
IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE - PORT ELIZABETH)

CASE No. 1026/09

NOT REPORTABLE

In the matter between:-

UMMI PROPERTIES (PTY) LTD

Applicant

and

COWSTA BELEGGINGS (PTY) (LTD

First Respondent

ROWAN TREE 1169 CC t/a TAPAS AL SOL

Second Respondent

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] The Applicant, a company with limited liability (formerly known as Knight Street Proper (Pty) Ltd), occupies the property known as the remainder of Erf 446, Humewood (*“the property”*), in terms of a 50-year Agreement of Lease entered into with Transnet Limited on 1 November 1994 (*“the main lease agreement”*). At the time the property was vacant land and the Applicant was in terms of that lease required to use and develop the land in accordance with its provisions. The development envisaged therein (which is now known as the Humerail Centre) seems to have been effected by way of various agreements of sub-leases concluded with various persons and entities some of which are currently conducting various businesses on the property, such as, eg., Spar, Virgin Active Gym, Clicks, Café Brazilia, Dataflo and two cocktail bars, namely, Memphizz Night Club and Finezz Cocktail Bar.

[2] The First Respondent, a close corporation known as Cowsta Beleggings (Pty) Ltd, occupies a portion of the property, measuring approximately 995 square metres (the leased property) in terms of an Agreement of Sub-Lease concluded likewise for a period of 50 years between the Applicant and the First Respondent on 14 June 1995. The leased property seems also to have been vacant land at the time and the First Respondent was also required to develop it in accordance with the Sub-Lease and was, subject to the prior written approval of the Applicant, not entitled to use the leased property for any purpose other than for purposes of a “shopping centre”. It would appear to have in any event been developed as a café which was at all relevant times known as Café Del Mar measuring some 87 square metres and seated approximately 20 to 25 people. In front of the development provision was made, apparently by the First Respondent in the course of the development of the leased property, for some eight or ten parking bays.

[3] The Agreement of Sub-Lease seems to have been authorized by clause 21 of the main lease agreement which reads as follows:

“SUBLETTING, HYPOTHECATION AND CESSION

21.1 *The Lessee shall have the right to sub-let any portion of the existing buildings, or the new buildings to be erected on the Premises, without the consent of the Lessor, provided that the Lessee shall remain responsible for compliance with all the provisions of this Lease.*

21.2 *Provided the prior written consent of the Lessor is obtained (which consent shall not be unreasonably withheld), the Lessee shall have the right to cede or assign, mortgage or otherwise dispose of or hypothecate this lease, or any of its rights in terms of this Lease.”.*

[4] Clause 16 of the Agreement of Sub-Lease between the Applicant and the First Respondent reads as follows:

"SUBLETTING, HYPOTHECATION AND CESSION

- 16.1 *COWSTA shall not have the right to sub-let any portion of the premises, or existing buildings, or the new buildings to be erected on the Premises, without the written consent of KNIGHT STREET PROPER and the Bank first being obtained. In the event of consent being granted COWSTA shall remain responsible for compliance with all the provisions of the sub-lease.*
- 21.2 *Provided the prior written consent of KNIGHT STREET PROPER and the Bank is obtained (which consent shall not be unreasonably withheld), COWSTA shall have the right to cede or assign, mortgage or otherwise dispose of or hypothecate this sub-lease, or any of its rights in terms of this sub-lease."*

[5] On 6 March 2009 the Applicant received a letter (**Annexure KD 4**) from the First Respondent's attorneys from which it appears that the First Respondent has "*recently entered*" into an agreement with Rowan Tree 1169 CC t/a Tapas Al Sol (who has, as I will indicate below, in the course on these proceedings been joined as the Second Respondent in this matter) in terms of which the First Respondent sub-leased the leased property, known as, as I have already indicated, Café Del Mar to the Second Respondent and that the Second Respondent is in the process of renovating the leased property. The purpose of the letter was clearly not to seek the Applicant's consent as envisaged in the aforesaid clause 16.1, but to obtain the Applicant's permission to have access to a portion of the property situate between the leased property and the portion of the property leased to the Virgin Active Gym.

[6] The Applicant, thereupon, on having investigated the position, established that the Second Respondent indeed commenced with certain building operations to the building situate on the leased property, whereupon, it, not being prepared to give consent to the occupation of

the leased property or it to be subleased to the Second Respondent, insisted on all building operations on the leased property being ceased forthwith.

[7] It would appear that the Respondents then undertook to cease such operations pending a meeting between the parties which was eventually held on 23 March 2009.

