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

CASE NOS: **6214/2010 & 19763/2010**

Before the Honourable Ms Acting Justice Cloete
On Thursday, 09 December 2010

In the matter between

DIANA LIEBENBERG

Applicant

And

GERARD FRATER N.O.	1st Respondent
YVETTE FRATER N.O.	2nd Respondent
JACOBUS PETRUS ROSSOUW N.O.	3rd Respondent
THE GERARD FRATER FAMILY TRUST	4th Respondent
DRAKENSTEIN MUNICIPALITY	5th Respondent

ORDER

Having considered the papers and having heard Counsel, it is ordered as follows:

The rule *nisi* issued on 23 September 2010 is made final and an order is issued in the following terms:

2/.....

1. The First, Second, Third and Fourth Respondents ("the Trust") are interdicted and restrained from causing or permitting any further building or construction work to be undertaken on the remainder of Erf 2681, Paarl ("Erf 2681"), until such time as they have obtained approval of building plans reflecting the construction in fact undertaken or intended to be undertaken on Erf 2681, alternatively, provisional authorisation under s 7(6) of the National Building Regulations and Building Standards Act, 103 of 1977 ("the Act") in respect thereof.

2. The Trust is interdicted and restrained from causing or permitting the operation of the Primi Piatti restaurant or any other restaurant which is not part of a country shop on the remainder of Erf 2681 until such time as all of the following have been granted:

2.1. final approval of the amendment of conditions of re-zoning applicable to the remainder of Erf 2681 permitting the operation of such a restaurant;

2.2. approval of building plans reflecting the construction in fact undertaken or intended to be undertaken on the remainder of Erf 2681, alternatively, provisional authorisation under s 7(6) of the Act in respect thereof;

2.3. an occupancy certificate, alternatively, written permission to use the building under s 14(1A) of the Act ; and

2.4. appropriate trading licences.

3/.....

3. The Trust shall pay the costs of applicant and fifth respondent, which costs shall include the costs of two counsel, where applicable, and the applicant's costs in respect of the postponement on 13 April 2010, save that the Trust shall not be obliged to pay any wasted costs incurred by applicant and fifth respondent as a result of the matter having to stand down on 14 September 2010, in respect of which fifth respondent shall bear applicant's costs and fifth respondent and the Trust shall each bear their own costs.

ORDER OF COURT

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COURT REGISTRAR

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REASONS HANDED DOWN ON 9 DECEMBER 2010

JI CLOETE, AJ

[1] This is the return day of a *rule nisi* issued by Moosa J on 23 September 2010. For sake of convenience, I shall refer to the initial applicant as "Liebenberg", the first to fourth respondents as "the Trust" and to fifth respondent in the application under case no: 6214/2010 as "the Municipality".

[2] Save as set out below, I am in agreement with the findings of fact and conclusions of law of Moosa J in the reasons handed down by him on 23 September

2010. I accordingly do not consider it necessary to repeat them here, save to highlight the following, namely that:

[2.1.] the learned judge granted the *rule nisi* in part in that he did not interdict the operation of the restaurant on the Trust's property since he was of the opinion that *'certain innocent employees of the restaurant would be adversely affected"*. He thus directed at paragraph 5 of his order that a copy of the *rule nisi* be served on the owner of the restaurant business, Windfall 32 Restaurant (Pty) Ltd, on the representative of the employees and/or trade union and that a copy of the *rule nisi* be displayed prominently on a notice board of the restaurant and/or staff room. Service in accordance with paragraph 5 of the Order was effected on 27 September 2010;

[2.2.] the learned judge was of the view that Liebenberg's fears that an additional restaurant on the Trust's property would attract such noise that her guests would cease to patronize her guesthouse, were premature. He stated that *'Once permission is granted to the Trust to erect an additional restaurant … should the noise level in future exceed the permissible level, the remedy of the applicant would be to complain to the municipality of the impermissible noise level or seek an interdict if she can show that the breach has caused her harm or is likely to do so'.*

[3] To my mind, Liebenberg's supplementary replying affidavit deposed to on 15 September 2010 makes it clear that such fears were not premature. I must assume for present purposes that this affidavit was indeed before the court when the interim interdict relief sought by the municipality was argued. It would appear that Moosa J's concern about the fate of the restaurant's employees overrode the consideration of the issue of noise nuisance (which was in any event not the main reason for Liebenberg's application), but that the learned judge was indeed mindful of Liebenberg's position when making the order in the form which he did, particularly at paragraphs 3.2 and 3.3.1.

