



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION)

16/2/2011
CASE NO: 75127/2009

In the matter between:

THE UNIVERSITY OF PRETORIA

Applicant

and

FREEFALL TRADING 17 CC t/a AANDKLAS

1st Respondent

OOSTHUIZEN, MARKUS

2nd Respondent

PETOUSIS PROPERTY INVESTMENT CC

3rd Respondent

CORAM: EBERSOHN AJ

DATE HEARD: 15TH SEPTEMBER 2010

DATE JUDGMENT HANDED DOWN: 16th FEBRUARY 2011

JUDGMENT

EBERSOHN AJ.

[1] The applicant is the University of Pretoria ("the University") which has various hostels for students inter alia a hostel known as "Madelief" with its street address being 1107 Prospect Street, Hatfield, Pretoria, on the property being a 13 storey building wherein 315 female students reside and another hostel close to "Madelief" being known as "Magrietjie" also in Prospect Street, being an 11 storey building in

which approximately 328 female students reside.

[2] The first respondent is a close corporation conducting the business known as "Aandklas" on the property known as Portion 2 of the Remainder of Erf 179, Hatfield, Pretoria ("the property"). It appears from the papers that Aandklas is a business where food, beverages and intoxicating liquor is sold to mainly younger people. Aandklas is in an area close to the campus of the University and which is frequented by many students of the University.

[3] The second respondent is cited as the person in control of and managing the affairs of the first respondent and he is also a member of the first respondent.

[4] The third respondent is a close corporation and is the owner of the fixed property referred to in paragraph [2] of this judgment.

[5] The University applied for an order against the respondents interdicting and restraining them, **firstly**, from engaging in any activity in contravention of the Pretoria Town Planning Scheme and in particular from conducting any form of business falling outside the Land Use Rights afforded in terms of the Pretoria Town Planning Scheme in respect of the property referred to in paragraph [2] of this judgment, and, **secondly**, from playing loud music on the property and causing loud noise emanating from the property thereby creating a nuisance (see: *East London Western Districts Farmers' Association v Minister of Education & Development* 1989 (2) All SA 163 (A), 1989 (2) SA 63 (A); *Allaclas Investments (Pty) Ltd. v Milnerton Golf Club* [2008] 2 All SA 163 (A), 2008 (3) SA 134 (SCA); *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC & Others* 2004 (2) SA 81 (SE)), and inconveniencing the staff and students residing in the said two hostels in the sense that they could not study, sleep and rest whilst the noise was being made on the premises of Aandklas, and ordering the respondents to take whatever steps may be necessary to curtail and limit loud noise, and thus the actionable nuisance, emanating from the said property.

[6] The application is opposed by all the respondents. The respondents filed their answering papers late and the first and second respondents sought condonation of the late filing which condonation application is opposed by the applicant. The third respondent did not file a condonation application.

[7] The first and second respondents filed their answering affidavit on the 18th August 2010, in other words, more than about seven months late.

[8] The two respondents advanced as reasons for and as excuses for the late filing of the answering affidavit the following as appears from paragraph 6 of the answering affidavit:

- a) that they only managed to consult with their attorneys "early during 2010 at which stage it was decided that we would file a notice of intention to oppose". The wording of this paragraph is vague and the court is kept in the dark as to
 - i) why it was only then consulted; and
 - ii) the exact date on which the consultation was held;
- b) that there was correspondence between the attorneys of the applicant and of the first and second respondents and:

"(A)lthough it seems to be the attitude of the Applicant that the formal proceedings must proceed the First and Second Respondents were under the bona fide impression that this matter may still be settled and do not want to incur any unnecessary costs."

It appears from the correspondence between the parties that at all times, however, it was the contention of the applicant to proceed with the matter in court and it is not clear how and on what basis the first and second respondents could have formed any such impression that the matter could be settled seeing that they were not agreeable to comply with the applicant's request that they comply with the law;

- c) that the second respondent, who was allegedly acquainted with all the facts, was employed in Stellenbosch and due to work obligations there could not readily be consulted. The wording of this paragraph was also very vague and the court is kept in the dark as to
 - i) when he was in fact consulted;
 - ii) why he could not travel to Pretoria sooner and if necessary more than once to finalise the answering affidavit.