[8] At this meeting the First Respondent formally requested the Applicant's consent to sub-lease the leased property to the Second Respondent. The Applicant refused to consent to such a sub-lease for reasons summarized in a letter dated 30 March 2009, **Annexure KD 6**, addressed to the Applicant by the First Respondent's attorneys confirming the discussions at the meeting.

I will in due course deal with the Applicant's objections in this regard, being the subject matter of this application.

As is also apparent from this letter the First Respondent expressed the view that the Applicant's refusal was unreasonable and that it intends to proceed "*with the Agreement of Lease, which it has entered ... with Tapas*".

[9] On 3 April 2009 the Applicant then, through its attorneys, demanded by way of a letter, **Annexure KD 9**, that all building operations be ceased on the leased property and, furthermore, indicated that the First Respondent's conduct constitutes a breach or repudiation of the Agreement of Sub-Lease concluded between them on 14 June 1995 and that it elected, purportedly in terms of clause 18 of the Agreement of Sub-Lease, to cancel the Agreement.

[10] The First Respondent, thereupon, through its attorneys, addressed a letter dated 9 April

2009, **Annexure KD 10**, to the Applicant in which it confirmed -

- (a) that the Agreement of Sub-Lease between the First and Second Respondents of the leased property has now been cancelled with immediate effect;
- (b) that all building operations on the leased property has been stopped;
- (c) that, if necessary, the property will be restored to its prior condition.

In this letter, however, a call was made upon the Applicant to consent by not later than 15 April 2009 in writing to the conclusion of a sub-lease of the leased property between the First and Second Respondents, a copy of which is annexed to the papers as **Annexure KD 11**.

The Applicant then, through its attorneys, undertook to respond by 16 April 2009.

[11] The Applicant thereafter, on its own version, on 16 April 2000 established that despite this undertaking and the concessions made in the letter of 9 April 2009, **Annexure KD 10**, that the building operations on the leased property had however continued unabated. According to the Applicant it appeared that a substantial deck was being erected on the leased property with an apparent intention to be enclosed on the front of the building overlooking Marine Drive and which will, when completed, extend the area to a business area far in excess of 100 square metres. The First Respondent denies in its answering affidavit that the building operations continued unabated, but conceded that a wooden deck was being erected in front of the building, but denied that it would be enclosed.

[12] In the meantime the Applicant received objections against the leased property being sub-leased to the Second Respondent from at least two other tenants of other portions of the property.

In this regard I can refer to the following:-

Firstly, there is a letter dated 31 March 2009 received from Café Brazilia being a business situate right next door to the leased property.

Apart from being concerned about loss of business, this tenant raised its concerns -

(a) on the danger and safety to its guests from the Paxton Hotel from heavy traffic and loitering, drinking and substance abuse activities it expects will be going on in and around the parking area;

(b) the lack of sufficient parking in the area, particularly, when the other popular venues, such as Memphis or Finezz, have functions there; and

(c) the noise level that will be coming from the leased property that will be a disturbing factor for itself and the entire Centre.

Secondly, there is an email from the Virgin Active Gym that expressed some health and safety concerns if the Second Respondent is allowed to operate on the leased property on issues such as an emergency exit and its aircondition extraction units which are situate right next to the

leased property.

[13] This state of affairs had given rise to this application being launched on 17 April 2009 as a matter of urgency in which an order was, in addition to a punitive order of costs, sought in terms of which the First Respondent is directed to forthwith -

- (a) cease all building works and alterations on the leased property; and
- (b) restore the leased property to its condition prior to the commencement of such building works and alterations.

[14] The matter was, however, postponed to 21 April 2009 and then again to 24 April 2009, being the day on which I heard argument in this matter.

[15] Subsequent to the launching of this application the Applicant's attorneys were advised that the Agreement of Sub-Lease, **Annexure KD 11**, had been executed with the Second Respondent and that it intends to commence trading with effect from 20 April 2009.

In an email dated 17 April 2009 addressed by the First Respondent's attorneys to the Applicant's attorneys the Applicant is, notwithstanding its alleged unreasonable refusal to consent to the leased property being sub-leased, requested in the alternative to consent, obviously in terms of clause 16.2 of the Agreement of Sub-Lease, to the cession of the First Respondent's rights under the Sub-Lease to the Second Respondent.

It is common cause that the Applicant was also not prepared to consent to such a cession.