THE POSITION OF THE EMPLOYEES

[4] It is common cause that, notwithstanding service of the Order in accordance with paragraph 5 thereof, the employees did not make any formal application to intervene in the proceedings prior to the return date.

[5] Mr Schreuder appeared on behalf of the employees on the return date. He informed the court that he had only been appointed by the employees a few days earlier and that he had not had an opportunity to take any formal procedural steps on their behalf. He did not however seek a postponement of the return day in order to take such procedural steps. Instead, he requested an opportunity to place *'certain information'* before the court.

[6] However, as correctly pointed out by both counsel for the Municipality and Liebenberg, it would be wholly irregular for Mr Schreuder to be afforded the opportunity to effectively adduce evidence from the Bar, and accordingly, this request was refused by me. I did however feel it important, in light of the Order and Reasons of Moosa J, to afford Mr Schreuder an opportunity to place argument before the court as to why the final relief sought by the Municipality and Liebenberg should not be granted.

[7] The high water mark of Mr Schreuder's argument was to the effect that the grant of a final order would be unfair to the employees, many of whom are breadwinners and who have dependants. However he was not able to refer the court to any of the provisions of the Constitution of the Republic of South Africa, Act No 108 of 1996 ('the Constitution") in support of the contention that in the present circumstances, this consideration should override the final relief sought by the Municipality and Liebenberg, nor indeed could he refer the court to any other authorities.

[8] Mr Schreuder conceded that it is in fact the unlawful conduct of the Trust which has placed the employees in the invidious position in which they find themselves and that such remedies as they may have lie, not against the Municipality and Liebenberg ,

but against the Trust and/or the lessee of the restaurant premises, Windfall 32 Restaurant (Pty) Ltd.

[9] Mr Kruger on behalf of the Trust relied on certain principles set out in *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs & Others,* case no 26841/09, an as yet unreported judgment in this division of Binns-Ward J in support of his contention that the rights of the affected employees should play a material role in this court exercising its discretion in favour of suspending the operation of a final interdict against the Trust permitting the unlawful operation of the restaurant on its premises.

[10] Mr Duminy SC on behalf of the Municipality and Mr Coetzee on behalf of Liebenberg argued that *410 Voortrekker Road Property Holdings CC* supra is distinguishable from the facts of the present matter, and that this Court should rather follow the principles set out by Fourie J in *Bitou Local Municipality v Timber Two Processors CC & Another* 2009 (5) SA 618 (C) at 625G-626A, in which the facts, Mr Duminy submitted, were similar in character to those in the instant matter.

[11] I agree with the submissions of Mr Duminy and Mr Coetzee. Mr Kruger conceded (correctly) that the Trust entered into a lease with Windfall 32 Restaurant (Pty) Ltd at a time when it knew that it was unlawful for it to do so, i.e. as recently as August 2010 and that the Trust knowingly acted unlawfully in arriving at the situation in which it now finds itself. In addition, *410 Voortrekker Road Property Holdings CC* supra dealt with an entirely different class of rights, namely those of asylum seekers who were facing arrest and deportation from South Africa. Binns-Ward J in the exercise of his discretion clearly had to have regard to constitutional principles and international conventions on human rights. In the instant matter, Mr Kruger conceded (correctly) that the only constitutional correlation is the rights of the employees, and that the Trust cannot rely on any constitutional imperative.

[12] Accordingly, and whilst the court has the utmost sympathy for the affected employees, the blame for the position in which they find themselves must be laid squarely at the doors of the Trust and/or their employer, Windfall 32 Restaurant (Pty) Ltd, the representative of which, so it happens, is the sister of Mr Frater, a co-Trustee of the Trust, and the employees should pursue whatever remedies they have against them. The employees' position cannot in these circumstances have an influence on this court considering whether the final relief sought by the Municipality and Liebenberg should be granted.

