IN THE HIGH COURT OF SOUTH AFRICA
(*NORTH GAUTENG HIGH COURT, PRETORIA*)

CASE No.15266/2010

In the matter between:-

WINTERBREEZE TRADING 158 (PTY) LTD	First Applicant
BUFFALO INN OVERNIGHT ACCOMMODATION (PTY) LTD	Second Applicant

and

THOMAS BUTLER SMITH	First Respondent
PRICILLE HENRIETTE SUSANNA JANSE VAN RENSBURG	Second Respondent

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REASONS FOR ORDER GRANTED IN TERMS OF RULE 49(11) ON 14 JUNE 2010

Van der Byl, AJ:-

Introduction

[1] On 14 June 2010 I granted an order in terms of which it is ordered -

(a) that, pending the hearing of Respondents' Application for Leave to Appeal, the operation and execution of the order granted in this matter on 31 March 2010, excluding paragraph 3 thereof, not be suspended and that the operation and execution of the order immediately be put into effect;

(b) that the Respondents should pay, jointly and severally, the one paying the other to be absolved, the costs incurred by the Applicants in respect of this application, including such costs as they may have been incurred in respect of the application for my recusal.

[2] I granted this order on the basis that my reasons for this order will be furnished in the course of the day on 15 June 2010.

What follows are those reasons.

Relevant facts of the matter

[3] On 31 March 2010 I granted an order in this matter in terms of which the Respondents were -

(a) interdicted from performing certain unlawful actions (**paragraph 1(a) to (f) of the Order**);

(b) interdicted from entering the business of the Second Applicant and the property of the First Applicant, but for the house on the property which is situated on Erf 99, Marble Hall, which the Respondents currently occupy (**paragraph 1(g) of the Order**);

(c) directed and ordered to return to the Applicants all the books and records, all keys to the premises and specifically the keys to the safe of the Second Applicant and all other documents and property which belongs to the Applicants (**paragraph 2 of the Order**).

[4] It only, for some inexplicable reason, came to my attention on 25 May 2010 that the Respondents filed a Notice of Application for Leave to Appeal on 1 April 2010.

[5] On or about Thursday, 3 June 2010 I did receive a call from the Applicants' attorney of record as is alleged in paragraphs 6 and 7 (**record pp. 79 and 80**) of an affidavit by him in this matter. The call was intended to have been made to my secretary, but, because she was not at her phone at the time, I answered the phone. The attorney, Mr. Thompson, apologised and explained that he actually intended to speak to my secretary with a request that she should approach me to establish when I would be available to hear an application in this matter in which I granted an order on 31 March 2010. I had no objection him having approached me directly and, being under the impression that he sought a date for the hearing of the Application for Leave to Appeal, indicated to him that I would be available on Wednesday, 10 June 2010 at 9h30 or Thursday, 11 June 2010 at 9h30. I accepted that he would make the necessary arrangements with the Respondents' legal representatives and requedsted him to

ensure that my *ex tempore* judgment delivered on 31 March 2010 be transcribed and made available at the hearing of the application and that the file be made available to me beforehand.

[6] The file was eventually made available to me and I noticed that the matter has been enrolled for Thursday, 10 June 2010 at 9h30, and that the file contained, in addition to the Application for Leave to Appeal dated 1 April 2010, an application in terms of Rule 49(11) filed on 14 April 2010 and an unsigned amended Application for Leave to Appeal dated 19 May 2010.

[7] On 10 June 2010 Mr. Van Zyl who appeared on behalf of the Respondents informed me that he was briefed only to seek a postponement of the matter to 28 June 2010 (which is a date in the recess) because counsel who appeared in the proceedings *a quo* was not available as she was on holiday. Mr Woodrow who appeared on behalf of the Applicants had no objection against the postponement of the Application for Leave to Appeal, but objected, for reasons to which I will refer in a moment, against a postponement of the Applicants' Rule 49(11) application. I, indicating that I wouldn't prefer to close the doors to the Court for the Respondents, then directed the matter to stand down until Friday, 11 June 2010 so as to afford the Respondents an opportunity to brief counsel on the Rule 49(11) application.

