8^{th} and 9^{th} respondents paid over the monthly rentals to the applicant. The applicant thereafter brought the urgent application seeking the relief set out above. Some two weeks later the Trust, Royal Anthem, brought an urgent counter application as set out above.

<u>LEGAL POSITION</u>

[6] It is clear that only one of the applications can be successful. Nedbank is seeking interim relief pending the outcome of their action instituted for the recovery of the outstanding amount due and owing as opposed to the Trust and Royal

Anthem that seek a final mandatory relief to enable them to cancel the present registered bonds of Nedbank and transfer the property to the purchaser.

[7] Although the Uniform Rules do not make substantive provision for a rule *nisi* order, it has in certain circumstances become part of our procedural law especially in matters that are urgent and afford interim relief into protect rights and interests.

[8] For Nedbank to be successful in their interlocutory application 1982/2006, they must convince the Court, that the four prerequisites have been be proved namely:

8.1 A *prima facie* right although "open to some doubt". See **KNOX D'ARCY LTD AND OTHER v JAMIESON AND OTHERS** 1995 (2) SA 579 (WLD) on 593 F – G, and

KNOX D'ARCY LTD AND OTHERS V JAMIESON AND OTHERS 1996 (4) SA 348 (AD).

8.2 A well granted apprehension of irreparable harm – The test is objective and a decision made if a reasonable man on the facts would possibly suffer harm. See

<u>MCILONGO NO v MINISTER OF LAW AND ORDER AND OTHERS</u> 1990 (4) SA 181 (EDD) on 185 C and 185 G.

8.3 The balance of convenience – See **<u>VAN DEN BERG v OVS LANDBOU INGENIEURS (EDMS) BPK</u>** 1956 (4) SA 391 (OPD) on 399 G:

> ¡°... moet die Hof, nadat hy die nadeel of skade wat die appellant mag ly deur die weiering van die gevraagde interdik opgeweeg het teen die nadeel of skade wat aan die respondent besorg mag word deur die toestaan daarvan, oortuig wees dat die aangevoerde getuienis voldoende en sterk genoeg is om die gevraagde interdik te regverdig.”

This implies that the stronger the chances of success, the less necessary that the balance must favour the applicant and *visa versa*. See **<u>NKWANYANA v SOUTH AFRICAN BANTU FOOTBALL ASSOCIATION AND OTHERS</u>** 1972 (4) SA 309 op 315 C (D and CLD).

8.4 No alternative remedy - This presumes that the applicant will be in a helpless position if the interdict is not granted. See **VAN NIEKERK v VAN RENSBURG** 1959 (2) SA 185 (FPA) on 187 A.

[9] The court has a wide discretion in applying the abovementioned prerequisites which must be considered judicially and on the facts of each matter.

[10] A final order as sought by the Trust and Royal Anthem as different prerequisites, being:

10.1 A clear right - whether a right is clear is a matter of evidence and must be proved on a balance of probabilities, facts which in terms of substantive law establish the right relied on. See **DIEPSLOOT RESIDENTS AND LANDOWNERS ASSOCIATION AND OTHERS v ADMINISTRATOR TRANSVAAL, AND OTHERS** 1993 (3) SA 49 (TPD) on 61B and **FREE STATE GOLD AREAS LTD v MERRIESPUIT (ORANGE FREE STATE) GOLD MINING CO LTD AND ANOTHER** 1961 (2) SA (WLD) 524 C – D.

10.2 An injury actually committed or reasonably apprehended – The test is also objective and the evaluation is on the facts of whether the applicant can establish on a balance of probabilities if injury will follow. See **NESTOR AND OTHERS v MINISTER OF POLICE AND OTHERS** 1984 (4) SA 230 (SWA) on 244.

10.3 No alternative remedy – This supposes that the alternative remedy must be:

10.3.1 adequate;

10.3.2 ordinary and reasonable;

10.3.3 a legal remedy;

10.3.4 afford similar protection: See **LAW SA, Volume II, Re-issue, paragraph 312.**

[11] **URGENCY**

11.1 In considering an application in terms of Rule 6(12) the court must ask itself what damages, if any, the applicant will suffer if it is to wait for a trial in the ordinary course of litigation and the urgent application is not granted.