THE RELIEF SOUGHT BY THE MUNICIPALITY

[13] On 19 November 2010 the Municipality filed a supplementary affidavit in which its deponent, Mr September, informed this court as follows:

[13.1.] Since the Order of 23 September 2010 the Municipality has given attention to the building plans of the Trust, but the process of approval or rejection of the plans has not yet been finalised;

[13.2.] The Municipality has not yet granted provisional approval to the Trust to proceed with the building works on the property as is envisaged in s 7(6) of the National Building Regulations & Building Standards Act, 103 of 1977 ("the National Building Act");

[13.3.] The Municipality has also not granted permission to the Trust to use the building before the issue of the certificate of occupancy, as provided for in s 14(1A) of the National Building Act;

[13.4.] Liebenberg has lodged an appeal against the Municipality's decision of 1 September 2010 to approve the Trust's application to amend the rezoning conditions to allow, *inter alia,* for the restaurant to be operated on the premises;

[13.5.] Notwithstanding the fact that the Municipality anticipates that it will shortly be in a position to grant possible approval in accordance with the provisions of s 7(6) and/or s 14(1A) of the National Building Act, the fact is that, pending the appeal by Liebenberg, the Municipality is not permitted to grant any sort of approval (i.e. whether conditional or otherwise) to the Trust to use the property in light of the provisions of the Land Use Planning Ordinance 15 of 1985 ("LUPO");

[13.6.] Accordingly, the Trust's current use and occupation of the property is unlawful.

[14] It is in these circumstances that the Municipality seeks a final order against the Trust in the terms set forth in the *rule nisi* issued on 23 September 2010, but with the following amendment, namely, that the Trust also be interdicted and restrained from causing or permitting the operation of the Primi Piatti restaurant or any other restaurant which is not part of a country shop on the remainder of Erf 2681 until final approval has been granted for the amendment of conditions of rezoning applicable to the remainder of Erf 2681 permitting the operation of such a restaurant.

[15] In support of the amended relief sought by it, the Municipality submits the following:

[15.1.] Section 39(1) of LUPO requires a municipality to comply and enforce compliance with the provisions of LUPO and the provisions incorporated in a zoning scheme in terms of LUPO, and the municipality *'shall not do anything, the effect of which is in conflict with the intention of this subsection'*.

[15.2.] Section 39(2) of LUPO provides that no person shall contravene or fail to comply with the provisions incorporated in a zoning scheme, or conditions imposed in terms of LUPO *'except in accordance with the intention of a plan for a building as approved and to the extent that such plan has been implemented …'* (my emphasis);

[15.3.] Section 20 of the regulations made in terms of s 47(1) of LUPO (PN1050/1988 dated 5 December 1988) provides that where a municipality *'... grants an application in respect of which objections have been received, it shall point out to the applicant not to act on the said approval until such time as it is confirmed in writing that no appeal has been received; provided that where an appeal is received, the said approval shall be suspended'* (my emphasis);

[15.4.] An appeal was delivered and is now to be heard by the Western Cape MEC for Environmental Affairs & Development Planning. (It is common cause between the parties that the appeal process can take four to six months, and possibly as long as two years);

[15.5.] Whilst it is true that progress has been made with regard to the regularizing of the building plans and possible occupation and use of the buildings on the erf pursuant to s 7(6) and s 14(1A) of the National Building Act, provisional approval to occupy the buildings does not override the provisions dealing with the permitted use of the erf under LUPO. Use as a restaurant remains unlawful until the amendment of the conditions is finally approved;

[15.6.] The current rezoning conditions remain applicable unless and until they are amended. They allow for operation of businesses on a surface area of 648m² and on which the *'business uses ...* [are] *restricted to a country shop, nursery and a wine tasting and – sales, as indicated on the site development plan (plan 3 dated July 2004)'*. The restaurant is currently only allowed if forming part of the *'country shop'*;

[15.7.] As admitted by the Trust, *'[t]he only part of the building that is being occupied is the newly added part occupied by the restaurant'*;

[15.8.] This is not part of the *'country shop'*. The current use of the newly added part can only be rendered lawful if the appeal against the granting of the amendment to the rezoning fails;

[15.9.] Given the provisions of LUPO, the Municipality has a public duty not to allow the buildings on the property to be used in contravention of the current applicable rezoning conditions, and accordingly it seeks an order giving effect thereto.