[16] In the circumstances the Applicant filed an amended Notice of Motion (**record pp. 89 to 91**), supported by a supplementary affidavit, in which, in addition to the usual order of costs, certain orders were sought of which only the following were persisted with, namely -

- (a) that the Second Respondent be joined as a party in these proceedings (**prayer 2**);
- (b) that the Agreement of Sub-Lease between the Applicant and the First Respondent dated 14 June 1995 be declared to have been cancelled with effect from 3 April 2009 (**prayer 3**);
- (c) that the Agreement of Sub-Lease between the First and Second Respondents be declared to be null and void (**prayer 4.1**);
- (d) that the purported or intended cession or transfer of the First Respondent's rights to the Second Respondent in terms of clause 16.2 of the Agreement of Sub-Lease be declared to be null and void (**prayer 4.2**);
- (e) that the leased property be forthwith restored to its condition prior to the commencement of the building works and alterations (**prayer 5.2**).

[17] The parties were in agreement that there was, because of its interest in the relief claimed, a need for the Second Respondent to be joined in the proceedings.

As is apparent from the papers the Second Respondent elected not to oppose any of the relief claimed and has apparently elected to abide by the this Court's decision.

[18] Counsel who appeared on behalf of the Applicant and the First Respondent were in agreement that the issues I was called upon to pronounce upon are -

(a) **firstly**, the interpretation to be assigned to the provisions of clause 16.1 of the Agreement of Sub-Lease concluded between the Applicant and the First Respondent on 14 June 1995, particularly, whether that clause contains an implied term that the Applicant may not withhold its consent to the subletting of the leased property unreasonably;

(b) **secondly**, and in any event, if regard is had to the First Respondent's request for the Applicant's consent to cede, as envisaged in clause 16.2 of the Agreement of Sub-Lease, its rights under that Sub-Lease to the Second Respondent, the question whether the Applicant is unreasonably withholding its consent to either the sub-letting of the leased property or the cession of any rights thereunder; and

(c) **thirdly**, the question whether the Applicant has duly cancelled the Agreement of Sub-Lease concluded between the First Respondent and itself on 14 June 1995.

[19] I deal *seriatim* with each of these issues.

The interpretation to be assigned to the provisions of clause 16.1 of the Agreement

[20] On this issue Mr. Van der Linde SC who appeared on behalf of the First Respondent made two submissions, namely -

(a) **firstly**, that clause 16.1 which purports to limit the First Respondent's right to sublet is in direct conflict with clause 21 of the main lease agreement which contains no prohibition against subletting, should prevail so that the First Respondent is indeed entitled to sublet without the consent of the Applicant;

(b) **secondly**, that the clause is in any event, if regard is had, *inter alia*, to clause 16.2, subject to an implied term that the Applicant would not withhold its consent to subletting unreasonably and that such an implied term in any event lends business efficacy to the Sub-lease.

[21] I find myself, with respect, unable to agree with the first submission made by Mr. Van der Linde SC.

Clause 21 of the main lease agreement (quoted in paragraph [3] above), empowers or authorizes the Applicant to sublet any portion of the property, but subject to the qualification that the Applicant would remain responsible for compliance with all the provisions of the main lease agreement.

Clause 16.1 of the Agreement of Sub-Lease (quoted in paragraph [4] above), limits the right of the First Respondent (who was not a party to the main lease agreement) to sublet the leased property, being a portion of the property, without the prior written approval of the Applicant.

The right conferred upon the Applicant to sublet any portion of the property can in my view by no stretch of the imagination be seen to be in conflict with the restriction placed in clause 16.1 on the First Respondent to first obtain the Applicant's consent to sublet the portion of the leased

property. As a matter of fact clause 16.1 does not affect the relationship between, and the rights and obligations of, either the Applicant or Transnet *vis-a-vis* themselves. Clause 21 in fact places an obligation on the Applicant to ensure that all the provisions of the main agreement are being complied with. This obligation would be seriously restricted or hampered if the Applicant is seen to be prohibited by clause 21 to reserve itself a right in an agreement of sub-lease to determine whether such a sub-lease may affect its obligations to ensure that the provisions of the main lease agreement are being complied with.

[22] In relation to the second of these submissions I also find myself unable to agree that the inclusion of the term in clause 16.2 which deals with cession, assignment, mortgage or hypothecation or disposal of rights, should be utilized in interpreting clause 16.1 on the question whether such a term should be read into that clause.

