REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. 10035/2009

In the matter between:

PREFIX PROPERTIES (PTY) LTD	**First Applicant**
MICHAEL DAVID UYS	**Second Applicant**
JANE DIANE DELLAR	**Third Applicant**

and

GOLDEN EMPIRE TRADING 49 CC	**First Respondent**
FULLIMPUT 1484 (PTY) LTD	**Second Respondent**

Third Respondent

JUDGMENT

GORVEN J:

1]The applicants and the respondents concluded two interrelated agreements on 10 April 2007, both of which were to take effect from 1 April that year. The first was concluded between the first applicant and the first respondent and involved the sale of a portion of the property on which is situated the Old Halliwell Hotel ("the property agreement"). The second was concluded between the second and third applicants on the one hand and the third respondent on the other in which the former sold to the latter 100% of the members' interest and loan account in the second respondent which was, at the time, a close corporation ("the CC agreement"). The agreement reflected the business of the Old Halliwell Hotel as an

asset of the second respondent.

2]The first respondent took occupation of the property in question on or about 1 April 2007. The case of the applicants is that this was done pursuant to the property agreement. Since 1 April the second respondent, with the third respondent at its helm, has conducted the business of the Old Halliwell Hotel. Submissions were made by the respondent that the first respondent is in possession of the business. This case was not made out on the papers as will become apparent later in this judgment. Many of the issues in the application are not contested. First, that the first respondent is presently in occupation of the property and has been in occupation from 1 April 2007. Secondly, that, pursuant to the CC agreement, the third respondent was registered as the sole member of the CC and, since the conversion of the CC to the second respondent company, has become its sole shareholder and director. Thirdly, that the property in question is subject to the Subdivision of Agricultural Land Act No 70 of 1970. Fourthly, that at the time of conclusion of the property agreement, the Minister of Agriculture had not consented in writing to the sub-division of the property in question and that, accordingly, since only a portion of the total property was the subject matter of the sale, the property agreement was void *ab initio*.[1] Fifthly, that the CC agreement has been cancelled due to the failure of the third respondent to pay the full purchase price.

3]As regards the property agreement, a deposit was required to be paid to the first applicant in the sum of R2.5m on or before 15 July 2007. This was not done. The

1" This is as a result of S 3(a)(i) of the Subdivision of Agricultural Land Act, No 70 of 1970 which provides, in its relevant part that "(N)o portion of agricultural land, whether surveyed or not, or whether there is any building thereon or not, shall be sold … unless the Minister [of Agriculture] has consented in writing." See *Geue and Another v van der Lith and Another* 2004 (3) SA 333 (SCA).

first respondent undertook to pay occupational rental of R54 169.82 monthly in arrears from the date of occupation. The property agreement provided that, once the full deposit was lodged with the conveyancer, any occupational rental paid would thereafter reduce the amount owed. The first respondent made payments totalling some R1.5m to the first applicant. The first applicant contends that these payments, many of which were in the precise sum of the amount agreed upon as occupational rental, formed occupational rental. The first respondent contends that it was the intention of the first applicant and the first respondent that they would be regarded as payments in reduction of the capital sum. In support of this averment, it put up an unsigned schedule containing columns for dates, amounts paid, a reducing balance, interest at 8.9% and total interest. This was said to have been prepared by the second applicant and showed a reducing balance beginning with R4.5 m. No explanation was given as to why this was the starting point where the property agreement purchase price was R7.5m. The contention that these payments were intended to reduce the capital sum is not supported by the property agreement and cannot be upheld since the deposit was never paid in full. In argument, Mr de Wet SC, who appeared on behalf of the respondents, accepted that the alleged agreement that these amounts would be regarded as payments towards capital would amount to a variation of the property agreement. Since the property agreement provided that no variation of its terms would be binding unless contained in writing and signed by the parties, no case in support of this contention was made out on the papers by the first respondent because no averment was made that this agreement was reduced to writing and signed by the parties.