[8] On Friday, 11 June 2010, however, the attorney of record of the Respondents, together with Mr. Woodrow, met me in chambers, and informed me that counsel who appeared in the proceedings *a quo* will only be back from holiday on Sunday, 13 June 2010, but will be hospitalized on Monday, 14 June 2010, and that he was unable to

obtain the services of another counsel. In the circumstances he requested me to postpone the matter to Friday, 18 June 2010, on which date, according to him, another counsel would be available. Mr. Woodrow, however, objected against such a postponement on the grounds thereof that, as indicated in the affidavit filed in support of Applicants' Rule 49(11) application, *inter alia*, that the purchasers of the property (which had been auctioned on 8 April 2010) who were, because of the pending Application for Leave to Appeal denied occupation of the property, indicated that should they be denied occupation any further they will cancel the sale. I, thereupon, indicated to Respondents' attorney of record that I will under the circumstances consider issuing a Rule *nisi* with interim relief returnable on Friday, 18 June 2010, and requested the parties to prepare a draft order.

[9] However, shortly thereafter the parties returned to my chambers with counsel which had in the meantime been briefed. He informed me that he will attempt to be ready to argue the Application for Leave to Appeal as well as the Rule 49(11) application on Monday, 14 June 2010 and submitted that interim relief for such a short period might be inappropriate. I, having regarded the request to be reasonable, thereupon, notwithstanding the protestations on behalf of the Applicant, allowed the matter to stand down until Monday, 14 June 2010 at 8h30.

[10] On Monday, 14 June 2010 Ms. De Klerk who appeared in the proceedings *a quo* on behalf of the Respondents, together with Mr. Woodrow, approached me in chambers and informed me that it is her instructions to ask for my recusal because I discussed this matter over the telephone with the Applicants' attorney of record and that she would hand up an affidavit to me in that regard.

[11] In court I was informed by Ms. De Klerk that they are not ready to argue the Application for Leave to Appeal as they were still awaiting the "*record of the proceedings*" to be transcribed.

[12] Mr Woodrow who appeared on behalf of the Applicants had no objection to the postponement of the Application for Leave to Appeal, but insisted that the Applicants' Application in terms of Rule 49(11) should proceed.

[13] Ms. De Klerk, thereupon, moved for my recusal to hear this application and handed up an affidavit by the First Respondent in which it is stated, in response to allegations made by Applicants' attorney of record in paragraph 6 and 7 of the affidavit to which I already referred which was handed to me on 11 June 2010, as follows:

> "*With shock and dismay I took notice of the fact that the attorney for the Applicants had a personal discussion with the learned Judge Van der Byl about the merits of the case, without our attorney and / or counsel present and with no invitation from the learned Judge to attend such discussion. I have instructed our attorney of record to apply that the learned Judge should recuse himself from this case on the grounds of perceived bias, which application will be launched prior to the hearing of this application.*" (My emphasis).

(I need to say that paragraphs 6 and 7 of the affidavit of the Applicants' attorney of record, the paragraphs contain no indication that I discussed "*the merits of the case*" with him)

The application for my recusal

[14] As is apparent from the aforegoing, there is simply no factual basis on which it can be contended that the Applicants' attorney of record had a personal discussion with me "*about the merits of the matter*". I pointed out to Ms. De Klerk, as is openly and honestly disclosed in the affidavit of Applicants' attorney of record, that the only discussion that took place related to the dates on which I would be available to hear the application which I, as I have already indicated, perceived to have been the Application for Leave to Appeal. As a matter of fact I was at that stage not even aware of the fact that the Applicants had launched a Rule 49(11) application.

[15] Ms. De Klerk, however, persisted with her insistence that I should recuse myself, and submitted that it was her instructions to bring this application and that the situation in any event created with the Respondents a perception of bias which, so she submitted, was enough.