[9] As pointed out the court has considerable difficulty with the excuses advanced and the secretive nature of the second respondent's work which kept him occupied in Stellenbosch was not stated and no details were imparted as to when and how he tried to get permission from his employer to be absent from his place of employment

to attend the consultations. It was noticed by the court, however, from information imparted on page 384 of the record that there was also an Aandklas in Stellenbosch too. Perhaps the reason for the secrecy was inadvertently divulged through the advertisement of Aandklas on that page.

[10] The court must refer to the two acoustics reports which were attached as annexures "RO5" and "RO6" to the answering affidavit of the first and second respondents:

- a) the two respondents seem to heavily rely on the two reports;
- b) the first report was dated the 11th June 2007 i.e. long before the application was served on the respondents and in the report proved that the first and second respondents themselves were concerned regarding the excessive noise emanating from the premises of Aandklas and the second report was dated the 13th August 2010, in other words, about 8 months after the application was served on the respondents and one month before the matter was heard by the court and this report also proved the applicant's case although the reports were very vague as to when certain noise measurements were done "during nighttime" and no explanation was given as to the exact time the measurements were done.

The court will later deal in more detail with the two reports.

[11] With regard to the condonation application of the first and second respondents the applicant responded as follows:

- a) the application was served early in December 2009. As the two respondents did not file a notice of opposition the applicant set the matter down on the unopposed roll of the 23rd February 2010 for an order by default;
- b) only after the applicant's attorneys advised the attorneys of the first and second respondent that if they did not file a notice of opposition the applicant would proceed to obtain relief by default, whereupon, and out of time, a notice of opposition was filed;
- c) the answering affidavit was filed more than seven months late and by stating that his was done designedly so as to make it extremely difficult for the applicant to comprehensively respond to the answering papers;

d) that as the attorneys of the first and second respondents were warned timeously that they should procedurally comply with the court rules, the two respondents could not have formed any impression that "**as the matter would be settled**" they need not comply with the court rules regarding a notice of opposition and the filing of an answering affidavit;

e) they contended ultimately that the first and second respondents have made out no case for condonation and that the merits of the case in any case was totally against the respondents.

[12] The third respondents filed its answering affidavit on the 24th March 2010 in other words many months late.

[13] In its answering affidavit it did not indicate that it intended applying for condonation of the late filing thereof.

[14] The first and second respondents raised two points in limine in their answering affidavit:

a) There was a misjoinder regarding the second respondent in the application. The papers clearly show, however, that the second respondent was managing Aandklas in Pretoria at the relevant time, he was on the admission of the first and second respondent's in their condonation application, the one with knowledge of all that went on at the relevant time at Aandklas in Pretoria and he acquired the knowledge clearly whilst managing Aandklas and there is accordingly no merit in this point in limine.

b) i) The deponent on behalf of the first and second respondents stated in paragraph 2.7 of the answering affidavit

"the applicant is attempting to enforce The Tshwane Town Planning Scheme, 2008. I associate myself with the Third Respondent's contention that the Applicant is attempting to enforce rights that vests in the general public and should be enforced by the relevant authorities."

ii) It is not clear what this statement was supposed to mean. If it was supposed to mean that only the municipality had a right of action against the respondents regarding the actionable nuisance, that is clearly wrong.

- iii) The deponent also stated the following in paragraph 2.8 of the said affidavit:

"...it is humbly submitted that the Applicant has no locus standi to enforce personal rights of its students. The right which the Applicant claims to protect, belong to its students and not to the Applicant. I am advised that it is trite that no party may litigate in a representative capacity."

