REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2012/17045

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

In the matter between –

HOGSHEAD BAR CC APPLICANT

and

ERF 2077 DOUGLASDALE EXTENSION
(PTY) LIMITED RESPONDENT

JUDGMENT

SUTHERLAND J

INTRODUCTION

[1] The Hogshead, in Douglasdale, is a place to which Johannesburgers repair to eat and drink. Apparently they do so in large numbers, and it is alleged that these patrons engorge the parking areas of the Douglasdale Shopping Centre and of and the neighbourhood. This congestion has caused grievances.

[2] The applicant, who trades as the "Hogshead," describes the business it conducts as a restaurant. The respondent, the owner of Douglasdale Shopping Centre and the applicant's lessor, thinks differently. The respondent holds the view that the Hogshead is not merely a restaurant but is also a bar, allegedly in breach of their lease. The respondent is also aggrieved at the swamping of the parking facilities by the patrons of the Hogshead which, so it says, is what is to be expected from a business of a bar. A bar, according to the regulations of the Gauteng liquor licensing authorities, is a place where you can buy liquor without being obliged to buy and eat a meal, and thus, is to be contrasted with a restaurant or a pub where food is to be consumed.

[3] The respondent wrote to the applicant on 28 February 2012, and again on 9 May 2012, and therein told it to stop being anything but a restaurant because, so it is alleged, there would otherwise be a violation of the terms of the lease. It also told the applicant that if it did not desist from the business of a bar and, in turn, stop monopolising the parking, which constituted unreasonable use and as such a breach of the lease, the lease would be cancelled.

[4] The applicant, in response to this communication from the respondent, denies running a bar or committing any breach of the lease. The lease commenced in July 2011 and runs on until 2016 with a further option to renew for five years, a prospect, therefore, of another ten future years of tenure. To protect itself and the R4 million investment it says it has put into in the place, the applicant has brought an application for an interim interdict to prevent the respondent cancelling the lease, on the grounds mentioned, pending the institution of an action to be launched by the applicant to address the differences of opinion about the nature of the business and the question of whether or not any breach of the lease by the applicant has occurred.

[5] The affidavits traverse a considerable body of evidence which demonstrate that you can eat at Hogshead and not only drink. This is, however, not the controversy: the dispute is whether or not when you buy a drink you are obliged to also buy a meal and sit down to eat it. There is some evidence that you can do so; moreover, the Hogshead offers a "get home safely ride" for those patrons whose devotion to revelry renders them unfit to pilot their own cars home.

[6] Whether or not it is feasible, by drawing a strict line between the patrons who eat and drink and the patrons who only drink, to assess whether the establishment is truly one kind of hospitality outfit or another seems problematic and is an unlikely issue that could safely be determined on affidavit. Despite the best efforts of both

litigants, the answer to that question about the true character of the business is not going to be answered in these proceedings.

[7] It was argued on behalf of the respondent that even though the applicant's case might show compliance with the lease, what was of crucial importance was to determine whether or not there were instances of non-compliance, *ie* 'slip-ups' which substantiated a basis to allege a breach. In this, reliance was placed on *Lawson & Kirk v SA Discount and Acceptance Corporation (Pty) Ltd* 1938 CPD 273 for the proposition that the true character of transactions is to be tested not by their consistency with their purported nature but by reference to the anomalies and deviations from the notional character. The difficulty lies not in such a principle, but in its application to given facts. As alluded to above, I am unconvinced that some measure of ostensible inconsistency is dispositive of a controversy which requires the characterisation of a given activity in order to place it within a spectrum of artificial distinctions invented to facilitate bureaucratic control of social behaviour. The application of the liquor laws seems to me to fall into this quagmire–like categorisation. Similarly, I am unconvinced that apportioning blame for the parking congestion, which is not necessarily the same thing as attributing causation, is an unnuanced enquiry.

[8] The burden upon the applicant is to establish the existence of the four traditional elements for an interim interdict; *ie* that -

8.1 it is vested with clear or *prima facie* legal right;

8.2 an imminent threat exists to such right, likely to cause irreparable harm;

8.3 the absence of an appropriate alternative remedy capable of warding off that harm, or adequately compensating the applicant for its occurrence;

8.4 a balance of convenience to favour its interests over the contending interests of the respondent.

WHAT RIGHT DOES THE APPLICANT INVOKE?

[9] What precisely is the right that is relied upon by the applicant? In the case of these parties that right can derive only from their agreement of lease. The right must be capable of being attributed to the bundle of rights that are encompassed by that agreement. It is not necessary that the right be expressly and clearly articulated in the lease agreement; were that so, it would be a clear right, a threshold not required for an interim interdict. A right derived from a tacit term or a right derived from an implied right is enough.

