IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 4365/2009

In the matter between:

DIAMOND'S DISCOUNT LIQUOR (PTY) LTD **Applicant**

and

FULL SAIL 75 (PTY) LTD **Respondent**

JUDGMENT DELIVERED ON 24 APRIL 2009

ALLIE, J

[1] This court is seized with this matter on the return day of a r*ule nisi* that was granted on 9 March 2009. The *rule nisi* was granted in the following terms:

"1 A rule nisi (to) sic hereby issue, calling upon all interested parties to appear and show cause on 31 March 2009, why an order in the following terms should not be made:

> *1.1 That respondent be ordered and directed not to proceed with any building work on the property known as 34 Huguenot Road, Franschhoek, Erf 157 and 160 Franschhoek, ("The Property") pending the final determination of proceedings to be instituted by the applicant against the respondent for an order directing the respondent to restore the premises previously known as Diamonds Discount Liquor, Huguenot Hotel, 34 Huguenot Road, Franschhoek, and alternative relief, such proceedings to be instituted within ten days from the date of any order confirming this rule.*

[2] Pending the return day of this application, paragraph 1.1 above is to operate as an interim order with immediate effect.

[3] The applicant shall be permitted to deliver a supplementary founding affidavit (if any) by 13 March 2009.

[4] The respondent is to deliver its answering papers (if any) by 20 March 2009.

[5] The applicant is to deliver its replying papers (if any) by 27 March 2009.

[6] The costs of this application will stand over for determination by the court at a future time".

[2] Unfortunately the history of litigation between the parties did not commence with the relief sought on 6 March 2009.

[3] Applicant was a tenant in the liquor store of the Huguenot Hotel owned by the respondent since April 2006. The respondent caused a large part of the hotel's building to be demolished by the end of January 2009. The part of the building in which the applicant traded was not demolished at that stage.

[4] The lease agreement between the parties was an oral agreement entered into with the applicant's full knowledge that the respondent intended to either extend, renovate or demolish the building. Both parties agree that an email from Michael Sternberg, on behalf of the applicant to Mr Maingard, on behalf of the respondent sent on 24 February 2006, reflect the essential terms of the purchase and sale of the liquor store and the lease agreement between the parties. The said email reads as follows:

"This email is for the attention of Robert Maingard

Dear Robert

I refer to our discussion this morning and thank you for your co-operation in facilitating closure on the purchase/sale of the above liquor store.

Permit me to confirm the various issues to which we have agreed:

1) Diamond's Discount Liquor (Pty) Ltd (dd1) will purchase the off consumption liquor licence trading under the name of The Huegenot at 34 Huegenot street, Franschhoek from either you or your company.

2) The purchase price for the equipment, fixtures and fittings and goodwill is R500,000. This figure includes the cold room, ice machine, freezer and fridges. This amount becomes payable on occupation either:

a) of the new premises, once the proposed alteration has been completed

or

b) the existing premises, if 2(a) above should not become applicable, by mutual consent.

3) The effective date of take over of trading by dd1 will be after close of business on Saturday, 1st April, 2006.

4) The stock on hand as at 1 April 2006 will be counted by representatives from dd1 and Attie Louw on Sunday, 2 April 2006 and valued as soon as possible at net cost price. It is hoped that within 7/10 days the valuation will have been finalized and immediately thereafter dd1 will make payment for the stocks.

5) The rental payable by dd1 from 3 April 2006 will be R7 500 per month plus VAT. Please supply your relevant bank details. The lease will continue on a monthly basis until such time as finality has been reached on the proposed alterations.

6) Our attorney, Lawrence Nathan will contact Attie Louw in order to prepare documents for transfer of the liquor licence.

Should I not hear from you to the contrary, I will assume that the above is an accurate outline of our discussions.

This information will also be faxed to you on (021) 876-2210.

Kind Regards,
Michael Sternberg"

[5] On 30 September 2008, the respondent sent a letter to all occupants of the Huguenot Hotel including the applicant advising them that their tenancy will be cancelled and requesting them to vacate the premises on 31 October 2008.

[6] On 14 October 2008, the applicant's attorney wrote to the respondent's attorney disputing the respondent's right to cancel the agreement of lease. In that letter the applicant's attorney sets out the terms of the agreement between the parties as confirmed in the email of 24 February 2006 but the attorney carefully elected not to repeat the following words contained in the email:

"The lease will continue on a monthly basis until such time as finality has been reached on the proposed alterations."