As contended by Mr. Van Rooyen SC who appeared on behalf of the Applicant, the two subclauses are aimed at different transactions. A sub-lease envisaged in clause 16.1 does not affect the contractual relationship between the lessee and the lessor in the sense that the lessee remains the latter's creditor and debtor (see: **Cooper, Landlord and Tenant, 2nd Edition, p. 251**). In other words when a lessee sub-lets he or she enters into a contract of lease with the sub-lessee who becomes his or her tenant while the lessee remains bound in all respects to the lessor (**Floral Displays (Pty) Ltd v Bassa Land and Estate Co. (Pty) Ltd 1965(4) SA 99 (D) at 100G**). On the other hand, a cession as envisaged in clause 16.2 is, as explained by **Cooper, supra, 251**, an act of alienation whereby a lessee divests himself or herself of his or her rights against a lessor substituting a third party as the lessor's creditor.

It may, if regard is had to the nature of these two transactions, perhaps be correct, as

contended by Mr. Van der Linde SC, that the transaction envisaged in clause 16.1 is less onerous than the one envisaged in clause 16.2. I, however, find myself unable to infer from that that the parties have erroneously omitted that term from clause 16.1 and in fact intended the term to have been included in the clause. As held in ***Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974(3) SA (A) at 532A*** an implied term is one which the parties intended or must be deemed to have been intended on the so-called “*bystander test*”.

The question is whether I can, in the absence of any agreement between the parties to what was intended in the clause, infer from the express terms of the agreement and the surrounding circumstances whether the term in question is one which the parties actually had in mind but did not trouble to express or would otherwise have expressed had their attention been directed to the term.

If regard is had to the whole of the main lease agreement, it would appear that, as I have already indicated, the Applicant is held to be responsible to Transnet for compliance with all its provisions. In the case of a sublease a third party is brought into the contractual relationship who is only responsible to the sub-lessee, in this case the First Respondent, whilst in the case of a cession a new party is introduced in the relationship with the Applicant in circumstances where such new party is directly responsible to the Applicant. The purpose of prohibition in a lease against subletting is, as held in ***Bryer and Others NNO v Teabosa CC t/a Simon Chuter Properties and Another 1993(1) SA 128 (C) at 137F***, to protect the lessor from having his premises used or occupied by an undesirable subtenant or in an undesirable manner.

The fact that the term was explicitly included in clause 16.2, does not in my view justify an inference that they did not have a similar clause in mind at the time they concluded clause 16.1.

In the circumstances I accordingly find myself unable to assign any interpretation to clause 16.1 other than the one apparent from the ordinary and plain reading of the clause and to read any implied term into the clause.

[23] This brings me to the second issue I am called upon to pronounce upon.

The reasonableness or otherwise of the Applicant's refusal either to the subletting of the leased property or the cession of First Respondent's rights under the Agreement of Sub-Lease

[24] As is apparent from the papers and as I will indicate in a moment, there are numerous disputes, be that factual, argumentative or speculative in nature, between the parties on the Applicant's reasons for its refusal to consent either to the conclusion of a sub-lease or to the cession of any rights under the Agreement of Sub-Lease which action is, either way, aimed at achieving the same practical effect, namely, to effect a situation where the Second Respondent can conduct the envisaged business on the leased property.

[25] It seems to be trite that the onus of proving that the Applicant is withholding its consent unreasonably rests on the Respondents (*Bryer, supra, 134B*).

[26] The reasons for Applicant's refusal are, as is reflected in the two founding affidavits filed, the following, namely -

(a) that the business of the Second Respondent, being that of a night club, which was

previously operated from Brookes Hill Pavilion was chaotic because of alcohol and drug abuse, gangs and violence and its concomitant security related problems and loitering in the car park;

(b) that it was always jam packed with live music with between 400 and 500, mostly young, people patronising it and operated at all hours of the day and more often than not, had patrons outside in the car park well after 5 am which is a kind of business for which there is no place at the Centre which is a high class shopping centre;

(c) that, because of the foregoing, the rights of the other tenants, the composition of which has been carefully managed to make sure that the tenants do not invade each other, will be catastrophically affected in that their parking problems would be insuperable, that the live music would destroy the adjacent businesses and have a detrimental effect on the ethos of the Gym next door;

(d) that the First Respondent has no more than eight or ten parking bays available of its own, but, bearing in mind an expected patronage of, according to the Respondents' own version, approximately 350 people requiring some 200 parking spaces, will need at least 200 parking bays to accommodate the Second Respondent's business;

(e) that this situation will in effect utilise and monopolise the parking provided by the Applicants for its other tenants which is provided by the Applicant on land in effect owned by it and carefully worked out to provide for the Applicant's tenants;

(f) that as the Humerail Centre is extremely busy to such an extent that at lunch time there is often no parking available;

(g) that on the complex as a whole provision is made for 616 parking bays which are already 113 short of the requirements laid down by the Municipality.

