IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: **23322/10**

In the matter between:

CLUB MYKONOS RESORT MANAGERS (PTY) LTD Applicant

And

HOBIE BEACH BAR CC First Respondent

CORDUS GOBRECHTS Second Respondent

APPLICATION FOR LEAVE TO APPEAL & COUNTER APPLICATION FOR LEAVE TO EXECUTE ORDER
JUDGMENT DELIVERED ON 11 NOVEMBER 2010

CLOETE, AJ

[1] There are two applications before me, one by respondents for leave to appeal against the order which I made on 29 October 2010, and the other by applicant for leave to execute such order. For sake of convenience I will deal firstly with the application for leave to appeal and thereafter the application for leave to execute.

[2] It is trite law that in order to succeed in their application for leave to appeal the respondents (i.e. the applicants in the application) have to persuade me that there is a reasonable prospect of success on appeal (see, inter alia, *Pharmaceutical Society of South Africa v Tshabalala*-Msimang 2005 (3) SA 238 (SCA) at 262D).

[3] The respondents rely on eight grounds in their notice of application for leave to appeal. In argument, however, respondents' counsel (correctly in my view) limited his submissions to two "main grounds", namely, the non-joinder of Calypso Villas (Pty) Ltd ("Calypso Villas") and whether Calypso Villas had in fact committed an act of repudiation based on the letter of Mr Hugo dated 26 August 2010.

[4] On the issue of non-joinder, it is clear that this is one which is not real but artificial. Whilst respondents' counsel submitted in answer to a question posed by this court that Mr Hugo on behalf of Calypso Villas might not have had the time "to intervene as a third party due to the application being urgent", he certainly had the time to furnish instructions to respondents' attorneys to vigorously oppose the application on their behalf and to depose to an answering affidavit of some 18 pages (without annexures) in support of such opposition. In any event, a reading of the answering affidavit of Mr Hugo makes it abundantly clear what the defences would have been to any application to which Calypso Villas was formally joined as a party. Such defences are comprehensively dealt with in the answering affidavit, to such an extent that the court came to the irresistible conclusion that Mr Hugo is clearly the "directing mind" of both Calypso Villas and first respondent. Indeed, during the course of argument, respondents' counsel (again, correctly in my view) did not seriously suggest otherwise.

[5] On the issue of repudiation, much has been made by respondents of the interpretation of Mr Hugo's letter of 26 August 2010. However, respondents are still unable to satisfactorily explain the contents of the letter of Geldenhuyse Inc of 1 October 2010, nor are they able to satisfactorily explain the assignment of the lease which is the actual repudiation. This issue has already been dealt with in the reasons furnished by this court on 3 November 2010 (at paras [19] and following) and need not be repeated here.

[6] Having read the notice of application for leave to appeal, having heard the submissions of the respondents and after careful consideration of the application for leave to appeal as a whole, I am satisfied that no new facts or submissions have been placed before me that would raise doubt in my mind whether the order which I made on

29 October 2010 was correct. In my view, there is no merit in the application for leave to appeal, which seems to have been brought as nothing other than an attempt by the respondents to continue to occupy the premises in question until at least the end of the profitable holiday season.

[7] I have thus arrived at the conclusion that there is no reasonable prospect of success on appeal.

[8] Notwithstanding the failure of the respondents' application for leave to appeal, I am still obliged to deal with the application in terms of r 49(11). In *Airy v Cross-Border Road Transport Agency* 2001 (1) SA 737 (TPD) at 743B-C, the court stated as follows:

> *"As to the competence to grant rule 49(11) relief where leave to appeal is refused: the power to grant such relief arises, inter alia, '(w)here … an application for leave to appeal … has been made' in such a case a party may make application for a direction that the operation and execution of the order in question should not be suspended. The rule does not limit the right of a party to make such an application to cases where an application for leave to appeal has been successfully made. Once the application for leave to appeal has been made, the jurisdiction to grant rule 49(11) relief arises. Whether it is appropriate to grant such relief will depend on the facts of each case."*

[9] On their version and at best for the respondents, they would be entitled to remain in occupation of the premises for a period not exceeding three calendar months from the date upon which notice to vacate is furnished.

[10] The first occasion on which the respondents made allegations relating to employees was in the answering affidavit of Mr Hugo filed in opposition to the r 49(11) application on 10 November 2010. The respondents allege that they have two permanent employees and five casual employees. The replying affidavit of Mr Winkler indicates that the so-called permanent employees are the second respondent and Mr Hugo's wife, although no employment contracts in respect of either have ever been presented to this court. As is conceded by the respondents, the other "employees" are

casual. The allegation that the respondents are now suddenly put to hardship as a result must be discounted: it is common cause that they were afforded notice to vacate on 27 September 2010. The respondents further agreed that, in the event that this court was disposed to grant the initial relief sought by the applicants, they could vacate by Friday, 5 November 2010.

[11] The respondents complain that they have made disbursements for reservations and marketing for performing artists for the season. I agree with applicant that they had no business to do so in light of the notice to vacate addressed to them on 27 September 2010. Similarly, they should not have taken any bookings for end of year functions well-knowing that they might not be able to honour them. It is also noted that these allegations were not made in the court a quo in the answering affidavit of Mr Hugo filed in opposition to that application. These actions would accordingly appear to have taken place after Mr Hugo deposed to his previous affidavit. In the circumstances, the respondents must be seen to be the authors of their own misfortune.