11.2 On the 25th May 2006 the parties by agreement assented to an interim interdict being granted on case 1982/2006. It is my humble opinion that the respondents, the Trust and Royal Anthem conceded that Nedbank was entitled to bring an application on an urgent basis when they conceded to the interim order, and the question is whether the Trust and Royal Anthem were entitled to bring an urgent application or whether both applications were tainted with self-imposed urgency. The question of urgency will be dealt with herein under application to the facts.

[12] **<u>APPLICATION TO THE FACTS</u>**

12.1 I have carefully evaluated the facts placed before the court, some of which was extensive and burdened the applications unnecessarily. Neither party attempted to be concise in their pleadings, nor in their arguments.

[13] Nedbank has brought an interlocutory application only

seeking interim relief pending the finalisation of their action for the recovery of an amount due and owing and for which they hold security in the form of mortgage bonds. This action has already been instituted. The Trust and Royal Anthem deny that Nedbank is entitled to collect the rentals since they aver that they have a binding agreement whereby Nedbank agreed to accept an amount in full and final settlement for the outstanding amount due and owing.

[14] In light of the above the Trust and Royal Anthem brought their application under case number 2150/2006 on an urgent basis to counter Nedbank's interim requests and seek final relief. This can only be granted if there is no dispute of the facts. A dispute arises when one party denies material allegations and the applicants can produce positive evidence to the contrary.

It is accepted that final interdicts should only be granted in motion proceedings if the facts stated by the respondents together with the admitted facts in the application affidavits justify such an order. See **PLASCON-EVANS PAINTS LTD**

v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (AD) on 634 I where the following was said:

> ¡°In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact....”

and in **SOFFIANTINI v MOULD** 1956 (4) SA 150 (EDCD) on 154 G – H:

> ¡°It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.”

The applications will therefore be evaluated separately with particular regard to the question if each applicant has succeeding in proving on a balance of probabilities that they are entitled to the relief sought.

[15] Nedbank on an interim interdict only has to prove a *prima facie* right. However, I am convinced that Nedbank, applicants in case 1982/2006 has a real right, since they have registered mortgage bonds over the said property of the Trust in their favour and have certain rights that flow therefrom should the mortgagor be in default.

[16] "A real right is a thing conferring on the holder of the right an exclusive benefit in the thing; ie the benefit is indefeasible legally by any other person."

and

"Mortgage is the right that one person has in the property of another which serves to secure an obligation."

and

"The essence of the right which the mortgagor obtains is to retain his hold or security over the property until the obligation is discharged and if the obligation is not discharged when due, to have the property sold and to recover the amount due to him form the proceeds of the sale of the property."

See **<u>Dale Hutchinson and Others: WILLES PRINCIPLES OF SOUTH AFRICAN LAW,</u>** 8th Edition on page 249 and 334 respectively.

[17] The Trust and Royal Anthem on the other hand base their application on an agreement concluded on the 24th January 2006 whereby by an amount of R1 800 000 would be paid in full and final settlement and that this contract was still binding. However he settlement was clearly made subject thereto that the said amount had to <u>be paid</u> on or before the 28th February 2006, to Nedbank's attorneys (See "JMV6" of the Nedbank's founding affidavit).

[18] The Trust's argument is that they delivered their guarantee on the 28th February 2006 and that the guarantee is equivalent to payment and therefore did not breach the agreement. Nedbank's denies specifically that the condition of payment was met. It is Nedbank's case additional thereto

that the settlement reached on the 24th February 2006 was not subject to a bond being registered from whence the finances would be forthcoming. I cannot believe that Nedbank believed that the finances would not be forthcoming and financed from the sale of the property when transactions in the normal course of registration would take place simultaneously. The Trust would not be able to raise such funds without a buyer, who if he would not be paying cash, would have to apply for a bond. It is accepted that the sale transaction had nothing to do with Nedbank since they were not the sellers but from the negotiations over the years with Nedbank they were aware that the only way to release the liability due and owing to them was by selling the property and that guarantees would have to be delivered. The attorneys of the Trust indicated that registration would most probably take place at the end of February 2006, which coincides with the last date determined by Nedbank. I think it would suffice to say that both parties knew and understood that the transaction would be completed by 28th February 2006 and that the funds would be forthcoming from the sale.