[16] The test to be applied in cases of applications for recusal has recently been laid down by the Constitutional Court in the case of ***President of the RSA v SA Rugby Football Union 1999 (4) SA 147 (CC)*** where the Court held at ***177B, para [48]*** as follows:

> "*It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath*

of office taken by Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.".

See also: ***Sager v Smith 2001 (3) SA 1004 (SCA) at 1009E***
S v Shackell 2001 (4) SA 1 (SCA), 10D-E
S v Basson 2007 (3) SA 582 (CC) at 606G, para [31]

[17] It is clear from these authoritative judgments that the test to be applied in applications for the recusal of a presiding officer is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case.

[18] In applying this test to the facts in hand, there is in my view not the remotest possibility that any "*reasonable, objective and informed person*" on the facts set out in the attorney of record of the Applicant would reasonably apprehend that I discussed the merits with the attorney and that I will, true to the oath of my office, not administer justice in this matter "*without fear or favour*".

[19] I accordingly dismissed the application for my recusal and wish to add that I regard, having regard to the true facts, the actions of the Respondents' counsel and attorney of record as highly irresponsible, reprehensible, unprofessional and unethical and a gross insult to my integrity. As I have already indicated, the application was not only based on wrong legal principles, but also on obviously wrong and unsubstantiated factual averments. I have no doubt that the representatives should have realized and, perhaps, most probably did realize that there is no legal or factual basis for an

application of this nature and should have advised the Respondents' accordingly. In failing to do so they merely created unrealistic expectations with the Respondents to such an extend that the First Respondent had, after I granted the order in this matter, loudly expressed his dissatisfaction with my decision in open court.

[20] This brings me to the merits of the Rule 49(11) application.

Submissions raised *in limine* in the Rule 49(11) application

[21] Ms. De Klerk raised two points *in limine*, namely -

(a) that the "*Notice of Motion*" in Rule 49(11) application is fatally defective because it does not comply with provisions of Rule 6 in that it does not comply with Form 2A as set out in the Rules;

(b) that it does not comply with the so-called Judge Southwood directions and is, therefore, not be entertained as an urgent application and that in any event this application can only be heard in the urgent court.

[22] With due deference to Ms. De Klerk, her submissions are ill-perceived.

[23] The Rule 49(11) is an application incidental to the Application for Leave to Appeal and, therefore, an interlocutory application which may be brought under Rule 6(11), may be brought by notice (and not by Notice of Motion) and is not hit by the provisions of Rule 6(12) (***Erasmus, Superior Court Practice, p. B1-370A; Airy and***

Another v Cross_border Road Transport Agency and Others 2001 (1) SA 737 (T) at 741F-H); and ***South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 551E***).

[24] I am satisfied that, because, *inter alia*, of the fact that the agreement of sale of the property is under threat of being cancelled as the Respondents are refusing to allow to take, or preventing them from taking, occupation of the property and that the Respondents are exercising control over, and the revenue derived from, the business of the Applicants, there is sufficient urgency to deal with this matter as such. There is in any event no suggestion that the Respondents are prejudiced in so far as this matter is enrolled as a matter of urgency. As a matter of fact they have been afforded more than ample opportunity to file opposing and supplementary affidavits.

[25) I now proceed to deal with merits of the Rule 49(11) application.

Merits of the Rule 49(11) application

[26] The principles on which applications of this nature should be considered have been set out in the leading case of ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd, 1977(3) SA 534 (A)*** in which Corbett JA (as he then was) held that in exercising a discretion in terms of Rule 49(11) the Court should determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors, namely -

(1)

(2) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;

(3) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;

(4) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and

(5) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.

[27] As far as the potentiality of irreparable harm is concerned, it is in my opinion clear that the harm to be suffered by the Applicants, should the Order remain suspended, by far exceed any harm, if any, the Respondents may suffer.