4]The nub of the relief sought by the applicants is that they be placed back in

possession of the property and the shareholding and loan account in the second respondent respectively on the basis that the property agreement was null and void *ab initio* and that the CC agreement has been cancelled and that ownership in both was reserved.

5]The relief sought was as follows.

(i) The Sheriff of this Court or his deputy be and is hereby directed to enter the premises of the Old Halliwell Hotel, Main Road, Curry's Post, KwaZulu-Natal and to compile and inventory of all corporeal movable property present on the said premises and belonging the First, Second and Third Applicants and the Second Respondent;

ii) Pending the final determination of this Application, the Sheriff or his deputy be and is hereby directed to attach all the Second Respondent's corporeal movable property currently present on and in the Old Halliwell Hotel premises;

iii) Pending the final determination of this Application, the Respondents and their employees be and are hereby interdicted and restrained from removing from the premises of the Old Halliwell Hotel any of the corporeal movable property reflected on the inventory compiled by the Sheriff or his deputy as referred to above;

iv) Pending the final determination of the Application, the Respondents and their employees be and are hereby interdicted and restrained from removing any of the corporeal movable property on the premises of the Old Halliwell Hotel as at the date of the issue of this order and belonging to the First, Second and Third Applicants and the Second Respondent;

v) Pending the final determination of this Application, the Respondents and their employees be and are hereby interdicted and restrained from removing, tampering with or damaging any computerised books of account or records and/or manual books of account or records relating to the business of the Second Respondent carried on the Old Halliwell Hotel premises;

vi) The First, Second and Third Applicants are authorised to enter the premises of the

Old Halliwell Hotel and to do all such things as may be necessary to preserve the said premises and property;

vii) The Second and Third Applicants be and are hereby directed and authorised to carry on the business of the Second Respondent on the premises of the Old Halliwell Hotel and to maintain all such accounting and other records as may be necessary to accurately reflect such trading activities;

viii) The First and second Respondents be and are hereby directed to vacate the Old Halliwell Hotel Premises within 10 (ten) days of the grant of this order;

ix) It is hereby declared that the written agreement of sale concluded between the First Applicant and the First Respondent on 10 April 2007 for the purchase of the immovable property described as *Portion A (of 57) of the Farm Halliwell No. 924, Registration Division FT, Province of KwaZulu-Natal, in extent of approximately 11,51 hectares,* a copy of which is annexure "MD6" to the Applicants' founding affidavit, is null and void *ab initio* and of no force and effect;

x) It is hereby declared that the agreement of sale concluded on 10 April 2007 between the Second and Third Applicants on the one hand and the Third Respondent on the other hand in terms of which the Second and Third Applicants sold their members' interest and loan accounts in the Second Respondent to the Third Respondent, a copy of which agreement is annexure "MD7" to the Applicants' founding affidavit, is validly cancelled and of no further force and effect;

xi) An order directing that the First Applicant is entitled to restitution of the Old Halliwell Hotel property;

xii) The Third Respondent is directed to sign all such documents as may be necessary to effect transfer of the entire shareholding in the Second Respondent to the Second and Third Applicants and to further effect cession of the Third Respondent's loan account, if any, in the Second Respondent to the Second and Third Applicants. Such documents the Third Respondent is directed to sign within 10 (ten) days of the date of this order. Failing compliance with the said order by the Third Respondent, the Sheriff of this Court or his deputy is hereby authorised to sign the necessary documents;

xiii) It is declared that the Second and Third Applicants are entitled to retain all payments made to them by the Third Respondent in discharge of her obligations in respect of the agreement of sale, a copy of which is annexure "MD7" to the Applicants' founding affidavit, pending the final determination of an action to be instituted by the Second and Third Applicants against the Third Respondent for such damages that they may have suffered by virtue of the Third Respondent's breach of the said agreement of sale;

xiv) The First and Third Respondent be and are hereby directed to jointly and severally pay the costs of this Application.

Paragraphs (i) to (iv) of the relief sought were granted by way of interim relief. At the hearing before me, the relief was amended by requesting, in the alternative to outright relief in terms of paragraph (ix), that that order be granted once the first applicant has registered a bond over the property as security for any lien which the court might find was held by the first respondent in respect of the property.