[19] Nedbank's letter is however, quiet clear and stated in unequivocal language, and to be understood by the ordinary reader. This condition was never queried by the Trust, in fact they confirm as previously mentioned that registration will take place before or on the 28th February 2006. They were aware that the date played a role.

[20] They however did not make any arrangements for postponements or an indulgence when they realised that registration would not take place for two reasons:

20.1 They were still negotiating with the municipality for the outstanding rates and taxes etc.

20.2 Mr Krohn, the Trust's and Royal Anthem's attorney had not received a copy of the title deed timeously. The Trust and Royal Anthem gave a long account of the request for the title deed from Nedbank and that the requests were ignored. As a result of Nedbank not supplying the original title deed, the transaction could not be registered before 28 February 2006 and that in fact instituted repudiation of the contract. It is quite clear from the pleadings before this court that nowhere was the original title deed requested by the respondents and it is further common knowledge that a copy was only needed to draw up the transfer documents. A copy could be obtained from the deeds office which is in fact exactly what the respondent's attorney eventually accomplished, albeit at a very late stage.

[21] With the knowledge that the payment was to be financed from the sale of the property, and that the last date for payment was 28 February 2006, respondents and/or their attorneys did not request extension or attempt to negotiate another date for performance. It is however doubtful if the conduct of Mr. Khron, the respondent's attorney had any bearing on the fact that payment could not be affected on the 28th February 2006.

The bank only issued guarantees on the 22nd February 2006 and a copy delivered to the applicant's attorney on the

28th February 2006, clearly not payment and clearly not in time to register the transaction before 28th February 2006.

[22] It is respondent's contention that a guarantee is as good as payment. This can only be if the guarantee is unconditional. The guarantees herein "AR3-4" and "AR5-6" contain the normal conditions but an additional condition features, namely that copies of the lease agreements with a gross income of R158, 674 be received by the bank (ABSA in this instant). Specific provision is also made that the bank reserves the right to withdraw the guarantees, for reasons set out therein. These guarantees are clearly then not unconditional.

[23] The Trust and Royal Anthem also averred that their attorneys were not informed which attorney on behalf of Nedbank was to deal with the cancellation transaction further delaying the registration process. This is also not true. During the negotiation period, Mnr. Van Zyl on behalf of Nedbank, informed the Trust's attorney on more than one occasion that Mr. Saffey of their offices would be attending

thereto. See “JMV6” and “JMV7”.

[24] **DISPUTES**

The parties are in dispute regarding the contents of the agreement reached on the 24th January 2006, specifically regarding the furnishing of the title deed. I am of opinion that the furnishing of the title deed or copy thereof is not a valid excuse for the Trust’s non-performance, since a copy could easily have been obtained from the Deeds Office timeously. It was only necessary to obtain a copy so that the documents could be drawn, which could and should have been done prior to the bank guarantees being made available.

[25] There was also the added problem of the outstanding municipal rates etc that had to be paid and negotiations with the municipality were not yet completed. It is common cause that the finalisation thereof took some time, and that the transfer would not then be registered in time to affect payment. This all happened on the “side” of the Trust and cannot be interpreted as Nedbank’s “unequivocal intention to no longer be bound”. See **STREET v DUBLIN** 1961 (2) SA 4 (WLD) on 10 B and see also **VAN ROOYEN v MINISTER VAN OPENBARE WERKE** 1978 (2) SA on 835 on 846 A.

[26] There is a further dispute if whether bond re-payments of

R18 500 were made monthly pending the final registration. The Trust is of opinion that this condition only applied to the previous agreement during October 2005, and that payments did not have to be made after the agreement was reached.

[27] Trust avers further that they were willing and entitled to continue with the contract.

[28] There are various differences regarding the actual agreement reached on the 24th January 2006 specifically what was said or not said by the various representing attorneys.

[29] A further confusion arises when Nedbank gives written instructions to Honey to close their file on the 23rd February 2006 and inform the Trust that the full amount outstanding must be immediately recovered. This instruction was most certainly premature, however, it is doubtful if it had any bearing on the non performance of the contract. As I commented in court, Nedbank probably realised (albeit

prematurely) that the Trust would not be able to affect payment before the 28th February 2006, hence their instruction. This cannot be construed as repudiation since the Trust would still be entitled to perform until the 28th February 2006 if it was at all possible. Nedbank gives no explanation for their seemingly hasty action.