[28] It appears from the initial as well as the amended Notice of Application for Leave to Appeal that the Respondents are seeking, as far as the merits of the matter are

concerned, leave to appeal primarily against the orders set out in paragraph 1(g) and 2 of my Order.

[29] The effect of those orders are that they are not deprived of their accommodation on the property, but are only debarred from entering and maintaining the business conducted by the Applicants and ordered to return the books and records of the business and the keys to the property.

[30] It is in my view evident that under these circumstances the Respondents stand to suffer no prejudice by complying with the orders granted pending their application for leave to appeal. They were merely ordered not to act in an unlawful manner, not to take the law into their own hands and to return to the Applicants certain property belonging to the Applicants. In so far as they contend that they have, as shareholders, the right to conduct the business of the Applicants they are free, in so far as a shareholder may have such a right, to pursue their application launched under Case No. 44341/08.

[31] On the other hand, the Applicants are, as I have already indicated, about to suffer particular harm in so far as they are precluded to exercise any control over, and the income derived from, their business and in so far as the agreement of sale are at risk to be cancelled should they not be able to allow the purchasers occupation of the property and the business conducted thereon. The Respondents have, since they are admittedly not registered owners of any shares in the Applicants, not entitled by virtue of their contention that they have a claim to the shares, to control the business, take control over the revenue derived therefrom and to frustrate the sale of the property (see: ***Standard Bank of SA Ltd v Ocean Commodities Inc 1983 (1) SA 276 (A) at 289A***).

[32] As far as the Respondents' prospects of success on appeal are concerned, I, not yet having heard full argument on that Application for Leave to Appeal, am disinclined to express any views on the Respondents' prospects of success.

[33] It would, however, appear, as I have already indicated, that the Application for Leave to Appeal is primarily directed at paragraphs 1(g) and 2 of my Order.

[34] As is apparent from my judgment, I granted the order set out in those paragraphs on the Respondents' own version from which it appears -

(a) that they are or were not employees; and

(b) that they are not registered shareholders of any of the Applicants,

so that they cannot as a reasonable inference have no right ir entitlement to exercise control over, and the income derived from, the business of Applicants.

[35] Leaving aside all other considerations, it appears to me that their prospects of success on appeal are relatively slim.

[36] Whether or not I am correct in this regard, I am satisfied, as I have already indicated, that the potential prejudice to the Respondents is insignificant relative to the potential prejudice to the Applicants.

[37] In my view it is apparent that the Application for Leave to Appeal as well as the various actions taken by the Respondents, such as -

(a) the unsubstantiated, abortive and ill-perceived application for my recusal;

(b) the repeated challenges on the urgency of the matter, the unsubstantiated;

(c) the unsubstantiated *in limine* points raised; and

(d) their apparent failure to take any active steps since 1 April 2010 to bring their Application for Leave to Appeal to its final conclusion,

have been launched merely in an attempt to delay the execution of the order as long as they possibly can.

[38] As far as the question of costs is concerned, I have been requested to order the Respondents to pay the costs in respect of the application for recusal on a punitive scale. I am not inclined to do that as it appears to me that the Respondents were ill-advised by their legal representatives and I see no reason why the Respondents should be mulcted with a punitive order of costs.

[39] It is for these reasons that I granted to order referred to in paragraph [1] of this judgment.

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P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANTS	**ADV C WOODROW**
On the instructions of	**THOMSON WILKS ATTORNEYS** **c/o INGRID VAN GREUNEN ATTORNEYS** **608 Reitz Street** **Sunnyside** **PRETORIA** **Ref : Mr S Thomson/sh/I004** **(011) 784 8984**
ON BEHALF OF THE RESPONDENTS	**ADV J DE KLERK**
On the instructions of:	**JAN D VAN ZYL ATTORNEYS** **Lake View Office Park** **137 Muckleneuk Street** **Nieuw Muckleneuk** **PRETORIA** **Ref: Van Zyl/mb/JZ4164/S249** **Tel: (012) 346 4082**
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