[12] Again, for the first time in these proceedings, the respondents allege that Calypso (not them) has made improvements to the premises. These allegations also stand to be entirely discounted, since the Calypso lease specifically provided that any alterations or additions of any nature may only be made with the consent of the landlord, and the cost of the alterations or additions would be for the account of the tenant, who would, on termination of the lease remove at its cost any alterations or additions made to the premises should the landlord so require. (my emphasis) Accordingly, neither the respondents nor Calypso (to the extent that this is relevant) enjoy any claim for improvements made.

[13] The respondents do not seriously dispute the ease with which they can move out of the premises. As pointed out by Mr Winkler in his replying affidavit, the allegations that there is a large deck, and that the premises can accommodate 50 guests, have no bearing upon the ease with which the respondents can vacate.

[14] On the other hand, the applicant, by contrast, is the owner of the property. The harm to the applicant as owner of the property is presumed as its claim is vindicatory: see inter alia *Fey N.O. v Van der Westhuizen & Others* 2005 (2) SA 236 (C) at 250C-D where the court stated as follows:

> *"(Counsel for the respondent) argued, moreover, with reference to another Knox D'Arcy case, namely, Knox D'Arcy Limited and Others v Jameson & Others 1995 (2) SA 579 (W) that the applicant was required to prove, in addition to a prima facie case, a well grounded apprehension of irreparable loss if the interdict was not granted, which he had not. This however does not apply in (quasi) vindicatory claims where the apprehension of irreparable harm is, in fact, presumed until the contrary is shown, and therefore does not have to be proved as suggested."*

[15] The disturbing developments subsequent to the order of this court of 29 October 2010 relating to the conduct of Mr Hugo (as set forth in the founding affidavit of Mr Winkler) and which Mr Hugo sought to explain in his answering affidavit (to my mind, without success), lend credence to the applicant's submission that it will suffer harm if the respondents are allowed by this court to remain in occupation of the premises. The applicant stands to be deprived of the use of its premises over the season. The opportunity to place a new tenant who will improve the premises is every day more jeopardised.

[16] In considering an application in terms of r 49(11) the court exercises a wide discretion. It has regard to:

[16.1.] Whether irreparable harm will be caused to the respondents if the judgment is executed;

[16.2.] The prospects of success on appeal, bearing in mind that where an appeal will be an exercise in futility, reliance on r 49(11) by an appealing party to suspend an order would be an abuse of process;

[16.3.] The balance of convenience, if there is potential for irreparable harm to both the applicant and the respondents.

See *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE) at 245I-J; *Absa Bank Ltd v Olivia Properties* 1999 (4) SA 554 (W) at 555G-H

[17] To my mind, every consideration of convenience and justice dictates that I should come to the relief of the applicant. No potential prejudice to the respondents, other than that with which I have dealt above, has been suggested or comes to mind. However, in order to cater for any potential prejudice which the respondents might suffer as a result of my order, I shall provide therein for the possibility that the respondents may be successful in any application which they may make for leave in the Supreme Court of Appeal for leave to appeal..

[18] In making provision for any potential prejudice, I have had regard to the following:

[18.1.] Whether I should require applicant to provide security. At paragraph 5 of the founding affidavit of Mr Winkler, it is stated that "the applicant is a very substantial entity well able to meet the costs of any such damages". Other than a passing reference to "die inhoud hiervan word ontken" in paragraph 28 of Mr Hugo's answering affidavit, he does not deal at all with the financial wherewithal of the applicant, and I must accordingly accept that this is admitted by the respondents. In the circumstances, I do not believe it necessary to order the applicant to furnish security;

[18.2.] I have taken note of the applicant's undertaking that it will ensure that accurate records are kept of the premises' trade over the season in order to assist in quantifying the respondents' loss if any such need arises, and that such damages as could be suffered by the respondents could therefore be quantified with ease (paragraph 5 of the founding affidavit of Mr Winkler). I have also taken note of the applicant's undertaking that, if this court were inclined to grant the respondents leave to appeal, the applicant will not conclude a long term lease agreement with any third party until the final determination of any such appeal.

[19] In all the circumstances I make the following order:

1. The application for leave to appeal is dismissed with costs.

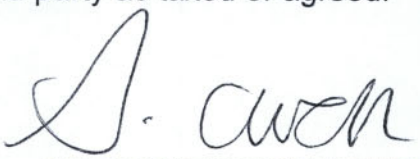
2. The order of this court of 29 October 2010 ("the Order") shall be operative with immediate effect, and notwithstanding any appeal procedures followed by the respondents;

3. The applicant is granted leave to execute the Order;

4. The provisions of 2 and 3 above shall be subject to the following conditions:
   (a) The applicant shall not conclude a long term lease agreement with any third party until the final determination of any subsequent application for leave to appeal to the Supreme Court of Appeal;
   (b) Applicant shall ensure that accurate records are kept of the premises' trade from date of occupation of the new tenant until 28 February 2011 in order to assist in quantifying the respondents' loss if such need arises;

5. Subject to 6, the costs of the application in terms of r 49(11) shall be costs in the respondents' appeal;

6. In the event of the failure of the respondents to follow any further appeal procedures, the costs of the application in terms of r 49(11) shall be borne by the respondents on the scale as between party and party as taxed or agreed.



JI Cloete, AJ