[30] It is the Trust's case that the agreement reached on the 24th January 2006 is still valid and that they, as owners have already entered into an agreement, with a third party, to enter into subleases with all the tenants in the building and therefore they were entitled to inform and threaten the tenants that all payments must be made to their agent (Royal Anthem).

30.1 There can be no doubt that Nedbank as applicant has established not only a *prima facie* right, but a real right. There are registered mortgage bonds in favour of Nedbank which serves as security for monies lent and advanced.

30.2 Further that the Trust was in arrears as far back as 2002 and that various attempts and agreements had been unsuccessful to settle the outstanding amount.

30.3 That in terms of clause 13 of the mortgage bonds, the mortgagor gave a cession of rentals and other revenues which may accrue from the mortgaged property to the mortgagee in the event that the mortgagor (the Trust) does not comply with the conditions of the bond.

30.4 Nedbank duly insisted on receiving these payments from the tenants to curb their losses regarding monthly bond repayments that were not being met by the Trust. The mortgagor's consent is not required when conditions have not be complied with and it is common cause that the conditions were not complied with.

[31] The Trust and Royal Anthem on the other hand, are of opinion that the agreement to settle the amount is valid since delivery of the guarantees is as good as receiving and this agreement must take payment preference over the real right of Nedbank. The contract must be enforced hence the

prayers for a final order against Nedbank.

[32] For the Trust and Royal Anthem to be successful they must be able to prove that they have a clear right on the facts before this court. If it is clear that the applicants cannot prove a clear right or even on *prima facie* right since there are serious disputes regarding their allegations and *prima facie* it would appear that the agreement has lapsed on the 28th February 2006.

[33] I do not deem it necessary to refer the matter for oral evidence. Nedbank has in case 1982/2006 established facts that have been confirmed not only by documentation annexed to the respective parties' affidavits but have been admitted or confirmed by the respondents (Trust and Anthem).

34.1 It is common cause that the Trust has been *in mora* for a period that stretches from 2002 until the institution of the applicants and that the Trust, in spite of arrangements that interim payments must be made on the loan account, did not adhere to the conditions. In addition to this, the municipal rates and taxes of the property also reflected on astronomical arrears which were part of the Trust's problem to expedite the registration of the agreement of sale.

34.2 It has been contended that the irreparable harm that Nedbank will suffer if they do not collect the rentals, will be insurmountable and unrecoverable. According to the letter sent from Nedbank's attorney on the 7th March 2006 ("AT3") the outstanding loan reflected an outstanding amount of R4, 360 000,00 which they called up when the Trust could not affect payment on the 28th February 2006.

34.3 Should Nedbank be entitled to collect and receive the rentals from the tenants, and thereafter make payments on the bond account, they would be able to curb their damage. It was further argued that the outstanding loan is escalating daily and that it is doubtful if the commercial value of the property will at all be sufficient to protect their rights, should the bond be called up. Any interim payment will be utilised in reducing the outstanding loan and escalating interest.

35.1 Mnr. Van Rhyn, on behalf of the Trust, argued that the cession of the lease amount granted by the Trust in favour of Nedbank has not been granted by the present lessor, the purchaser, and cannot be enforced against them. This argument is truly not understood. How can a purchaser, who is not yet the registered owner, have more rights than Nedbank who presently holds registered real rights and interest in the said property? Besides, no lease contracts were produced at any stage during the proceedings and attached to the respondent's replying affidavits which were also a specific requirement and condition of the guarantee issued by Absa.

35.2 Nedbank, while the bonds are still registered in their favour can and should enforce their rights against the lessees. The court in any case accepts that the entity collecting the rentals was appointed as an agent by the Trust, operating as such in the Trust's interest.

35.3 It is not sure what the Trust and/or its agent have done with the money previously collected by the tenants i.e. from January 2006 until the interim order of 25 May 2006. Since the Trust has been *in mora* for more that 4 years. There is no doubt they have suffered harm and will do so if the interim order is not granted.