6]As a first submission the respondents contended that there were factual disputes requiring that the matter be referred to oral evidence rather than dealt with on the papers. The basis of this submission was twofold. In the first place, the respondents relied on an agreement concluded on 18 March 2008. The applicants claimed that this was a fraudulent agreement and was not signed by the second applicant. The respondents submitted that this dispute required such reference. I will deal more fully with this agreement below. Suffice it to say that it is not necessary to determine this issue for the purpose of the application. The second basis is the claim by the first respondent to an improvement lien over the immovable property. This, also, does not give rise to a genuine factual dispute on the papers as will become apparent later in this judgment.

7]The substantive defences set up by the respondents were, in essence, threefold, namely:

1. That other agreements were concluded between the parties relating to the same subject matter which gave the respondents rights of possession;
2. That in relation to the property agreement, the first respondent has made improvements and accordingly has a lien entitling it to resist the application for eviction from the property;
3. That in relation to the claim to be restored to possession of the subject matter of both agreements, the applicants were obliged to tender repayment to the respondents of the amounts paid pursuant to the agreements and, absent such tender, the relief sought was not competent.

8]The first two of the agreements set up by the respondents were concluded on 27 October 2006. In terms of the first of these, the first applicant sold to the first respondent the entire property, as opposed to a subdivision thereof, on which the Old Halliwell Hotel is situated. In terms of the second of these, the second respondent sold to the first respondent the business of the Old Halliwell Hotel owned by it. The third agreement was the one referred to above dated 18 March 2008. This provided that the first applicant sold to the third respondent, acting on behalf of a company to be formed, the portion of the property dealt with in the property agreement. It was alleged that the sub-division had been approved by the Minister of Agriculture prior to that date and that, accordingly, this agreement was

not null and void as is the property agreement.

9]In argument Mr de Wet indicated that he did not intend to rely on the first two of these agreements. At a certain point in argument he attempted to retract this concession but, when it was pointed out to him that each of these was subject to a suspensive condition and that there had been no averment in the application papers that the respective suspensive conditions had been fulfilled, he accepted that he could not rely upon them on the papers as they stand. In my view this concession was correctly made. Nothing further need be said about these two agreements. Significantly, and as adverted to above, this means that no case was made out on the papers that the second respondent had given possession of the business owned by it to the first respondent. It is clear, therefore, that the second respondent must be regarded as having had possession of the business throughout.

10]As regards the agreement of 18 March 2008, no averment was made that the company on whose behalf the third respondent concluded the agreement had been formed. The agreement made provision that, if this was the case, the third respondent would become personally bound as principal thereunder. However, nowhere in the papers was it averred that the third respondent is, or ever was, in occupation of the property. Even if this averment had been made, it was nowhere averred in the papers that she was given occupation pursuant to this agreement. There are indeed disquieting features of this agreement, as was submitted by Mr Dickson SC, who appeared on behalf of the applicants. It is not necessary to go into these for the purpose of dealing with this point however. As indicated, the agreement has not been set up as a basis for the third respondent being in

occupation. It has been accepted, throughout, that the first respondent was given occupation pursuant to the property agreement. This basis for one of the respondents retaining possession of the property must accordingly fail. It is for these reasons that it is not necessary to resolve the status of this agreement over which there is a factual dispute. This can be dealt with in separate proceedings if the parties so desire and nothing that I say in this judgment should be construed as deciding these factual disputes. This judgment goes only so far as to find that the case contended for by the respondents in this regard has not been made out on the application papers.

11]Regarding the question of a lien, the assertion was made by the respondents that the first respondent has a lien "in respect of improvements effected on the Old Halliwell property". This was developed, in it fullest sense, by averring that the first respondent "upgraded rooms to attain a four star status" and "built a conference centre". They stated that the sum of R612,190.14 had been spent on upgrading the rooms. As regards the conference centre, the respondents sought to rely on a valuation of the conference centre in the sum of R3 375,000.00. An annexure was put up which, when corrected as to the area covered by the conference centre and applying the amount reflected in it per square metre, results in this sum representing the replacement cost of the conference centre.