[7] The attorney went further to state that the applicant did not occupy the premises on a month-to-month basis. The attorney's letter provides no explanation on how the applicant's long term right of occupation is reconcilable with the period of the lease spelt out in the email written on behalf of applicant, as a monthly basis.

[8] This aspect of the duration of the lease and the applicant's rights of occupation which must clearly flow from the period of the lease still remain the essential dispute between the parties.

[9] On 19 January 2009 the applicant was granted a spoliation order on an interim basis. On the return day of the spoliation the application, the *rule nisi* was discharged with costs.

[10] On 28 January 2009 the respondent's urgent application for the eviction of the applicant was struck from the roll for lack of urgency.

[11] The applicant effectively used the premises as a storage facility in January 2009 as the Municipality had declared it unsafe.

[12] On 4 March 2009 while the applicant had some stock and equipment stored in the liquor store portion of the Huguenot Hotel, the demolition company employed on behalf of the respondent, demolished that portion of the premises.

[13] In his judgment in the *rule nisi*, in this matter, Koen AJ said that the respondent argued the interim application on the applicant's papers at its own election. Counsel for the respondent now states that prior to the applicant's argument commencing on 6 March 2009, Counsel for the respondent informed the acting judge presiding that the respondent had two points in *limine*, one of which was urgency which included a submission that the respondent required time to respond to the applicant's papers. The acting judge presiding was allegedly not willing to afford the respondent the opportunity to argue its points in *limine*. On behalf of the respondent it is now argued that the *rule nisi* was granted by default, on the applicant's version only. This contention deserves some attention.

[14] This case itself demonstrates the undesirability of hearing the case on the merits in a piecemeal fashion. Had Koen AJ had the benefit of answering and replying papers, he may have come to a different conclusion.

[15] The relief sought by the applicant now is that the *rule nisi* be made final. In effect what the applicant seeks is a final order preventing the respondent from developing its proposed shopping centre pending the determination of proceedings that the applicant must bring within 10 days of the rule being made final for the restoration of the liquor store in the premises previously known as Diamond Discount Liquor, Huguenot Hotel, 34 Huguenot Road, Franschhoek or alternative relief.

[16] The applicant accordingly seeks a final order prohibiting the re-development of the respondent's land until it is placed in occupation of the liquor store previously built in Huguenot Hotel or until it is granted alternative relief. The duration for which the applicant must be placed in occupation of such premises is at this stage uncertain on the applicant's case.

[17] This court was informed that that would be an issue that the court dealing with the further proceedings would have to concern itself with. The duration for which the applicant claims an entitlement to occupation is however relevant to determining the *prima facie* case although open to some doubt.

[18] Applicant admits that it was bound to pay the respondent the purchase price in the future if it had occupation of premises in the new, altered building or the existing premises by mutual consent. The purchase price is R500 000 for equipment, fixtures, fittings, goodwill, a cold room, ice machine, freezer, fridges and an off-consumption liquor licence. The applicant argues that the commercial value of the purchase price has diminished by reason of the demolition of the premises that it previously occupied. The applicant traded from those premises for 34 months.

[19] From the above, it is clear that at the time when the parties concluded the agreement of sale and lease, they both contemplated that the premises in which the liquor store was situate may be altered. They also contemplated a situation where if the premises are not altered, the applicant could occupy the then existing premises by mutual consent.

[20] In **Kerr's Principles of the Law of Contract (6th Ed) at page 159,** the essential terms of a contract are described as those terms without which a contract cannot exist. At page 368 the author goes on to say that for a lease to come into existence only two terms are necessary, those relating to the use and enjoyment of the property and the rent to be paid.

[21] It is common cause that finality had not been reached on the terms of the applicant's continued occupation of the then existing premises. Accordingly the essential terms of a prospective agreement of lease had not been agreed upon.

[22] In these circumstances it is inconceivable that the applicant enjoyed a *prima facie* right to continued occupation, although open to some doubt as concluded by Koen AJ in the judgment in which he granted the *rule nisi*. The applicant's right of occupation to the then existing premises was clearly open to considerable doubt, having concluded an agreement to agree on the unspecified terms of a lease in the future.

