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

Case No 6214/2010
& 19763/2010

In the matter between:

GERARD FRATER N.O.	First Applicant
YVETTE FRATER N.O.	Second Applicant
JACOBUS PETRUS ROSSOUW N.O.	Third Applicant
THE GERARD FRATER FAMILY TRUST	Fourth Applicant

and

DRAKENSTEIN MUNICIPALITY	First Respondent
DIANA LIEBENBERG	Second Respondent

Court:	Cloete, AJ
Heard:	08 February 2011
	Judgement on application for Leave to Appeal
Delivered:	17 February 2011

JUDGMENT

CLOETE AJ:

INTRODUCTION

[1] This is an application for leave to appeal by the first to fourth respondents in the court *a quo* ("The Trust") against paragraphs 2 and 3 of

the order which I made on 9 December 2010. For sake of convenience I will refer to the parties as they were cited in the reasons for the order handed down by me.

[2] The Trust has limited its grounds of appeal to the following:

2.1 Paragraph 2 of the order is unenforceable against the Trust and as a result the court had no jurisdiction to grant it;

2.2 The costs order made against the trust was accordingly inappropriate.

[3] A further ground of appeal in terms of a notice of amendment delivered on 3 February 2011 was abandoned during the course of argument when counsel for the Trust became aware that the Trust had misconstrued that portion of the reasons for the order upon which this ground of appeal was based.

[4] The Trust conceded that the defence of non-joinder of the lessee of the premises has not been raised as a ground of appeal.

WHETHER PARAGRAPH 2 OF THE ORDER IS UNENFORCEABLE AGAINST THE TRUST

[5] The Trust relies on certain authorities in support of its submission that the order is unenforceable against it. In order to place these authorities in their proper context, each will be considered in turn.

[6] In *Administrator, Cape and another v Ntshwaqela and Others* 1990 (1) SA 705 (AD), the court *a quo* in this division had granted a *mandament van spolie* against the owners of certain immovable property as also the Cape Provincial Administration (the "CPA") and the South African Police (the "SAP"), to the effect that they were "*directed to restore* (the respondent

squatters) *to undisturbed possession of the ... sites*" from which they had been removed.

[7] One of the grounds of appeal advanced by the CPA and the SAP against the order was that since neither of them had *dominium* or a right of control over the sites from which the squatters had been removed, they had no means, legal or otherwise, of giving effect to the order.

[8] The Appellate Division found that the order had been correctly granted. It was solely prohibitory in content and neither the owners nor the CPA and SAP had been required to do anything. There was thus no room for an argument that the order had been impossible of performance or, put differently, that it was unenforceable. I will deal with this authority again hereunder.

[9] In *South Atlantic Islands Development Corporation Limited v Buchan* 1971 (1) SA 234 (CPD) the court refused an application for an order interdicting and restraining the owner and master of a foreign fishing vessel, at the time docked in Cape Town, from fishing within the territorial waters of a certain island in the Atlantic Ocean in breach of fishing rights granted to the applicant under a concession. The court found that it could not, whether directly or indirectly, control the catching of fish in foreign waters and the fact that the vessel was temporarily in Cape Town did not confer jurisdiction on the court to make such an order.

[10] The facts in *South Atlantic Islands Development Corporation Limited supra* are entirely distinguishable from those in the instant matter. There the court was dealing with the granting of an order sought to be enforced in foreign waters. In the present matter it is common cause that this court indeed has jurisdiction over the Trust.

[11] In *Metlika Trading Limited and Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) the court *a quo* had granted an interim

order compelling the appellants (the owners and operations managers of an aircraft) to take all steps necessary to secure its return to South Africa pending the finalisation of an action to be instituted by the respondent against them and others. The issue which arose was whether, if the court was unable to enforce compliance with its order (the aircraft being outside of its jurisdiction), it nonetheless had the jurisdiction to grant the order. The court found that it was clearly within the power of the appellant owners and operations managers to procure the return of the aircraft to South Africa; and that the order could be enforced by way of contempt proceedings against the second appellant's directors. At page 19 I – J the court put it thus: "*The order could be enforced by contempt of Court proceedings against the directors of* ... (second appellant) ... *The availability of that remedy, in the event of a failure by* ... (second appellant)... *to comply with the order, rendered the order sufficiently effective to confer jurisdiction on the court a quo to grant the order.*" I will deal with this authority again hereunder.