12]It is trite law that a party asserting a lien must make certain averments. An improvement lien is founded where a possessor or occupier who meets certain criteria has incurred expenses which were necessary for the salvation or useful for the improvements of the thing.[2] The amount secured by the lien is that sum by

2 *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 at 627 – 628;

which the overall value of the property has been increased by the improvements.[3]

13]In relation to the upgrading of rooms, the claim to a lien was met by the applicants with the submission that the first respondent was obliged to maintain the property under the property agreement and that this was all that it had done. In addition, it was claimed that the first respondent had failed to aver that the expenses were necessary or useful and, accordingly, had not made out a case for the existence of an improvement lien. It was also submitted that there were insufficient averments and evidence to support the overall amount for which the lien was claimed as security on the application papers in respect of both the upgrading of rooms or the conference centre. The applicants also averred that the conference centre structure was such that it had not acceded to the land and that the first respondent could remove it from the property. A tender that it may do so was made. Finally the applicants put up correspondence which, they claimed, showed that the first respondent accepted that it could not use the construction of the conference centre to found a lien, it having accepted that it was building the centre at its own risk.

14]The applicant is correct that insufficient averments necessary to establish an improvement lien were contained in the affidavit deposed to on behalf of the first respondent. There was no averment that the expenses incurred were necessary or useful neither were there sufficient averments or evidence as to the amount for which the lien was to serve as security. The report put up in support of the value of the conference centre was not sworn to by a qualified person nor did it deal with

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Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970 (3) SA 264 (A) 270 E – H.
3 *United Building Society* case at 630

the correct basis for valuation, dealing as it did only with replacement cost. Mr De Wet submitted that I should take a generous view of the averments, reading into them the essential requirements. I am not disposed to do so. The applicants were entitled to deal with the averments as they arose on the papers and clearly did so. In the absence of the necessary averments, no detailed evidence was able to be put up by the applicants in reply. It would therefore be prejudicial to the applicants to deal with it on the basis suggested by Mr De Wet. Once again, the finding on the papers does not preclude a later successful claim by the first respondent if all the necessary facts are pleaded and proved. As a result, in my view, the respondents failed to set out a basis for the existence or extent of the claimed lien on the papers. It is therefore unnecessary to consider the adequacy of the tender of the applicant of alternative security for any lien.[4] It is also unnecessary to make any findings on the other points raised by the applicants mentioned in the paragraph immediately preceding this one.

15]As regards the defence that the applicants have failed to tender restitution of the respondents' performance, the position relating to the property agreement and the CC agreement differs.

16]Dealing with the property agreement, a case has not been made out on the papers that the payments made were payments towards the capital and were not payments of occupational rental. I have dealt with this above. Accordingly, on the papers, no tender for re-payment is necessary since, absent averments and evidence to the contrary, the agreement provides that these payments related to

4 In *Sandton Square Finance (Pty) Ltd v Vigliotti* 1997 (1) SA 807 (T) it was held that a court has a discretion to deprive a lien holder of possession and substitute alternative security in respect of both a debtor and creditor lien and an improvement lien.

the first respondent's occupation of the property. Of course it may be that the respondents can make out a different case in a subsequent action if the correct averments are made and are supported by the requisite evidence. My finding is limited to the case which appears from the papers and I refrain from making a finding that the payments were, in fact, payments of occupational rental. There is therefore no basis made out on the papers to require the first applicant to tender restitution of the performance of the first respondent under the property agreement.

17]When it comes to considering the CC agreement, the position is somewhat more complex. It is common cause between the parties that, of the R1m purchase price, the third respondent has paid to the second and third applicants the amount of R550,000.00. In their founding papers the applicants claim to be entitled to retain this amount pending the outcome of an action to be instituted by these applicants against the third respondent for damages arising from her breach which, they claim, caused the severe devaluation of the shareholding whilst in her possession. It is common cause that, contrary to the position on 1 April 2007, the second respondent at present has substantial liabilities and that its business has been run down to the extent that it is unable to pay both its Telkom and Eskom accounts and has substantial other debts. This much was admitted by the third respondent but she indicated that she had made arrangements with Eskom that the second respondent may extinguish its indebtedness in instalments. She also claimed that the situation disclosed on the papers resulted from the economic recession. The applicants also suggested that the second respondent is likely to be indebted to the third respondent by way of a loan account. Even though this was pertinently raised and invited a response from the third respondent, she ignored

this reference and failed to disclose the position.