[27] Notwithstanding the onus resting on it, the First Respondent's case is based mainly on responses to the Applicant's objections.

[28] In this regard it is contended, as is apparent from the answering affidavit, by the First Respondent, *inter alia* -

(a) that, although it is conceded that there were indeed problems at Brookes Hill Pavilion from where the Second Respondent conducted its business, the problems were not caused by its patrons, but were related to bad management on the part of Brookes Hill Pavilion Centre;

(b) that, because of its concern for the safety and security of patrons, the largest items of business expenditure of the Second Respondent is expended on security;

(c) that the Second Respondent's business is that of a "*restaurant / bar*" which provides live music and which will be operating from 11h00 to 2h00, ie., some 14 hours of the day;

(d) that it is generally full on Thursday and Friday nights and that it is foreseen that the

venue would be able to cater for approximately 350 people;

(e) that the Fire Department of the Municipality conducted about a month earlier an inspection and that it was satisfied that all fire regulations had been complied with (no report or other evidence in support of this allegation of the nature of this inspection has, however, been annexed to the papers);

(f) that the Second Respondent denies that its business will destroy the quality of the Humerrail Centre and that parking issues will arise;

(g) that the Gym closes at 21h00 whereas the Second Respondent only provides live music from 22h00 to 23h30;

(h) that the Applicant is only out to protect his tenants from competition;

(i) that, regarding the objection relating to the noise, the speakers are fitted with a sound limiter which controls the maximum sound levels, that the sound levels are set below the legal limit set by the Municipality and that the venue is designed in such a way that any noise that escapes will be conveyed across the busy Marine Drive towards the harbour;

(j) that the building plan details have in relation to the alterations to the premises been submitted to, and approved by, the Municipality (no information is, however, furnished on the nature of the plans submitted and the approval by the Municipality).

[29] Notwithstanding the many issues raised on the papers which I attempted to briefly summarize above, counsel concentrated in argument on the following issues raised as objections against both the subletting of the leased property and the cession of the rights under the Agreement of Sub-Lease, namely -

- (a) the parking is;
- (b) the noise which is expected to be emanated from the leased property;
- (c) the patrons the Second Respondent would attract;
- (d) the contention that an establishment such as that of the Second Respondent is not for the Humerrail Centre and that, particularly, a night club falls outside the description of a shopping centre;
- (e) compliance with the Port Elizabeth Municipality's Town Planning Scheme.

[30] Except for responding, sometimes argumentatively or speculatively to the objections raised by the Applicant, the only factual averments made by the First Respondent in discharging its onus to prove unreasonableness on the side of the Applicant in so far as he refused any consent envisaged in clause 16 of the relevant Agreement, are the following, namely -

- (a) that the Second Respondent has submitted building plans to the Municipality in respect of the alterations at the leased property which has been approved and that the Municipality would not have approved the plans if the result would have impacted adversely on parking at the Centre;

(b) that the Fire Department of the Municipality conducted an inspection of the property and was satisfied that all fire regulations have been complied with.

[31] The First Respondent, however, failed to submit any documentation or other evidence on the plans submitted and the inspection conducted and I am unable to evaluate the impact of those plans and the inspection may have on the Applicant's objections against the envisaged subletting or cession.

[32] The reason for the qualification that consent should not be unreasonably withheld is, on the one hand, to give the lessee the right to sub-let and, on the other hand, to protect the lessor from having his premises used or occupied in an undesirable manner or by an undesirable sub-lessee (*Cooper, supra, 252*). From this it follows that a reason for a refusal which is unconnected with the proposed sub-lessee or the proposed use or occupation of the premises would generally be regarded to be unreasonable (*Herbert Porter v Johannesburg Stock Exchange 1974(4) SA 781 (W) at 790G*).

[33] On a consideration of the Applicant's objections against the envisaged sub-lease or cession and the submissions raised in response thereto, I am unpersuaded that the objections are unrelated to the use of the property and that they can be held to be unreasonable.

[34] In my view the Applicant has indeed an obligation to establish whether the business to be conducted by the Second Respondent in the Centre could be duly accommodated in the Centre without prejudicially affecting the rights of the other tenants and its obligations towards those tenants.