[16] In response, counsel on behalf of the Trust argued that nothing precludes the Municipality from considering the granting of provisional authorisation of the building as it stands in *'its virtually completed state'* in terms of s 7(6) of the National Building Act and, likewise, from granting permission in terms of s 14(1A) of the National Building Act to use the building for the purposes allowed in terms of the approved amendment to the zoning conditions. In support of its contention the Trust argued that the provisions of the National Building Act override the provisions of LUPO where there is *'a conflict'* in light of the provisions of s 148 of the Constitution, which read as follows:

> *'148. If a dispute concerning a conflict cannot be resolved by a Court, the national legislation prevails over the provincial legislation or provincial constitution.'*

[17] The Trust also contended that the Municipality is furthermore entitled to grant permission to the Trust to temporarily utilise its premises for purposes not otherwise allowed in terms of the current zoning of the property. In support of this submission the Trust relies on s 15(1)(a)(ii) of LUPO which provides that:

> *'15(1)(a) An owner of land may apply in writing to the town clerk or secretary concerned, as the case may be –*
> *(ii) To utilize land on a temporary basis for a purpose for which no provision has been made in the said regulations in respect of a particular zone.'*

[18] In my view, the first submission on behalf of the Trust has no merit. Firstly, counsel for the Trust conceded during argument that s7(1) of the National Building Act applies also to LUPO, and that the Municipality can only grant approval in terms thereof

once Liebenberg's appeal is dismissed. Secondly, if *'nothing'* precludes the Municipality from considering the granting of permission or authorisation in terms of s 14(1A) of the National Building Act, then this would defeat the very purpose of s 20 of the regulations made in terms of s 47(1) of LUPO. Section 14(1A) refers to such permission or authorisation being granted *'on such conditions'* as the local authority may deem fit. It could never have been the intention of the legislature that the Municipality could, of its own accord, dispense with the peremptory provisions of the regulations which govern the operation of LUPO itself, particular if regard is had to the following sections of LUPO:

[18.1.] Section 9(1), which provides that *'control over zoning shall be the object of scheme regulations ...'*;

[18.2.] Section 11, which provides that *'the general purpose of a zoning scheme shall be to determine use rights and to provide for control over use rights and over the utilisation of land in the area of jurisdiction of a local authority'* (my emphasis); and

[18.3.] Section 47(1), which provides that the administrator may make regulations relating to matters *'which shall or may be prescribed by regulation in terms of this Ordinance and, generally, relating to all matters which he deems necessary or expedient to prescribe in order to achieve the purposes of this Ordinance'* (my emphasis).

[19] Counsel for the Trust also referred me to s 150 of the Constitution which provides that:

> *'150. When considering an apparent conflict between national and provincial legislation ... every court must prefer any reasonable interpretation ... that avoids a conflict, over any alternative interpretation that results in a conflict.'*

[20] To my mind, the interpretation which I have placed on the relevant legislation achieves the objective set out in s 150 of the Constitution, and, on this interpretation, no conflict results as envisaged in s 148 thereof.

[21] As to the second submission on behalf of the Trust, namely that s 15(1)(a)(ii) of LUPO entitles the Municipality to grant permission to the Trust to temporarily utilise its premises for purposes not otherwise allowed in terms of the current zoning of the property, to my mind, the same considerations must apply and the Municipality is clearly bound to adhere to the provisions of s 20 of the regulations. In any event, s15 of LUPO sets out the procedure to be followed by an owner of land who wishes to utilise the land on a temporary basis for a purpose for which no provision has been made in the regulations in respect of a particular zone. Section 15(2) provides that (a) the application must be advertised if in the opinion of the town clerk or secretary any person may be adversely affected thereby; (b) where objections against the application are received, they must be submitted to the owner for his comment; and (c) the town clerk or secretary must obtain the relevant comment of any person who in his opinion has an interest in the application. There is nothing on the papers before me to indicate that the Trust has made any application in terms of s 15 of LUPO, other than in a letter written by the Trust's attorneys to the Department of Environmental Affairs & Development Planning on 24 November 2010, in which reference is made to the Trust's *'original application in terms of Regulation 15 …'*. The Trust's application was clearly made in terms of s 42(3)(a) thereof. Indeed, in the affidavit of Mr Frater deposed to on 26 November 2010, he states that:

> *'Dit is die Trust se bedoeling om, sodra aan die aspekte van die Munisipaliteit se skrywes van 07 Oktober 2010 en 15 November 2010 voldoen is, aansoek te doen vir toestemming in terme van Artikel 7(6) & 14(1A) van die Wet op Nasionale Bouregulasies en Boustandaarde Wet 103/1977 asook 15(a)(ii) van "LUPO".*

Dit sal tog sinneloos wees om aansoek te doen vir sekere toestemmings welwetende dat daar steeds aspekte is wat nog nie tot die bevrediging van die Munisipaliteit aan voldoen is nie.'