18]The second leg of the reasoning of the applicants is that, since the third respondent is unable to pay her debts, if they repaid the money paid by her and later succeeded in the intended action for damages, she would be unable to satisfy their claim. In essence, accordingly, the applicants contend that it would be equitable for them to retain the amounts paid towards the purchase price pending the outcome of an action for damages. The third respondent admitted having personal debts at present but stated that she intended to honour her obligations. She questioned the relevance of her indebtedness and gave no details of the extent thereof nor how or by when she intended to honour her obligations. It is likely that, if the third respondent had been in a position to pay the purchase price under the CC agreement or discharge her other indebtedness, she would have done so. It seems unlikely that, if restitution of the purchase price is made to the third respondent, she would be able in the future to satisfy any judgment against her for damages. At this stage the applicants have set out *prima facie* grounds for a damages claim. I cannot make any definitive finding on the papers that a claim for damages will succeed and I refrain from doing so.

19]Mr De Wet's main submission against giving possession of the shareholding in the second respondent to the second and third applicants, however, was that it is impermissible to set off the part payment of the purchase price against their unliquidated claim for damages. In this regard, he relied on the case of *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd en Andere.*[5] That matter was brought by way of action. The purchaser of immovable property had failed to

5 1974 (1) SA 414 (NK) at 424 C – E and 428 D

pay the purchase price, prompting the sellers to cancel the agreement. They claimed, and were granted by default judgment, orders evicting the purchaser from the immovable property and directing the purchaser to return the movable property to them. The purchaser was given leave to defend the damages claim of the sellers. They had dealt with the amount which had been paid to them by the purchaser under the agreement by applying it in reduction of their damages claim rather than by tendering repayment. An appeal against this judgment was upheld on the basis that the sellers were only entitled to eviction and return of the movable property against restitution of the part payment of the purchase price. It was held that it was not permissible to retain the payment made by the purchaser by bringing it into account in reduction of the unliquidated damages claim.

20]Where a contract is cancelled as a result of breach and where the innocent party claims return of their performance under the agreement, the general position is that a tender to return the performance of the guilty party is necessary. As was said in *Feinstein v Niggli & Another* [6] "[t]he object of the rule is that the parties ought to be restored to the respective positions they were in at the time they contracted. It is founded on equitable considerations." *Feinstein* involved the purchase of the shareholding in a company, which purchase was induced by a fraudulent misrepresentation. The purchaser sued for rescission and the repayment of the purchase price. The seller set up as a defence that, since the value of the shareholding had diminished, the seller was non-suited since he could not tender the return of the subject matter in the same form in which it had been received. The court held that, since the rule is founded on equity, it can be departed from where considerations of equity and justice necessitate such a

6 1981 (2) SA 684 (A) at 700F-G

departure.[7] It held that the reduction in value had not been shown to be due to the fault of the purchaser and that the tender of restoration of the loan account and shares in their state at the time of cancellation was effective. A tender of restitution is, therefore, not invariably required of an innocent party which has cancelled pursuant to a breach by another party.