[35] The Applicant is in my view not unreasonably withholding his consent at least on -

(a) the available parking in the Centre and the additional burden that will, bearing in mind the fact that the Second Respondent will be open for some 14 hours per day commencing at 11 am and will be in a position to accommodate some 350 patrons on at least Thursdays, Fridays, Saturdays and public holidays, be placed on the rights of customers of the other tenants to park in the Centre;

(b) the noise, whether or not it complies with the noise levels set by the Municipality, due to at least the live music that will be offered on the property which will, as opposed to the existing situation in the Centre, be emanated from the business of the Second Respondent;

(c) the risk of unruly behaviour on the side of irresponsible patrons over which no control can be exercised by the Second Respondent as soon as they have left the premises;

(d) the fact that it would require the management of the Centre to exercise control over unruly behaviour as was, according to the Respondents' own version, required at Brookes Hill Pavilion.

[36] The fact that any of these objections and considerations may, as has been done on behalf of the First Respondent, be criticized, is in my view no reason to hold that they are unreasonable.

[37] This brings me to the last issue I was called upon to pronounce upon.

Cancellation of the main lease agreement

[38] The relief claimed in this regard is based on the fact -

(a) that at first the First Respondent sub-leased the leased property to the Second Respondent without any attempt to seek the Applicant's consent as required by clause 16 of their Agreement; and

(b) that it thereafter on having been informed that it breached the Agreement in that respect, persisted with its intention to sublease the leased property notwithstanding the Applicant's refusal to consent to the subletting of the leased property.

[39] Although the First Respondent's actions in this regard smacks of arrogance, I cannot ignore -

(a) the fact that the First Respondent immediately upon having been informed of the breach undertook to cancel the disputed Agreement of Sub-Lease and to cease all building operations on the property and, thereupon, formally requested the required consent;

(b) the fact that it, after consent was refused, persisted, obviously on legal advice, to proceed with its intentions to sub-let which it was, strictly speaking, in law entitled to do (see: ***Bryer's case, supra, 134A***);

Furthermore, there is, except for the uncertainty on the alleged repudiation, the question whether the Applicant complied in all respects with the provisions of clause 18 of the Agreement of Sub-Lease.

[40] It is in any event apparent from the founding affidavit (**paragraph 27**) that the Applicant is aware of the disputes relating to the Applicant's right to cancel and has foreshadowed the possibility that action proceedings be instituted.

In my view that is the route to follow should the Applicant still wish to persist with its intentions to cancel the Agreement of Sub-Lease.

At this stage I am unpersuaded that there is sufficient evidence to grant an order as the one envisaged in prayer 3 of the amended Notice of Motion, baring in mind, furthermore, the interests that are at stake (according to the evidence the Sub-Lease is valued at between R8 million and R10 million),

Order

For the reasons set out in this judgment the following order is made:-

1. It is ordered that Rowan Tree 1169 CC t/a Tapas Al Sol be joined in the proceedings as the Second Respondent.
2. It is declared that the Applicant has lawfully withheld its consent, envisaged in clause 16 of the Agreement of Sub-Lease concluded between the Applicant and the First Respondent on

14 June 1995, to the sub-letting of the property known as Portion of Erf 446, Humewood, to the Second Respondent or to the cession to the Second Respondent of the rights of the First Respondent held under that Agreement.

3. The Agreement of Sublease purportedly concluded between the First and Second Respondents contrary to the Applicant's consent referred to in paragraph 2 above is declared to be null and void.

4. The First Respondent and the Second Respondent are ordered to restore, jointly and severally, the one complying the other to be absolved, the property referred to in paragraph 2 above to its condition prior to the commencement of any building works and alterations effected to the property by either the First Respondent or the Second Respondent or by both First Respondent and the Second Respondent consequent upon the purported Agreement of Sub-Lease concluded between the First and Second Respondents.

5. The First Respondent is ordered to pay the Applicant's costs incurred in respect of this application.

.....
P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANT

On the instructions of:-

ADV R P VAN ROOYEN SC

FRIEDMAN SCHECKTER
75 Second Avenue
Southernwood
Newton Park
PORT ELIZABETH

**Ref : Mr Friedman / Mr De Vos / ps
Tel: (041) 395 8412**

ON BEHALF OF FIRST RESPONDENT

ADV H J VAN DER LINDE SC

On the instructions of:

**BURMEISTER DE LANGE SONI INC
29 Mount Road
Mount Croix
PORT ELIZABETH
Ref: K Williams/ef/MAT11413/C103
Tel: (041) 373 9690**

DATE OF HEARING

24 April 2009

JUDGMENT DELIVERED ON

28 April 2009