[10] The applicant's heads and the oral argument advanced tended to focus on the respondent's complaints and to endeavour to refute their validity. The Notice of Motion reflected the same focus. Nowhere in the founding affidavit is there an

express, discrete articulation of the exact right relied upon. In paragraph 43 the applicant's founding affidavit the deponent speaks of a *prima facie* right and alludes to rights of 'occupation' and to the apprehended harm thereto. An allusion is also made to its expectations of some ten years of tenure, and to the damage to its customer connections if news of a cancellation of the lease was to be published. Elsewhere, mention is made of a R4 million investment in the business.

[11] The balance of the affidavit addresses squarely the complaints by the respondent. First, that the applicant is in contravention of the liquor licensing laws and that this violation is in turn a breach of the lease. Secondly, that the applicant's business causes a nuisance to other tenants because its patrons use up an unreasonable proportion of the limited parking space, such nuisance being a breach of the lease. In offering a rebuttal, the applicant, at some length, demonstrates that the liquor licensing authorities are aware of its activities and make no complaint of a violation. Further, it challenges the respondent to substantiate that the cause of the overcrowded parking space is capable of being culpably attributed to the applicant, rather than, for example, to mere inadequacy of capacity. There is undoubtedly congestion; who is responsible is the question.

[12] Although not neatly articulated, it seems plain, in my view, that the precise right the applicant invokes is the right to undisturbed possession of the leased premises.

[13] In my view, what the applicant really seeks is specific performance of the lessor's obligation to secure and to leave the lessee in undisturbed possession of the premises. The obligation of the respondent in this sense is a 'negative' duty to leave the respondent alone. The academic writers have revelled in the niceties of what to describe relief of such a nature. Lambiris, "*Orders of Specific Performance & Restitutio in SA Law*" (Butterworths, 1989, p22) refers to the debate about the appropriateness or inappropriateness of calling an order for 'specific performance of a negative duty' an 'interdict'. He disapproves of so doing and draws attention to a conceptual distinction between an order for specific performance, which is aimed at procuring a 'performance' of a contractual obligation and an 'interdict,' which is aimed at 'protection' of a contractual right. Kerr, "*The Principles of the Law of Contract*" (6 ed, 2002 p 700) favours the use of the term 'interdict,' for a remedy to enforce negative provisions of a contract, but the examples he cites seem to have peculiar characteristics, *ie* restraints of trade, which, in my view, inhibit extrapolating the appropriateness of that particular label to use for a generic form of relief for any 'negative' contractual obligation sought to be enforced. Harms, writing in *LAWSA*, (Vol 11) [Interdicts] p 412, para [390], is content to distinguish a prohibitory interdict from a mandatory interdict.

[14] What is plain is that an interdict is available to enforce a contractual obligation. A good example of enforcing compliance with lease obligations through an interdict is the decision in *V&A Waterfront Properties (Pty) Ltd & Ano v Helicopter & Marine Services (Pty) Ltd* 2006 (1) SA 252 (SCA). In this case the lessee occupied a

helicopter landing pad. The lease stipulated that its use of the pad had to conform to all statutory requirements. The civil aviation authority grounded a helicopter. The lessee threatened to ignore the grounding instruction. The SCA held that the lessor could interdict the lessee from flying unless and until it secured an upliftment of the grounding order. The premise was that such an interdict served to enforce the terms of the lease.

[15] Plainly in the V&A example, the facts illustrate a clear breach by the lessee, whilst, by contrast, in the present case, although is certain that the lessor's intended cancellation will intrude on a right, it is uncertain that the lessor's complaints are unfounded.

[16] The doubt about whether the lessor is acting unjustifiably in seeking to cancel does not exclude an interim interdict preserving the *status quo* being granted. In the decision in *Ladychin Investments v South African National Roads Agency* 2001 (3) SA 344 (NPD), the pivotal controversy was about the erection of a toll plaza that would adversely affect the business of the applicant. The applicant sought to stop the construction on the grounds on non-compliance with certain statutory procedures. The respondent's activities were ostensibly lawful, unless and until a court on review set aside the authorisations to build the plaza. The prospects of success on future review determined whether or not an interim interdict was appropriate.

[17] In the present case, matters are less clear cut. The applicant will eventually have to prove that the Hogshead is not in breach of any liquor licensing laws, a contention supported, though not definitively, by the absence of action taken against it

by the licensing authorities despite, so it is alleged, with some substantiation, their direct knowledge of the trading practices of the Hogshead. Further, the question about the hogging of the parking is extensively traversed on the papers to demonstrate the scale of the problem, but nevertheless still awaits a commensurately extensive and substantiated analysis to exclude all the obvious factors to reach the conclusion that the Hogshead was responsible for all or some of the congestion and that it is culpable within the contemplation of the terms of the lease.