21]*Feinstein* followed a line of cases which established this principle. These cases are largely dealt with in *Harper v Webster* [8] and cover a number of situations. In *Harper* a fraudulent misrepresentation had induced the purchaser to buy a herd of cattle. When the contract was cancelled for fraud, a number of the cattle had been sold and some had died. The purchaser tendered the balance of the herd and the money value of those he could not return against repayment of the purchase price and was held entitled to do so. The courts have had a similar approach when bad eggs were sold and subsequently destroyed[9], a substantial portion of defective manure had been used and only a fraction could be tendered in return[10] and in the so called holiday travel cases. The most recent of these is that of *Tweedie & another v Park Travel Agency (Pty) Ltd t/a Park Tours.*[11] Here, the sole reason that the plaintiff had purchased a tour from South Africa to Twickenham was to watch a rugby test match. The defendant failed to provide a ticket to the match and the plaintiff, having travelled to England as part of the tour, had to watch the match on a large screen television set. He could clearly not tender the return of his travel to and from England or the stay in the hotel room but the court held that he was never the less entitled to the return of the purchase price of the entire tour as well as to

7 At p 700H-701A. See also *Marks Ltd v Laughton* 1920 AD 12 and *Extel Industries (Pty) and another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 SCA at 731 D – E and 732 B – C
8 1956 (2) SA 495 (FC)
9 *Marks Ltd v Laughton, supra.*
10 *African Organic Fertilisers & Associated Industries Ltd v Sieling* 1949 (2) SA 131 (W)
11 1998 (4) SA 802 (W)

reimbursement of his expenses as damages.

22]The principle has been developed more fully in recent years and stated as follows:

> It has frequently been said that the action for *restitutio in integrum* is a separate and distinct remedy and that it is not an enrichment action. See eg *Davidson v Bonafede* 1981 (2) SA 501 (C) at 510A - E, where Marais AJ cites with approval De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 2 ed at 144. However, under the influence of English law, which recognises *restitutio in integrum* as based on unjust enrichment, there has been over the years a general relaxation of the rule that a party seeking restitution must first be willing and able to restore what he or she received. See Daniel Visser 'Unjustified Enrichment' in Zimmerman and Visser (eds) *Southern Cross: Civil law and Common law in SA* at 536 - 7. Whether the need to make restitution is excused, either wholly or partially, will now depend upon considerations of equity and justice and the circumstances of each case; the occasions on which it will do so are not limited to a specified and limited number of exceptions.[12]

Nestadt J (as he then was) said the following:

> True, as already indicated, the duty to make restitution is not an unqualified or absolute one. There are a number of exceptional cases where restoration is excused or if full restitution cannot be made the deficiency can be made good by a form of substitutionary monetary return. Pausing here for a moment, it follows, I think, that restitution, being an integral part of cancellation, it is for the party relying on the cancellation of a contract to allege and prove that restitution whether actual or (partly) substitutionary has been made or tendered or excused.[13]

23]In the present matter, the applicants say that they will institute an action for damages. The third respondent says it is impermissible to set off a claim for

12 Per Scott JA in *Mackay v Fey NO & another* 2006 (3) SA 182 (SCA) para [10], p188D-F
13 *Uni-Erections v Continentql Engineering Co Ltd* 1981 (1) SA 240 (W) 247-248

damages against the repayment of the purchase price on the basis of *Bonne Fortune.* However, that case differs from the present one in certain material respects. In the first place it was decided on an application amounting to a test on exception since the default judgment was based solely on the pleadings which did not contain a tender for return of the purchase price nor any averments dealing with the equities of withholding return of the payment. Secondly, it was final in nature, determining the rights between the parties apart from the question of damages. The present application asks for return of the merx and the retention by the applicants of the purchase price pending an action to be instituted. In the third place, averments have been made concerning the reduction in value of the second respondent and the unlikelihood of the third respondent being in a position to satisfy a claim for damages which was not done in that matter. Fourthly, the applicants have not ignored the need to tender restitution as was done in that matter. They have attempted to make out a *prima facie* case to be excused restitution of the third respondent's performance pending an action to be instituted for damages and indicated that the equities can be resolved in the foreshadowed action. In addition, *Bonne Fortune* did not deal with the line of cases to the effect that this is an equitable remedy and that justice may dictate that a tender should not be required in certain circumstances, whether temporarily or at all. That case is therefore not authority against the grant of the relief sought in this matter.