[22] Furthermore, counsel for the Trust confirmed during the course of his argument that no such application has been made.

THE RELIEF SOUGHT BY LIEBENBERG

[23] Liebenberg also seeks an order that the *rule nisi,* subject to the amendment sought by the Municipality, be made final.

[24] The Trust similarly opposes the relief sought by Liebenberg, and argues that, for the following reasons, the *rule nisi* should not be made final on account of the Liebenberg application, alternatively and in any event that Liebenberg should be ordered to pay the costs in respect of her application:

[24.1.] The relief sought by Liebenberg for the demolition of the illegal building works *'failed'*;

[24.2.] In light of the Municipality's intervention, the Liebenberg application was not essential for the grant of the *rule nisi*;

[24.3.] Liebenberg approached this court with *'dirty hands'* in that she herself was in defiance of building regulations;

[24.4.] Liebenberg's application lacked the urgency with which she initially approached the court;

[24.5.] Liebenberg lacked *locus standi* in that she failed to prove that she possessed the right, in her own right, to stop building operations on account of a contravention by the Trust of the National Building Act;

[24.6.] Even on common law grounds Liebenberg failed to establish a case for the final interdict she claimed;

[24.7.] The factual basis on which Liebenberg based her application was found to be wanting by the court issuing the *rule nisi*;

[24.8.] Liebenberg had several other remedies at her disposal;

[24.9.] Liebenberg is advertising her guest house property for sale. From the description of the property in the advertisement the following appears:

[24.9.1.] The noise that Liebenberg submitted as the motivation for her application could either not be heard by her guests or could easily have been curtailed by the application of double-glazing to the windows. These facts were omitted from her founding affidavit;

[24.9.2.] It is suggested by the advertisement that the premises being advertised for sale could be used as a coffee shop and a retail shop. This raises the possibility that Liebenberg's application to this court could at least partially have been motivated by an ulterior purpose, i.e. stifling trade competition by the retail businesses and restaurant on the Trust's adjacent property.

[25] However, as pointed out by Liebenberg's counsel, the first eight submissions made on behalf of the Trust were considered and taken into account by Moosa J in arriving at the findings of fact and conclusions of law which he did when furnishing his reasons for the order of 23 September 2010. Save for the ninth submission on behalf of the Trust (relating to the advertising by Liebenberg of her guesthouse property for sale),

all of the Trust's arguments have already been dealt with in the previous proceedings and despite his reservations concerning the *'noise nuisance'* aspect in Liebenberg's application, the learned judge nonetheless granted the *rule nisi* in the terms which he did. Further, it is not submitted on behalf of the Trust that Moosa J was incorrect in making the Order which he did. Accordingly, I cannot see on what basis these arguments again have to be considered by me, particularly in light of the views already expressed by me with regard to the reasons handed down by the learned judge.

[26] As to the submissions made on behalf of the Trust relating to Liebenberg advertising her guest house property for sale, I do not understand how they are at all relevant to the determination of whether a final interdict should be granted. Firstly, if the guest rooms have double glazing and are *'completely soundproofed'* it can just as easily be concluded that Liebenberg is taking all steps which she reasonably can to (a) run her guesthouse business with minimal disruption to her guests and (b) place the guest house property in a more marketable condition. The suggestion in her advertisement that *'the office area and reception are separate and could also be used as a small retail shop'* (my emphasis) can hardly, in my view, be stretched so far as to be seen as an attempt by Liebenberg to stifle *'trade competition by the retail businesses and restaurant on the Trust's adjacent property'* as was submitted by counsel for the Trust in his heads of argument.

THE GRANTING OF A FINAL ORDER OR AN EXTENSION OF THE RETURN DATE

[27] The three requirements for the grant of a final interdict, all of which must be present are:

[27.1.] A clear right on the part of the applicant(s);

[27.2.] An injury actually committed or reasonably apprehended;

[27.3.] The absence of any other satisfactory remedy available to the applicant(s).

See *inter alia Setlogelo v Setlogelo* 1914 AD 221 at 227.