- iv) In Municipality of Stellenbosch v Levinsohn 1911 CPD 303 the court found that a municipality may act in respect of a nuisance affecting its inhabitants generally. The University may similarly act as it did in the present instance and there is no merit in the second point in limine too.

[15] The counsel of the first and second respondents raised the following four alleged points in limine in his heads of argument and did not deal at all with the merits of the application itself in his heads:

- a) the alleged misjoinder of the second respondent with which point the court already dealt with;
- b) that if prayer 1.2 was granted it would create uncertainty and would be incapable of enforcement. It is so that the term "loud music" used in prayer 1.2 is rather vague and when a court grants relief the order will be more specific and would be quite capable of being enforced;
- c) that the applicant has an alternative remedy and that the applicant suddenly and without first warning the respondents brought the application. There is no merit in this point as according to the papers, as will be illustrated later in this judgment, the first and second respondents acted with full knowledge that they were in the wrong and disregarded the clear rights of the University and the students and the provisions of the Town Planning Scheme, all for financial gain. There is no merit in this point too.
- d) that the applicant failed to prove the Pretoria Town Planning Scheme and its contents:
 - i) In paragraph 96 of the founding affidavit the applicant explicitly stated

that the property was to be used as a place of refreshment and the applicable portion of the Town Planning Scheme with regard to the property was quoted and reads as follows:

"The erven shall be consolidated and shall be used only for the purposes of places of refreshment, business buildings, dwelling units and certain restricted industries, which are normally associated with a shopping centre and which create no danger or nuisance of noise, dust, smoke, fumes or smell, such as a bakery, subject to the following conditions...."

iii) The definition of a **"place of refreshment"** in the Town Planning Scheme appears in paragraph 8.6 on page 138 of the record as follows:

"PLACE OF REFRESHMENT

Means land and buildings or a part of a building used for the preparation, sale and consumption of refreshment on the property such as a restaurant, cafe, coffee shop, tea room, tea garden, sports bar, pub, bar, and may include take-aways and a maximum of two table games, two dartboards, two electronic games, television screens and soft background music for the customers but excludes a place of amusement. The kitchen layout shall comply with the Municipality's health regulations."

iii) **"Background"** relating to music is defined in the New Shorter Oxford Dictionary as follows:

"background: 6. music or sound-effects used as an accompaniment; a less prominent position, obscured, retirement; treat as unimportant, give no emphasis to."

There is clearly a vast difference between **"background"** music and music being played loudly through amplifiers and loudspeakers with a prominent thumping beat, causing students inconvenience and stress.

iv) The definition of a **"place of amusement"** In the Town Planning Scheme, also appears in paragraph 8.6 on page 138 of the record as follows:

"PLACE OF AMUSEMENT

Means land and buildings or a part of a building used for

entertainment purposes such as a theatre, cinema, music hall, concert hall, table games, skating rink, dancing, amusement park, casino, electronic games, night club, an exhibition hall or sports arena/stadium used for live concerts or performances."

- v) The owner of the property, the third respondent, admitted the contents of paragraph 96 of the founding affidavit in paragraph 32 of its answering affidavit to the effect that the property's zoning allowed "a **place of refreshment**" to be conducted on the property and not "a **place of amusement**."
- vi) The first and second respondents also did not dispute, in paragraph 59 of their answering affidavit wherein they dealt with paragraph 96 of the founding affidavit, what was stated by the applicant in paragraph 96 namely that the property was zoned for a place of refreshment only and not as a place of amusement, and merely contended that they conducted a place of refreshment on the property and not a place of amusement.
- vii) It is therefore not clear upon which facts the counsel based this point in limine and it cannot succeed.

[16] The third respondent's counsel advanced a peculiar point in limine against the applicant's locus standi. He stated, without referring to any authority, that the applicant, being a university, must prove patrimonial damages to have locus standi in terms of the Town Planning Scheme. The court already referred to the Levinsohn case in this regard. There is no merit in this point and it is not necessary to further deal with it.

[17] As the merits of the matter must also be considered when a court decides on the issue of condonation the court will proceed to deal with and consider the merits.