WHAT IS THE ATTACK ON THE RIGHT TO UNDISTURBED POSSESSION THAT WILL CAUSE IRREPARABLE HARM?

[18] The facts show that the lessor has formed an intention to cancel if its demands are not met. It has not yet given a notice to cancel. The letter of 9 May 2012 demands acquiescence within two days or the lessor will invoke clause 16.1 of the lease, which regulates the lessor's remedies upon a breach by the lessee. That clause requires a 7 day notice to remedy the alleged breach before a notice of cancellation can be validly given. Therefore, the next logical hostile step to be faced by the applicant is the notice to remedy, and the second hostile step would be the cancellation itself. These are steps that the contract authorises.

[19] The exercise of a right given under a contract is not an illegal act and is not itself a breach of the contract. However, what is in dispute is the *entitlement to invoke the right to cancel* rather than the invocation *per se* of that right.

[20] Although the applicant alleges that the motive that drives the stance of the respondent is not a genuine objection to the sale of liquor, but rather a need to placate other influential tenants over inadequate parking, the body of evidence does not yield up a firm base upon which to argue convincingly, on paper, that the respondent is *mala fide*. It has adduced evidence which is undisputed about the consumption of liquor without consuming a meal. It has also adduced evidence and advanced argument that renders the propriety of the sale of liquor in the manner it contends the applicant trades, at least, questionable. There are answers given to these accusations, but, nevertheless, the grounds of complaint are not fanciful nor, ostensibly, contrived.

[21] Plainly, a cancellation of a business lease where the premises are a critical part of the business operation, the business identity and its goodwill is a threat to its very viability. The harm is self-evident, *ie* the extinction of the business.

IS THERE AN APPROPRIATE ALTERNATIVE REMEDY AND WHAT IS THE BALANCE OF CONVENIENCE?

[22] Prest, "*Interlocutory Interdicts*" (Juta) 1993, p3 observes, cryptically, that –

> "... the interdict is a remedy for the prohibition of prima facie illegitimate activities. The principle *that a court will be slow* to grant an interdict restraining a person *from exercising his rights* and carrying on legitimate activities does not apply where the activities which the court is asked to interdict are illegitimate"

This remark, with respect, begs the question: will a court *ever* interdict a person in such circumstances and, if so, why? Is the respondent in the present matter, as lessor, doing no more than invoking its contractual right to allege a breach and cancel?

[23] It has been argued that the appropriate way for the applicant to protect its rights does not require it to prevent the respondent from exercising its contractual rights; *ie* to cancel, if it thinks it has grounds to do so. It is contended that the applicant should wait until the respondent indeed cancels and then challenge the justification to do so, if necessary by seeking interim interdictory relief pending resolution of disputes of fact. Thus, the question is posed: Is the application premature? It seems to me that the risk of the law being an ass is strong if the implication of a finding of prematurity in these proceedings results in no more than a fresh application for interim relief in identical terms immediately after the cancellation is effected. In my view the mere threat, seriously made, is sufficient to trigger an alarm to justify an application to court for help.

[24] I was referred to *Edrei Investments 9 Ltd (In liquidation) v Dis–Chem Pharmacies (Pty) Ltd* 2012 (2) SA 553 (ECP). It concerned a lease by Dis-Chem of premises from Edrei. Dis-Chem, an anchor tenant, was contractually bound to operate at full pace for the duration of the lease. The operation was unprofitable. Dis-Chem told the lessor it was withdrawing early, admittedly in breach of its obligations. It

acknowledged that it was exposed to a liability for damages. Before it could withdraw, the lessor, Edrei, sought an interdict to compel it to remain and perform its obligations; *ie* to compel specific performance. The propriety of such relief was debated. The court granted specific performance owing to the disastrous effect of an anchor tenant vacating and causing a ripple of damage to other trader tenants. The *Edrei* case turned on the existence of irreparable harm. In the present case, a preservation of the *status quo* pending a finding on the facts, seems to call for similar protection.

[25] I was also referred to two decisions dealing with the interdicting of a creditor from initiating or proceeding further with a winding up application as supposed support for the applicant's stance and the timing of the application.

