

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 1387/2009

DATE: 28 JANUARY 2009

5 In the matter between:

FULL SAIL 75 (PTY) LIMITED APPLICANT

and

DIAMOND DISCOUNT LIQUOR (PTY) LTD RESPONDENT

10 JUDGMENT

BINNS-WARD, A J:

In this matter the applicant, Full Sail 75 (Pty) Limited, has
15 applied as a matter of urgency for an order, in essence, to
evict the respondent, Diamond Discount Liquor (Pty) Limited
from premises situated at the ground floor, Huguenot Hotel, 34
Huguenot Road, Franschhoek. The applicant is the owner of
the property and respondent has been in possession thereof in
20 terms of a lease agreement.

It is apparent from correspondence exchanged between the
parties in September and October 2008 that the terms of that
agreement, certainly in so far as they affected the applicant's
25 ability to give notice of its termination, are in dispute between

the parties.

It is clear that at the end of September 2008, the applicant gave notice to the respondent requiring the latter, in terms of what it contended to be a monthly lease agreement, to vacate
5 the property by the end of October. It is equally clear from the correspondence that within the month of October, the respondent made it clear that it placed the issue of termination of the lease in dispute.

10 The purpose or object behind the termination of the lease, was the redevelopment of the premises, and to that end the applicant subsequently obtained a demolition permit permitting it to demolish the building, part of which is occupied by the respondent. Such demolition has commenced and appears to
15 be fairly advanced.

In that context, an application was brought by the respondent in this matter, *qua* applicant, in Case Number 871/2009 before Mr Justice Fourie. The nature of the relief sought in that matter appears to have been a mixture of *spoliatory* relief and
20 prohibitory interdictory relief. In any event it gave rise to an order, on 19 January 2009, in terms of which a *rule nisi* issued calling upon all interest parties to show cause to this Court on 2 February 2009, why an order should not be made, *inter alia*, interdicting, ordering and restraining the applicant in the case
25 before me, from depriving the respondent in the current case,

of access to and possession of the premises and from demolishing the premises.

The order made in in Case Number 871/2009 directed an
5 exchange of papers in order to render the matter ripe for
hearing on the return date. An application for leave to appeal
was lodged in respect of Mr Justice Fourie's order and that
application was dismissed by him with costs. The learned
judge further made a direction in terms of Rule 49(11)
10 directing that the order made by him on 19 January 2009
remain in effect, notwithstanding any further procedures that
might be taken in the prosecution of appeal processes.

When the matter before me was called, the only papers in the
15 file were the notice of motion and supporting affidavits. I was
informed by Mr *Kantor*, who appeared for the respondent, that
he intended to take certain points *in limine*, which he was able
to argue on the basis of the founding papers. He indicated
that in the event of the Court finding against his points *in*
20 *limine*, he would seek leave, on behalf of the respondent, to
file answering papers.

In those circumstances I directed that the points *in limine* be
argued before me at this stage. Essentially those points were
an absence of urgency apparent on the founding papers and
25 secondly, the impropriety of any relief of the nature sought by

the applicant in this matter being granted at this stage in the face of the existing order of Mr Justice Fourie.

Certainly in respect of the question of the applicant's
5 knowledge of the dispute concerning respondent's occupation of the premises, that knowledge is established on the papers with effect from October 2008 and before the demolition of the premises commenced. Mr *Louw*, for the applicant, contended the existing situation, created by the advanced state of
10 demolition of the property, introduced an independent cause of urgency, particularly with regard to public safety considerations.

In my view it was not open for the applicant to commence the
15 demolition of the property, knowing that it faced a problem in regard to the occupation of part of that property by the respondent, and then rely on the demolition it had decided to begin in those circumstances as a basis for urgency in subsequently instituted eviction proceedings.

20 In regard to the public safety issues, if these are indeed pressing, there is a duty in terms of the National Building Regulations & Building Standards Act on the relevant local authority, which would appear from the papers before me, to be cognisant of the situation, to take its own steps in that
25 regard.

Accordingly I am not satisfied that, in upholding the preliminary point of lack of urgency on the basis that any
5 urgency is self-created, that there are any public interest considerations related to safety which cannot properly be addressed, if necessary, by the appropriate public authority.

But even if I were wrong in considering that the urgency in this
10 matter is self-induced, I am of the view that the existence of the order made by Mr Justice Fourie, and in particular paragraph 1.6 thereof, which I characterise as a prohibitory interdict rather than a *spoliatory* order, constitutes a material obstacle in the way of affording relief to the applicant. The
15 granting of the essential relief sought by the applicant at this stage, would bring about an entirely unwholesome situation of two extant orders from this Court standing in contradiction of one another. That would axiomatically be an unacceptable situation.

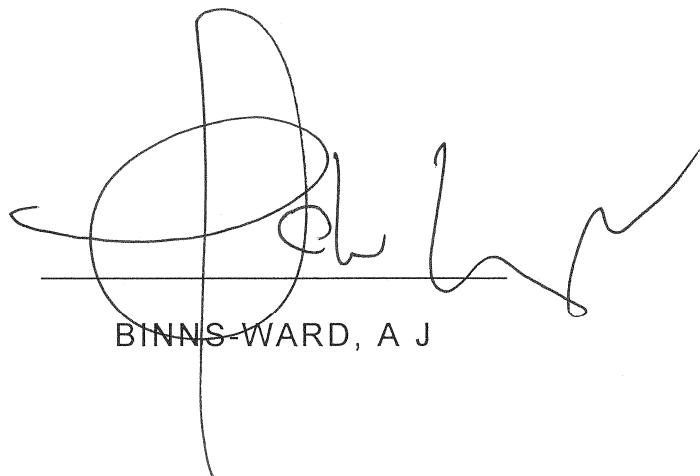
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In the circumstances it is clear to me that the approach adopted by the applicant in this matter was an inappropriate one. If urgent relief is required, it should have been approached on the basis of seeking to have the return day of
25 the interim interdict issued by Mr Justice Fourie, accelerated

and on the basis of obtaining a discharge of that order sooner rather than later. I say that because of the reasons mentioned earlier. A discharge of that order will be necessary before, in my view, the applicant is able to obtain effective relief in this matter.

That leaves only the question of what order to make. It seems to me that the issue of the disputed occupation of the premises by the respondent is a continuing live issue and in those circumstances it seems to me inappropriate to dismiss the application before me today, because, on the facts, it may if and when the interim order made by Mr Justice Fourie is discharged, be further prosecuted.

Accordingly the order that is made today is that the matter is struck from the roll and the applicant is ordered to pay the respondent's costs of opposition.

A handwritten signature in black ink, appearing to be 'A. J. Binns-Ward', written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

BINNS-WARD, A J