[12] In *N and Others v Government of Republic of South Africa and Others* (No 3) 2006 (6) SA 575 (D) the court dealt, *inter alia*, with the remedy available to an aggrieved party when a state organ was in contempt of a court order. It was in that context that the court found that although the relevant state organ was in contempt of the order, section 3 of the State Liability Act 20 of 1957 effectively deprived the aggrieved party of a remedy: "...*unless and until section 3.... is declared unconstitutional, there is no legal mechanism such as incarceration to enforce the court decrees*... (against state organs)" [at 584 F]. It was in this context that the court referred to a contempt order as being "*a useless thunderbolt*" [at 584 F].

[13] To my mind, *N and Others v Government of Republic of South Africa and Others supra* has no relevance at all to the present matter. The Trust is not a state organ and is not afforded the protection of the State Liability Act 20 of 1957.

WHETHER THE ORDER MADE IS MANDATORY OR PROHIBITORY

[14] The next issue to be considered, in light of *Administrator, Cape and Another v Ntshwaqela and Others supra* is whether the order which I made is mandatory or prohibitory insofar as the Trust is concerned. In order to do so it is necessary to briefly refer to the relevant historical common cause facts in the instant matter.

[15] Liebenberg launched her application on 25 March 2010 to interdict the Trust from performing any building or construction work on erf 2681 Paarl until such time as the requisite permission was obtained. In her founding affidavit she complained of the unacceptable noise levels being generated by a restaurant conducted on the Trust's property. In his opposing affidavit deposed to on 11 April 2010 Mr Frater, on behalf of the Trust, denied that the Trust was conducting the restaurant business known as "Megu" and averred that the owner of the restaurant leased the premises from the Trust. Liebenberg also stated in her founding affidavit that on 11 March 2010 there was an advertisement in the local newspaper for employees for a new restaurant to be conducted on the Trust property. In his answering affidavit Mr Frater admitted this and referred to the new restaurant as "an intended restaurant". He also admitted that the extension to the existing zoning and building plans had not yet been approved. It is common cause that no approval to the zoning and the building plans had been granted right up until this matter was argued on 8 December 2010.

[16] The Trust thus knew that it would be unlawful for it to take any steps to cause or permit the operation of a restaurant until such time as the relevant approval had been obtained. It is clear however that despite this knowledge, and in the face of pending litigation in respect of its unlawful building operations, the Trust blythely proceeded to enter into a lease with a company, Windfall 32 Restaurant (Pty) Ltd ("Windfall") in August 2010 for the purpose of enabling the latter to commence its restaurant business on the premises. As

set out in the reasons for my order, the representative of Windfall is not only a co-trustee of the Trust but is also the sister of Mr Frater.

[17] The municipality launched its application against the Trust on 6 September 2010 and sought, *inter alia*, relief in the terms set out at paragraph 2 of my order. The Trust's response is that it cannot "undo" its unlawful conduct due to the fact that there is now a valid lease in existence, and that therefore, the order which I made is unenforceable.

[18] Joubert: *The Law of South Africa ("LAWSA")* volume 11 at paragraph 303 defines a prohibitory interdict as one which enjoins a respondent to refrain from doing something, whereas a mandatory interdict is one which orders a respondent to do something.