24]I am of the view that there is sufficient evidence to show that it would be just and equitable, pending the outcome of an action, that the second and third applicants are excused from tendering restitution of the third respondent's performance under the CC agreement prior to the return to them of the shareholding and loan account in the second respondent. The third respondent

has not answered to the averments of the applicants in this regard apart from raising the legal point regarding restitution and averring that the diminution in value of the shareholding in the second respondent is not due to her fault. This, of course, cannot be finally resolved on the papers. Apart from what I have said above, it is also a consideration that the third respondent has had possession of the shareholding giving her control of the second respondent for some 3 ½ years. In the circumstances it is my view that the failure of the second and third applicants to tender restitution of the third respondent's performance under the CC agreement does not non-suit them in relation to the relief they seek. Whether they need to repay the part payment of the purchase price is therefore not finally determined on these papers. All that is determined is that, on the equities, they are not required to make restitution prior to obtaining possession of the shareholding in the second respondent.

25]In the result, the following orders issue:

1. The First, Second and Third Applicants are authorised to enter the premises of the Old Halliwell Hotel and to do all such things as may be necessary to preserve the said premises and property;

2. The Second and Third Applicants are authorised to carry on the business of the Second Respondent on the premises of the Old Halliwell Hotel and are directed to maintain all such accounting and other records as may be necessary to accurately reflect such trading activities pending the outcome of the action mentioned in paragraph

8 hereof;

3. The First and Second Respondents are directed to vacate the Old Halliwell Hotel Premises within 10 (ten) days of the grant of this order;

4. It is declared that the written agreement of sale concluded between the First Applicant and the First Respondent on 10 April 2007 for the purchase of the immovable property described as *Portion A (of 57) of the Farm Halliwell No. 924, Registration Division FT, Province of KwaZulu-Natal, in extent approximately 11,51 hectares,* a copy of which is annexure "MD6" to the Applicants' founding affidavit, is null and void *ab initio* and of no force and effect;

5. It is declared that the agreement of sale concluded on 10 April 2007 between the Second and Third Applicants on the one hand and the Third Respondent on the other hand in terms of which the Second and Third Applicants sold their members' interest and loan accounts in the predecessor in title to the Second Respondent to the Third Respondent, a copy of which agreement is annexure "MD7" to the Applicants' founding affidavit, is validly cancelled and of no further force and effect;

6. The First Respondent is directed to restore possession of the Old Halliwell Hotel property to the First Applicant within 10 days of the

date of this order;

7. The Third Respondent is directed to sign all such documents as may be necessary to effect transfer of the entire shareholding in the Second Respondent to the Second and Third Applicants and to further effect cession of the Third Respondent's loan account, if any, in the Second Respondent to the Second and Third Applicants. Such documents the Third Respondent is directed to sign within 10 (ten) days of the date of this order. Failing compliance with the said order by the Third Respondent, the Sheriff of this Court or his deputy is hereby authorised to sign the necessary documents on behalf of the Third Respondent;

8. It is declared that the Second and Third Applicants are entitled to retain all payments made to them by the Third Respondent in discharge of her obligations in respect of the agreement of sale, a copy of which is annexure "MD7" to the Applicants' founding affidavit, pending the final determination of an action to be instituted by the Second and Third Applicants against the Third Respondent for such damages that they may have suffered by virtue of the Third Respondent's breach of the said agreement of sale;

9. In the event of the Second and Third Applicants failing to institute the action referred to in paragraph 8 hereof within 20 days from the date of this order, the Second and Third Applicants are directed to repay

to the Third Respondent the amounts paid by her pursuant to annexure “MD7” to the Applicants’ founding affidavit. In that event and in the further event that they fail to make such repayment within 30 days from the date of this order they are directed to retransfer to the Third Respondent the entire shareholding and loan account in the Second Respondent;

10. The First and Third Respondents are hereby directed to pay the costs of this Application jointly and severally, the one paying the other to be absolved.

DATE OF HEARING:	15 November 2010
DATE OF JUDGMENT:	6 December 2010
FOR THE APPLICANTS:	Adv AJ Dickson SC, instructed by ER Browne Inc.
FOR THE RESPONDENTS:	Adv A de Wet SC, instructed by Venn Nemeth and Hart Inc.