[26] In *Soundcraft (Pty) Ltd t/a Advances Audio v Daan Jacobs t/a Radio Spares and TV* 1982 (4) SA 685 (W), a debtor was threatened with a liquidation application. The threat was withdrawn after the interdict was applied for, but to decide the question of wasted costs the matter was dealt with. The court held that there was a right not to be drawn into 'frivolous or unfounded litigation'. The facts assumed for the decision were that there was a *bona fide* dispute about whether the debtor owed the creditor the money claimed. The court held that the applicant was entitled to an interdict to stop a threatened liquidation application. The decision relied on the notion that to launch liquidation proceedings based on a disputed debt was an abuse of the court process. The argument that such a principle violated a person's right to approach a court was rejected. The debtor's case, moreover, was not to challenge the propriety

of a liquidation application *per se* but, rather, to challenge a continuation of such threat when the creditor was informed that it had no basis to continue liquidation proceedings. However, it needs to be stressed that on the facts in this case, the very dispute over the debt unsuited the creditor, because a disputed debt is no basis for such proceedings.

[27] By contrast, in the present matter, the mere dispute of fact about whether the conduct of the applicant in running the Hogshead breaches the lease is not a ground to unsuit the respondent from alleging that a breach does exist. Therefore, although there may seem to be an attractive similarity with the applicant in the *Soundcraft* case the decision is distinguishable.

[28] In *Kalley Flooring Co (Pty) Ltd v President Carpeting Manufacturers Ltd* 1982 (4) SA 681 (C), a creditor initiated a winding up application. The debtor, instead of filing an answering affidavit, brought an application for an interdict to stop the liquidation proceeding from continuing, in which papers its solvency was plainly demonstrated. The creditor persisted with the liquidation application and opposed the interdict application. The interdict was granted. I may say that I am mystified why, in these circumstances, the interdict was thought to be preferable to simply defending the liquidation application. However, I cannot deduce that this decision promotes any general principle which is of use in the present matter.

[29] It seems to me that the balance is manifestly tilted towards the applicant whose business is in jeopardy. Damages cannot restore the business. The computation of what profits might have been made over a ten-year period is a monstrously difficult task, if possible at all. An investment of R4 million is at stake. The lessor's difficulties by contrast relate, for the interim period, to how to ameliorate the parking congestion. This problem may continue to result in frayed relationships with other lessees. However, the contrasting risk to which each party is exposed, in my view, favours the applicant.

THE APPROPRIATE RELIEF

[30] The relief sought by the applicant was initially very wide and quite unjustified by the legitimate needs of the applicant to protect its rights. The relief was amended to trim the prayers down to an interdict to stop the respondent invoking its right to cancel on the particular grounds mentioned in the two letters and traversed in this judgment.

[31] The notion was that this interim relief was to stand pending a trial to be instituted within a month of the judgment. That is not good enough. The need to resolve the disputes of fact requires rapid finalisation. I propose to refer the matter to oral evidence and order the affidavits to stand as pleadings.

[32] The costs of these proceedings ought, in my view, to be costs in the oral hearing to which reference I have made, because the justification for this application will be dependent upon the findings in that hearing.

[33] Accordingly, I make an order as follows:

(1) The dispute between the parties as set out below is referred to oral evidence in terms of Rule 6(5)(g) -

1.1 whether or not the applicant's business, The Hogshead, was at any time during the currency of the lease conducted in contravention of any statutory regulation under the relevant liquor licensing laws;

1.2 whether or not such contravention constitutes a breach of the lease;

1.3 whether or not such breach was material;

1.4 whether or not The Hogshead business is culpable in relation to the congestion of the parking facilities;

1.5 whether or not such culpability is causally connected to a breach of the lease;

1.6 whether or not, as a result of such culpability as is found to exist, the respondent is entitled to invoke its rights under clause 16 of the lease to cancel the lease;

(2) For the purposes of such hearing, -

1. the affidavits shall stand as pleadings;

2. additional evidence may be adduced, provided an affidavit setting forth the import thereof is served on the other party;

3. persons other than the present deponents may testify, including experts, if such evidence is sought to be adduced;

4. the respondent is interdicted from taking steps to cancel the lease, on a ground covered by the issues mentioned above, pending the judgment in that oral hearing.

(3) The parties, may, if by agreement they wish to vary the formulation of the issues to be referred, set the matter down, summarily before me, on notice, to effect such agreed variation.

(4) The costs of this application shall be costs in the cause in the hearing referred to above.

SUTHERLAND J
1 June 2012

Hearing 25-26 May 2012

Delivered: 5 June 2012

For the Applicant: Adv R Cohen,
instructed by Glynnis Cohen Attorney

For the respondent: Adv B Leech SC with Adv R Keightley,
instructed by Werksmans Attorneys
Ref N Kirby