[19] In the instant matter the municipality clearly sought an order enjoining the Trust to refrain from doing something (a prohibitory interdict), namely to refrain from causing or permitting the unlawful operation of a restaurant on its premises; and not to undo something (which, put differently, would be a mandatory interdict, being one which ordered the respondent to do something). The Trust argues that it is neither causing nor permitting the operation of the restaurant and that (although it acknowledges its unlawful conduct in so doing) it permitted the operation of the restaurant when it gave occupation of the premises to Windfall and concluded the lease in August 2010. It thus argues that the operation of the restaurant is accordingly being conducted in terms of an existing lease and that the Trust can do nothing to stop its operation, save by acting unlawfully.

VALIDITY OF THE LEASE

[20] The question which then arises is whether the lease itself could ever have been validly concluded between the Trust and Windfall, since, as argued by the municipality, the Trust had no lawful rights, and could thus not have passed any lawful rights to the lessee.

[21] In Wille's Principles of South African Law (9th ed) at page 761, the learned author states the following: "*The legislature may expressly prohibit a particular type of contract, or it may do so by clear implication, as for example when the statute imposes a penalty upon a person for doing the act contemplated by the contract but does not expressly prohibit the act.*"

[22] Section 14 (4) (a) of the National Building Regulations and Building Standards Act 103 of 1977 provides that:

"*The owner of any building, or any person having an interest therein, erected or being erected with the approval of a local authority, who occupies or uses such building or permits the occupation or use of such building-*

(i) unless a certificate of occupancy has been issued in terms of subsection (1)(a) in respect of such building;

(ii) except in so far as it is essential for the erection of such building;

(iii) during any period not being the period in respect of which such local authority has granted permission in writing for the occupation or use of such building or in contravention of any condition on which such permission has been granted; or,

(iv) otherwise than in such circumstances and on such conditions as may be prescribed by national building regulation,

shall be guilty of an offence."

[23] Section 39(2) of the Land Use Planning Ordinance 15 of 1985 ("LUPO") provides that no person shall contravene or fail to comply with the provisions incorporated within a zoning scheme, and section 46 (1) of LUPO stipulates that any person who contravenes section 39(2) shall be guilty of an offence and on conviction liable to a fine not exceeding R10 000 or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.

[24] In *De Faria v Sheriff, High Court, Witbank* 2005 (3) SA 372 (T), where there had been a sale in execution in contravention of section 30 of the Administration of Estates Act 66 of 1965, the court, after reviewing the leading

cases, stated the following (at 379 E – F): *"...it is virtually impossible to escape the conclusion that the Legislature intended the general rule to apply, i.e. that non-compliance with the prescriptions thereof results in a nullity. Firstly, the prohibition contained in section 30 is clearly couched in peremptory language ("no person ... shall"). Secondly, it is also couched in negative language. Thirdly, a criminal sanction is imposed in the event of the provisions thereof not being complied with. Fourthly, it is self-evident that recognition of a sale in contravention thereof by the Court will bring about, or give legal sanction to, the very situation which the Legislature sought to prevent."* The court thus dismissed an application to compel payments to be made in terms of the sale agreement arising from a sale in execution of immovable property in contravention of the relevant provision of the statute.

[25] In the instant matter:

25.1 The prohibition contained in section 39(2) of LUPO is clearly couched in peremptory language;

25.2 The prohibition contained in section 14(4) (a) of the National Building Regulations and Building Standards Act is similarly couched in peremptory language;

25.3 Criminal sanctions are imposed in the event that the provisions thereof are not complied with;

25.4 To my mind, recognition by this court of a lease in contravention of these statutory provisions will, in the words of the learned judge in *De Faria supra* ... *"bring about, or give legal sanction to, the very situation which the Legislature sought to prevent."*

[26] This is in line with the view expressed by the court in *Bitou Local Municipality v Timber Two Processors CC and Another* 2009 (5) SA 618 (CPD). In that matter the applicant local authority had made application for

(a) a declaratory order that the operation of a commercial sawmill by the first respondent on the second respondent's farm and the use of certain buildings for the sawmill were unlawful; (b) a final interdict prohibiting first respondent from operating a commercial sawmill on the farm and from using the buildings for the sawmill; and (c) a final interdict prohibiting the second respondent from permitting the first respondent to operate a commercial sawmill on the farm and to use the buildings for the sawmill. At the hearing of the matter, counsel for the respondents conceded that the applicant was entitled to the relief sought but asked that the interdicts be suspended pending the final determination of the respondents' rezoning application. Counsel for the applicant argued that, were the court to suspend the operation of the interdicts, such suspension would be tantamount to the condonation of criminal conduct and the court thus had no discretion to suspend the operation of a final interdict.