36.1 Nedbank's argument is that the balance of convenience favours them stronger than the Trust. If the interim relief is refused, they will suffer harm as discussed above. They also tender to pay whatever damages the Trust may suffer in the event that Nedbank is not successful with their action instituted. They have also undertaken to utilise the tenant's lease amount to service the loan account, municipal rates and taxes etc.

36.2 No prejudice will therefore be suffered by the Trust. The only disadvantage that the Trust will suffer is that it will have no control over the tenants payment which is an income and not have an income to pay the rates and taxes which is the responsibility of the owner of the immovable property only in the event that the applicant Nedbank pays these services the respondents will suffer no damages.

[37] The Trust put forward an argument that the instability and "tug of war" between Nedbank and the Trust regarding to whom the tenants must make payments is disruptive and it is afraid that the tenants are going to cancel their contracts which will be financially harmful. I cannot agree with this argument. A tenant has no rights to the property except a right of occupation on condition he pays his contracted lease amount. What would it matter to whom the amount is to be paid, as long he is in possession of unimpeded occupation of the premises. In fact the tenants, seemingly under the

influence of the 10^{th} respondent, Royal Anthem, exacerbated Nedbank's position making it necessary to bring the application on an urgent basis.

[38] I am satisfied that the applicant (Nedbank) in case 1982/2006, had in the circumstances to curb damages no other recourse than to bring this urgent application. The Trust has for four years struggled to make payments or settle the matter in spite of various attempts and indulgences. Nedbank attempted without the intervention of a court to extract payment from the tenants in accordance with there real registered right, however to no avail, forcing them to eventually vent themselves to court with an urgent application. Nedbank has already instituted action for the recovery of the outstanding amounts, but it is common knowledge that litigation in the High Court is sometimes cumbersome and at times lengthy and protracted. The applicant will be helpless during this time and not have the benefit of the tenant's payments with which to reduce the loan. It is also not clear how the Trust and/or Royal Anthem has dealt with the funds up and till this application.

Applicant only become aware Royal Anthem's involvement after a letter was received on the 1 April 2006.

38.2 The Trust on the other hand was aware of the tenants being approached for the payments by Nedbank. They were also aware as previously stated above that the agreement confirmed in "JMV6" categorically stated that payment was to be received on the 28th February 2006. With their prior knowledge of all the difficulties facing timeous registration, they did not ask for extention, and in spite of them being in possession of letters from Nedbank's attorney that they may not collect the rentals, they do not deem it necessary to bring an application. Only after Nedbank instituted action, and only somewhat two weeks later, did the Trust bring an urgent counter application.

38.3 Taking all the criteria into account in determining whether these application should be treated as urgent in terms of Rule 6(12) or not, prejudice to be suffered by Nedbank whilst waiting for a hearing in the ordinary course, and the prejudice that the respondent might suffer by an abridgement of the prescribed times have been weighed up. By consent parties conceded by requesting the interim order on 29 May 2006 that there was urgency to receive the income for payment of the various obligations, being certainly *ad idem re* the urgency of Nedbank's position. I have already indicated that had the parties not agreed to an interim order, I would have at that stage obliged the applicant taking into regard the prejudice suffered.

38.4 The respondents were aware since early March that Nedbank was of opinion that the agreement had lapsed and were not going to give any further extension for payment. Why did the Trust not bring the application immediately thereafter? I firstly find no merits in their grounds for urgency and secondly it is obvious that their application is being disputed factually by Nedbank and final relief cannot be given.

[39] The application 2150/2006 is therefore dismissed with costs.

[40] Before the final order is given, I intend amending paragraph 4 of the applicant's amended notice of motion to read as follows:

> "Directing that the applicant shall appropriate such rentals to the indebtedness of the Trust pending the outcome of the action instituted against the Forum Trust II ("The Trust"), under case number 3249/2004 in the above Honourable Court ("The Action"), subject to the undertaking of the applicant contained in paragraphs 86, 87 and 88 of the founding affidavit."

[41] An order is then granted in terms of prayers 1, 2, 3, 4 as amended 5, 6, 7, 8 and 9 of the amended notice of motion.

D. MILTON, AJ

On behalf of the Applicants: Adv. L. Wepener SC en
J. J. F. Hefer
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the Respondents: Adv. A. J. R. Rhyn SC en
C. Snyman
Instructed by:
Krohn & Kie
BLOEMFONTEIN

/em