[18] Aandklas and Madelief are on opposite sides of Prospect Street right across the street from each other and are, as the crow flies, about 50 metres apart and the other residence, Magrietjie, is about 80 metres away from Aandklas. Aandklas does business in a residence modified for restaurant purposes. The deponent to the applicant's founding affidavit, Yolanda Jordaan, is in the employ of the University, and is the head of Magrietjie and she resides in it. Jordaan is clearly acquainted with what is happening in the area. Jordaan's duties are to enforce, at the said residences, the

applicable rules and regulations of the applicant, to attend to complaints of the students and to generally control and manage the hostels in such a way so as to ensure a safe environment for the students and to create an atmosphere which is conducive to study.

[19] According to the papers Aandklas conducts a business which the applicant described as a place of amusement and sells food and alcoholic beverages to members of the public, predominantly young persons who gather there socially and listen to the music played and to live music. At the outside of Aandklas's building there is an open air space with an awning over it and there are tables and chairs. Inside the building itself there are further tables and chairs where customers can enjoy food and drinks. There is also a so-called bar area where customers can order and enjoy drinks.

[20] According to the founding affidavit and supporting affidavits Aandklas opens relative late in the morning, about at noon, and then remains open quite often until the early hours of the next morning. Music is played by Aandklas through amplifiers and loudspeakers and during some evenings of the week Aandklas would have live bands playing music loudly through amplifiers and loudspeakers. In this regard the court need only further refer to the numerous supporting affidavits filed on behalf of the applicant and petition attached to the founding affidavit wherein displeasure is voiced concerning the loud noise emanating from Aandklas, so loud that the students in Magrietjie and Madelief could not rest, sleep and study. Numerous letters were addressed on behalf of the University to Aandklas regarding the noise emanating from Aandklas and the whole sordid history of complaints against Aandklas and the excessive noise emanating from it is fully detailed in the founding papers.

[21] At all relevant times there existed the NOISE CONTROL REGULATIONS - GAUTENG (General Notice 5479 in Provincial Gazette 75 of 20 August 1999) and "disturbing noise " is defined therein as follows:

"disturbing noise" means a noise level that causes the ambient noise level to rise above the designated zone levels, or if no zone level has been designated, the typical rating noise levels for ambient noise in districts, indicated in Table 2 of SABS 0103;"

[22] The papers also show that numerous approaches regarding the excessive and disturbing noise emanating from Aandklas were made on behalf of the University to the first and second respondents, and despite promises from the management of

Aandklas, proved to be without success.

[23] The first and second respondents met the attack of the applicant against the excessive noise and thus the actionable nuisance, with a denial that excessive noise emanated from Aandklas and by asserting that Aandklas was operated strictly as a place of refreshment. It is necessary, in this regard to refer to a letter dated the 23rd August 2007 from Marcus Oosthuizen, the second respondent, on behalf of Aandklas to one Joël Fourie, wherein activities scheduled by Aandklas from the 7th September 2007 to the 20th October 2007 were detailed which included music in a tent on Aandklas's premises and broadcasts of sports events in the tent. The then current daily programme was detailed as follows in the letter:

**"Monday Music
Tuesday Music
Wednesday Quiz nights
Thursday Rock Thursday
Friday Music
Saturday Music
Sunday F1 Cup on F1 days. No music."**

[24] In paragraph 14.4.4 (p. 272 of the record) of the answering affidavit of the first and second respondents it was stated that Aandklas trades strictly until 0200 in the mornings and by 0130 to 0140 switched of the music so as to convey the message to patrons that Aandklas would be closing soon.

[25] In paragraph 14.4.6 (page 273 of the record) it was denied that Aandklas ever held karaoke nights where amateurs could sing. It was also stated:

" First Respondent has housed live bands on two 2 occasions over the past couple of years. A decision was taken that it is not cost effective and as such First Respondent has no intention of ever again hosting a live band."