[23] There was considerable debate before me about whether the interim relief granted by Koen AJ was as Mr Heunis (SC) for the applicant contends interim, interim relief or as Mr Gauntlett (SC) for the respondent contends, merely interim in nature. Subsequent argument before me concerned whether the relief that I am called upon to grant is interim or final in substance.

[24] In **Joubert LAWSA Vol 11 (2nd Ed) para 401** it is said that if the relief sought is interim in form but final in substance, the applicant must prove the requirements for the grant of a final interdict. [see **Metlika Trading Ltd v Commissioner of SARS 2005 (3) SA 1 (SCA); V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Service (Pty) Ltd 2006 (1) SA 252 (SCA); Masuku v Minister van Justisie 1990 (1) SA 832 (A)].**

[25] In *casu,* the relief sought is clearly interim in form as it is meant to exist only until the final determination of proceedings to be instituted by the applicant against the respondent. With the court rolls in opposed matters extending into an extremely lengthy period, the final determination of the contemplated proceedings will not be forthcoming soon. The effect of the final order will be final in substance in that, the owner of immovable property will be prohibited from re-developing its land for a lengthy period in circumstances where the applicant's claim for specific performance in the form of a restoration of the status *quo ante* is clearly not limited to an order that the respondent re-build only that part of the Huguenot Hotel that housed the liquor store. The parties contemplated an alternative occupation to the existing premises itself at the time when they concluded their agreement. The applicant in its papers, refer to the respondent having an obligation to provide the applicant with alternative premises in the vicinity. On the assumption that the applicant will in due course prove that it is entitled to accommodation in such alternative premises, a court determining the disputes in the contemplated proceedings will not lightly grant specific performance by way of restoration of the previous premises because it will operate unfairly toward the respondent. In **Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A) at 783 C-D** Hefer JA said the following:

"It remains after all, a judicial discretion and from its very nature arises the requirement that it be not exercised capriciously, nor upon a wrong principle ***(Ex Parte Neethling and other 1951 (4) SA 331 (A) at 335)****. It is aimed at preventing an injustice*

for cases do arise where justice demands that a plaintiff be denied his right to specific performance and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case, e.g., if, in the particular circumstances, the order will operate unduly harshly on the defendant."

[26] In **Haynes v King William's Town Municipality 1951 (2) SA 371 (A) at 380B,** De Villiers AJA said that an order of specific performance may be refused where the cost to the defendant in being compelled to perform is out of all proportion to the corresponding benefit to the plaintiff and the latter can equally well be compensated by an award of damages.

[27] In **ISEP Structural Engineering & Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A) at 5E-H Jansen JA** said the following:

"Conceivably such a case could arise where, e.g., a leased building is to be pulled down at or shortly after expiration of the lease and the cost to the lessee of reinstatement would be considerable. The cost of for example re-plastering, painting, etc. would be out of proportion to the benefit to the lessor – owner, which would in the case postulated be nil or, at most, negligible."

[28] Having come to the conclusion that an order for specific performance in the form of restoration of the old leased premises is unlikely, there can be no

basis for the order that the respondent be prohibited from re-developing its property.

[29] Having found that the applicant has not passed the test of proving a *prima facie* right although open to some doubt, it follows that it has also not established that it has a clear right.

[30] The actual injury committed is common cause, in as much as, both sides agree that the premises previously occupied by the applicant have been demolished.

[31] The absence of an alternative remedy must be adequate in the circumstances, ordinary and reasonable and it must be a legal remedy and grant similar protection. [see **Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd 1961 (2) SA 505 (W) at 518D-G Martin v Kiesbeampte Newcastle Afdeling 1958 (2) SA 649 (D) at 654F-G; Francis v Roberts 1973 (1) SA 507 (RA) at 512D-E; Cape Town Municipality v Abdulla 1974 (4) SA 428 at 440H]**

[32] As set out previously, the applicant can claim damages as an alternative to specific performance by way of damages for actual loss incurred subject of course, to the exercise of its duty to mitigate its loss or it can claim that the

respondent be compelled to provide it with alternative accommodation should it prove such an entitlement. Consequently an adequate alternative remedy exists.

It is ordered that:

The *rule nisi* is discharged with cost including the cost of two counsel and including the costs of 6 March 2009.

ALLIE, J