[28] Both the Municipality and Liebenberg have established a clear right. As matters stand at present, the operation of a restaurant and the resumption of any building work is illegal. There is no final approval for the amendment of the existing zoning, nor of the building plans. Although the Municipality has now granted its approval for the amendment of the zoning conditions, an appeal process is underway and accordingly such approval is suspended pending the outcome of the appeal.

[29] Both the Municipality and Liebenberg have established that an injury has actually been committed as a result of the unlawful conduct of the Trust. It is not necessary for either to show that the injury committed entails physical harm or pecuniary loss. In *V&A Waterfront Property (Pty) Ltd & Another v Helicopter & Marine Services (Pty) Ltd & Others* 2006 (1) SA 252 (SCA) at 257E-H, the court stated as follows:

> *'The respondents contended nevertheless that breach did not constitute "injury" for purposes of the second essential requirement for final interdict relief which was expressed in the classic formulation as "injury actually committed or reasonably apprehended". The argument was that "injury" in that phrase had necessarily to entail physical harm or pecuniary loss. The appellants had consequently to show, so the contention proceeded, that the helicopter was unairworthy and that its operation involved risk to life and property.*
>
> *The argument is founded on neither authority nor principle. The leading common-law writer on the subject of interdict relief used the words "eene gepleegde feitelijkheid" to designate what is now in the present context, loosely referred to as "injury". The Dutch expression has been construed as something actually done which is prejudicial to or interferes with, the applicant's right. Subsequent judicial pronouncements have variously used "infringement" of right and "invasion of right" ... of course it is hard to imagine that a rights invasion will not be*

effected most often by way of physical conduct but to prove the necessary injury or harm it is enough to show that a right has been invaded.'

[30] Is there any other satisfactory remedy available to the Municipality and Liebenberg? An applicant for a permanent interdict must allege and establish, on a balance of probabilities, that he has no alternative legal remedy. In *Francis v Roberts* 1973 (1) RAD 507 at 512D-E the court summarised this principle as follows:

'As I understand the law, however, where the words "any other ordinary remedy" are used in this context, they do not mean the factual remedy of the plaintiff abating the injury himself by resorting to some physical action. They mean a remedy which is available through the normal processes of the law, such as a claim for damages."

[31] It is clear that the Municipality has no other satisfactory remedy. The Trust submitted that the Municipality will suffer no prejudice at all from the suspension of the order. This however is not the point. As stated by Moosa J when handing down the reasons for the order made on 23 September 2010 *'the overwhelming and undisputed evidence is that the Trust with impunity and scant ... regard for the law carried on its unlawful building operations ... the* (Municipality) *asked the Trust to desist from such conduct. Despite giving undertakings to* (the Municipality) *that it will cease building operations, it reneged on such undertakings and continued the building operations'.* It seems to me that there is a real risk that if the order is suspended the Trust may well resume its unlawful building operations and the clear indication on the papers is that the Trust will continue to permit the premises to be used as a restaurant until such time as this court takes the necessary steps to prevent it from doing so. Furthermore, conduct which is tantamount to criminal conduct cannot be condoned by our courts, and there is no question that the Municipality, which has a public duty not to allow buildings on a property to be used in contravention of the current applicable rezoning conditions, has any satisfactory remedy available to it other than the grant of a final order by this court.

[32] As to Liebenberg, the Trust submitted that she now appears to object to the business development only on the basis of noise nuisance. It was submitted that her complaints in this regard may be addressed *'by other far less drastic means than ousting the Trust, the restaurant and the numerous employees of the restaurant (of whom the great majority are breadwinners) from earning a living'*. This submission does not however address whether Liebenberg has any other satisfactory remedy available to her. To my mind, she may have other remedies available to her, but none are satisfactory on the facts before me. Whether, in the event that Liebenberg's appeal against the approval by the Municipality of the amendment to the rezoning of the property is refused and the noise level in future exceeds the permissible level, Liebenberg would be at liberty to pursue other remedies, is not the issue. The fact of the matter is that the restaurant is being conducted (with the attendant alleged impermissible noise levels) unlawfully. What may or may not happen in the future, should the restaurant operate lawfully, is in my view not a factor which has any material bearing on whether Liebenberg currently has any other satisfactory remedy.

CONCLUSION

[33] In the result, the *rule nisi* issued on 23 September 2010 is hereby made final subject to the amendment sought by the Municipality and Liebenberg. I accordingly make the attached Order.

J I CLOETE, AJ