[26] That the first and second respondents were blatantly lying in this regard is clear if regard is had to the following:

- a) Annexure REP3 on page 377 of the record where a copy of the Website of Aandklas appears and indicated clearly:

"Venue info: A rock/metal bar in Pretoria's Hatfield Square with regular live music nights."

- b) On page 379 a copy of the Website of Aandklas under "**Features**" stated unequivocally that the following were to be found at Aandklas (quoted verbatim):

**** Bar**
*** live entertainment.**

Rock and Alternative music with quizz nights and other student fun."

- c) On page 381 of the record appears a printout from the Internet wherein it is stated, with reference to Aandklas under the heading "**Anything else you need to know?,"**

"Rock, metal and alternative student bar close to the university. Bands usually play here and they also have themed nights."

- d) Pages 383-384 of the record are copies of Aandklas's advertisement which appeared on an internet programme called "**Twitter**" and advertised the following on the 26th August 2010 (i.e. about three weeks before the matter was heard in this court):

"Follow Aandklas to your local code",

and the code applicable in various overseas countries, eg. Australia, Canada, United Kingdom, Indonesia and Ireland, was then stated.

On page 384 Aandklas is described in the advertisement as:

""Bio Aandklas is a Rock Bar situated in Stellenbosch and Pretoria. We focus on Rock tunes and South African Music. We host live performances and rocking people!"

On the same page appeared 9 items advertised to take place in Aandklas as follows (quoted verbatim):

- "1. Box office & New Holland - Tomorrow night - come check it out! 3:28 AM Aug 23rd via web.**
- 2. Gonna be a huge week! Jack Parow on wednesday, quiz on thursday and The start of the world cup feel it....!!! 12:52**

AM Jun 7th via web.

3. @barnabraf lekker...net jy wat so kan rol! 1:40 AM 7th via web.
4. nog net een dag ...dan groooooot dingewie sal dit wees? 1:19 AM May 28th via web.
5. Kan net nie wag vir Saterdag nie!!! Gaan 'n epic een wees! 12:59 AM May 26th via web.
6. Wrestlerish se Album launch en New Holland môre by Aandklas! Gaan mal wees! R30 kry jou in by die deur! Sien julle daar!!! 2:36 AM May 24th via web.
7. wonder hoe moeilik dit gaan wees vir die Stormers volgende week? 1:42 AM May 24th via web.
8. Gonna be at Aandklas for the rugby! Awesome specials, go SA teams! What an awesome day for some rugby! 5:08 AM May 22nd via web.
9. Stormers v Waratahs and Bulls v Crusaders. 4 TV's and a Big Big Screen. Come and play Saturday at Aandklas. Great specials at the Bar!!! 1:18 AM May 21st via web."

- e) On page 390 appeared a copy of the "BOO.com" programme's review of Aandklas and the following was stated about Aandklas (quoted verbatim):

"Rock, metal and alternative student bar close to the university. Bands usually play here and they also have themed nights."

- f) On page 386 of the record a copy of an advertisement of Rhythm Records of their "Skop, Skiet & Donner Launch Toer" appeared wherein it was stated (quoted verbatim):

"Oor net minder as 'n week strike ons die pad om die nuwe album te promote.

Ons gaan deur ons twee nuwe members Jedd Kossew op guitar en Jason Oosthuizen op dromme gejoin word.

Kom luister na die nuwe tracks, kom check die nuwe band en als wat ons by die shows gaan aanvang.

Die nuwe CD en vier nuwe shirt designs gaan te koop wees teen

R150 per shirt."

On page 392 of the record the itinerary of the show indicated that it would take place at Aandklas on the 27th April 2010.

[27] Attached to the answering affidavit of the first and second respondents were the two reports obtained from dBAcoustics a firm advising on acoustics to which the court already referred *supra*. The first is annexure "RO5" to the answering affidavit and is dated the 11th June 2007. Regarding this report the deponent to their answering affidavit stated in paragraph 17.1 that

"when first respondent realised that there might be some merit to the applicant's complaints in 2007 it appointed an acoustics company known as DB Acoustics to compile a report about noise in the vicinity of the first respondent's business and to advise first respondent on remedial steps that could be taken to prevent noise from escaping from its business."