[27] The court agreed that in circumstances in which a respondent is guilty of criminal conduct, no discretion exists to suspend the operation of a final interdict (save possibly where the contravention could be regarded as *de minimis*), since this would be tantamount to a court abrogating its duty as an enforcer of the law. At 626 J – 627 E the learned judge went on to say the following:

"*I am further of the view that, even if I were to have a discretion in this regard, it should be exercised by dismissing first and second respondents' plea ad misericordiam. Briefly, my reasons for this view are as follows:*

[36.1] Apart from the fact that the suspension of the interdicts would be tantamount to the sanctioning of criminal conduct, it would seriously undermine applicant's authority to enforce its zoning scheme and the provisions of the National Buildings Act. As stated by Harms J in the United Technical Equipment case [1987 (4) SA 343 (T)] *... a lenient approach may be an open invitation to members of the public to follow the course adopted by first and second respondents, namely to use land illegally and to erect buildings illegally in the hope that this would be legalised in due course and*

that, pending finalisation of an application for rezoning, illegal use and illegal buildings will be protected indirectly by the suspension of any interdicts which may be sought by applicant.

[36.2] A suspension of the interdicts would have the effect of presenting the appeal body with a fait accompli engineered through first and second respondents' own unlawful conduct. This, as stated in the Nelson Mandela Municipality case [2004 (2) SA 81 (SE)] *... would undermine the confidence of ratepayers and residents in the ability of applicant and courts to perform their constitutional and statutory functions, and to safeguard the rights and interests of ratepayers and residents in a lawful, reasonable and fair manner.*

[36.3] First and second respondents have wittingly and deceitfully established the sawmill illegally..."

[28] In this regard, I believe that it is important to bear in mind that, in the face of pending litigation to prohibit its unlawful conduct, the Trust entered into a lease with an entity represented by one of its very own co-trustees to permit the unlawful operation of a restaurant on its premises. In my view therefore, the lease cannot be regarded as a valid lease.

REMEDY AVAILABLE TO THE MUNICIPALITY IN EVENT OF NON COMPLIANCE BY THE TRUST

[29] As paragraph 2 of the order made by me is solely prohibitory in content, and the lease itself was not validly concluded between the Trust and Windfall, any non-compliance with the terms of the order will mean that the municipality may enforce its rights by way of contempt of court proceedings. This is in line with the approach taken by the court in *Metlika Trading Limited and Others supra*. It follows that the court order made against the Trust was appropriate.

[30] During the course of argument counsel for the Trust attempted to demonstrate how ineffectual the enforcement of the order would be by sketching the example of the sheriff attempting to evict Windfall under a warrant of ejectment. In my view, a warrant of ejectment has no relevance in this matter since the municipality is not armed with an order against the lessee, but with an order against the Trust which is unlawfully permitting the operation of a restaurant on its premises.

WHETHER LEAVE TO APPEAL SHOULD BE GRANTED

[31] It is trite that leave to appeal will be granted *inter alia* only when there is a reasonable prospect of success on appeal (the other factors which a court should bear in mind in considering whether leave to appeal should be granted are not relevant to the instant matter).

[32] In light of my findings and conclusions as set out above, I do not believe that there is a reasonable prospect that a court on appeal will come to a different conclusion.

[33] In the result, the Trust's application for leave to appeal is dismissed with costs, including the costs of two counsel.

J I CLOETE