[28] In this report it was indicated that the noise level exceeded the laid down norms and nine recommendations as to the curbing of the excessive noise were made therein. These appeared on page 319 of the record.

[29] The further report, annexure "RO6" to the answering affidavit, was obtained from the same firm on the 13th August 2010, i.e. about a month before the matter was heard by the court. According to this report the noise level was still excessive and they made further recommendations to attempt to limit the noise. It appeared that such an excessive amount of noise as was made on the premises of Aandklas was almost impossible to curtail and to prevent it from escaping from the premises.

[30] The case regarding the excessive noise and thus the actionable nuisance against the first and second respondents was thus conclusively proved by the University.

[31] Regarding the zoning of the property it was already indicated by the court that the zoning was for a place of refreshment only and did not allow the business of a place of amusement to be conducted there. On this aspect the first and second respondents were clearly operating their business illegally.

[32] Normally, under such circumstances, the court would be entitled to refuse the condonation application but in this matter the court decided, in the interest of justice,

to allow the answering affidavits of the respondents for clarity sake and in the light of the information contained therein which assisted the court. The costs of opposing the condonation application of the first and second respondents will be awarded to the applicant.

[33] As it is clear that the business of Aandklas as a place of amusement was conducted illegally and in any case in such a manner that the noise emanating from its premises created an actionable nuisance (See: *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C)) the application must succeed on both grounds and costs must follow the event. As punitive costs were neither asked for nor argued such an award will not be made. Costs will be ordered against the third respondent too as it is the owner of the erf concerned and it allowed the actionable nuisance on its property. (See *Porter v Cape Town City Council* [1961] 4 All SA 270 (C), 1961 (4) SA 278 (C)).

[34] As the business of Aandklas is illegally conducted as a place of amusement no period of time to do what was necessary to abate the actionable nuisance can be granted and none was in any case asked for by the respondents.

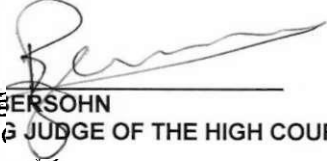
[35] The court must address the binding of the record. The record consisted of 401 pages and was nearly five centimetres thick yet it was placed in the court file as one bundle with an elementary splitpin in the top left corner which was supposed to contain the many pages in one bundle. The splitpin lasted for ten minutes and then the whole bundle became apart and the court had to remedy the problem itself. This will not be tolerated further and may result in applicants being penalised regarding their fees.

[36] The following order is made:

1. **The answering affidavits of all the respondents are admitted by the court.**
2. **The respondents are interdicted from engaging in any activity in contravention of, and in particular, from conducting any form of business or activity, including that of "a place of amusement", which falls outside the Land Use Rights afforded in terms of the Pretoria Town Planning Scheme to the property described as Portion 2 of the Remainder of Erf 179, Pretoria Town, on which a business**

known as "Aandklas" is presently conducted, and associated legislation, and are interdicted from playing any music on the said property except background music whilst customers are enjoying refreshments on the property, and may not conduct any activity on the said property that results in humans, animals and/or machines, in the wider definition of "machines", from causing and/or making "disturbing noise" as is defined in the Noise Control Regulations-Gauteng promulgated in General Notice 5479 contained in Provincial Gazette No. 75 of 20 August 1999 and also excessive and/or disturbing noise, as is forbidden therein and in associated legislation and the common law.

3. The first and second respondents are ordered to pay, jointly and severally, the one paying the other to be absolved, the applicant's costs of opposing their condonation application.
4. The first, second and third respondents are ordered to pay, jointly and severally, the one paying the other to be absolved, the applicant's costs of the application.


P.Z. EBERSOHN
 ACTING JUDGE OF THE HIGH COURT

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