



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

16/2/2011
CASE NO: 75442/2009

In the matter between:

THE UNIVERSITY OF PRETORIA

Applicant

and

THE PARTNERSHIP, FIRM OR ASSOCIATION
KNOWN AS SPRINGBOK BAR

1st Respondent

TRUTER, RIAAN

2nd Respondent

NIRAFS 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 two hostels for students, namely "Asterhof" and "Vergeet-My-Nie" in Hatfield, Pretoria.

[2] The first respondent is "**Springbok Bar**" which belongs to a closed corporation by the name of Trade Now 193 CC ("**Springbok Bar**"). It appeared from the papers that Springbok Bar is a business where food, beverages and intoxicating liquor is sold to its customers. Springbok Bar is in an area close to the campus of the University and is frequented by mainly younger people including students of the University.

[3] The second respondent was joined in his capacity as "**currently also a proprietor or person involved in the business of the first respondent**".

[4] The third respondent is the owner of the property on which Springbok Bar conducts its business it being erf 651, Hatfield, Pretoria ("**the property**").

[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 [4] of this judgment, and **secondly**, from playing loud music on the property and causing loud noise emanating from the property thereby creating an actionable nuisance (see: East London Western Districts Farmers' Association v Minister of Education & Development Aid [1989] 2 All SA 163 (A), 1989 (2) SA 63 (A); Allacras 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 Springbok Bar, 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 was opposed by only the first and second respondents.

[7] In paragraph 6 of the answering affidavit the two respondents gave notice that they would apply for condonation of the late filing of the answering affidavit which should have been filed already by the 4th February 2010 but which was in fact only filed on the 7th September 2010, i.e. about 8 months late, and this matter being heard on the 15th September 2010, clearly embarrassed the applicant and left the applicant with very limited time in which to respond and file a replying affidavit.

[8] The two respondents advanced as an excuse for the late filing of the answering affidavit the reasons set out as follows in paragraph 6 of the answering affidavit:

- a) that in 2008 they caused a report to be obtained from a firm regarding the acoustics of the premises of Springbok Bar;
- b) when they went to consult with their attorneys, after having been served with the application papers, the report was not at hand and the deponent to the answering affidavit, one Judy Truter, had forgotten from whom the report was obtained;
- c) they searched for the report and eventually found it and the answering affidavit could only then be completed.

[9] The court has considerable difficulty with the excuses advanced:

- a) why they did not just trace the acoustics firm through the payment they made to it is not explained;
- b) no explanation was given as to why the two respondents simply did not call for a fresh report from an expert in acoustics;
- c) the problem experienced by the two respondents was apparently not conveyed by the attorneys of the two respondents to the applicant's attorneys asking for an extension of time in which to file the answering affidavit; and
- d) why a dated report had to be looked for and why a fresh report, wherein the acoustics expert could have dealt with the allegations of the applicant in the founding papers, was not obtained, was also not addressed.

[10] The court also has problems with regard to unsatisfactory aspects regarding the acoustics report which was attached as annexure "F" to the answering affidavit:

- a) the two respondents heavily relied on the report but it was nonsensical as the report was dated already the 1st December 2008 i.e. long before the application was served;
- b) the original founding affidavit wherein the incorrect third respondent was joined was only deposed to by Badenhorst on the 8th December 2009, consequently

the court finds proof, in the respondents obtaining an acoustics report, of the applicant's allegation that before that date its representatives communicated their objection to and their concern regarding the excessive noise emanating from the premises of Springbok Bar and that the respondents considered rectifying the problems causing them, therefore, to obtain the acoustics report;

- c) the alleged noise measurements referred to in the acoustics report were done "during nighttime" and the exact time was for some reason or another not stated.

[11] The first and second respondents raised four points in limine.

[12] The first and second points in limine were basically to the same effect namely that they denied that the deponent to the applicant's founding affidavit, one Werner Badenhorst, was duly authorised to depose to the founding affidavit. The applicant, however, attached an affidavit by the Registrar of the University, one Grové, wherein he verified that he was duly authorised to bring and defend legal actions on behalf of the University and that he specifically authorised Badenhorst, who was conversant with the facts, to depose to the founding affidavit. Badenhorst was clearly only the deponent to the founding affidavit but the application itself was launched by Grové on behalf of the University in terms of the powers granted him by the University. The grounds advanced by the two respondents were merely formalistic and without substance and the first and second points in limine cannot succeed.

[13] The third point in limine was to the effect that the first respondent was cited incorrectly. With all the evidence before the court it is quite clear who Springbok Bar was namely Trade Now 193 CC. Why this nonsensical point was taken in the first instance is not clear and it cannot succeed.

[14] The fourth point in limine was that there was a dispute of fact and that the applicant should have foreseen it and not have proceeded by way of application but should have proceeded by way of action. It is trite that, in motion proceedings and where there arises a dispute of fact, that the applicant can only succeed if such of the allegations made by it, which were admitted by a respondent, together with the respondent's allegations, entitles such an applicant to an order. (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 620 (AD)). In the present instance and applying the abovementioned principle, and as is set out in this judgment the applicant succeeded on a balance of probabilities and the fourth point in limine must also fail.

[15] The respondents also tried to make out a case of misjoinder with regard to the second respondent. The second respondent, was, however, placed on the scene at Springbok Bar and as the manager of it by deponents to affidavits filed on behalf of the applicant and the sheriff even served the papers on him at Springbok Bar. There is no merit in this contention of the second respondent.

[16] 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.

[17] Springbok Bar is on the corner of Hilda and Prospect Streets, Hatfield, Pretoria and the University's hostel "Asterhof" is directly opposite the road some 100 metres away as the crow flies. The main building of the hostel is occupied by about 150 female students, all registered with the University, and the deponent Badenhorst and his family live in quarters on the ground floor of the building. All the bedrooms face towards the north with the Springbok Bar right across the street. Towards a westerly direction from Asterhof's main building is another hostel situated in a building, two storeys high, known as "Vergeet-My-Nie", which is part of Asterhof and houses a further 150 registered female students. Badenhorst is also head of Vergeet-My-Nie. Badenhorst's duties are to enforce at the residences the applicable rules and regulations of the applicant, to attend to complaints of the students and protect their interests and to generally control and manage Asterhof in such a way so as to ensure a safe environment for the students and to create an atmosphere which is conducive to study.

[18] Springbok Bar conducts its business in a single storey building and the applicant described Springbok Bar as a place of amusement of about 160 square metres under roof and which sold food and alcoholic liquor to members of the public, predominantly young persons. Outside Springbok Bar's building there is a terrace or wooden deck of about 80 square metres in size where there are about 8 fourseater tables and 12 sixseater tables. This area is not covered by a roof. Inside the building itself there are further tables and chairs where customers can sit down and enjoy food and drinks. There is also a so-called bar area where customers can order and enjoy drinks.

[19] According to the founding affidavit and supporting affidavits Springbok Bar opens relative late in the morning and then remains open quite often until the early hours of the next morning. Music is loudly played through amplifiers and loudspeakers and during some evenings of the week live bands would loudly play music through amplifiers and loudspeakers. In this regard the court need only further refer, by way of

illustration, to one complaint from a student Caroline Brockwell-Watson addressed to Badenhorst which letter appeared on page 74 of the record. It reads as follows:

"Dear Asterhof Parents,

I find it exceptionally difficult to live in our Main Building. The Bunker has no concern for our academic needs, I find it not only impossible to study but also to sleep. The volume is turned up to such an excessive level even though there are only five customers in the restaurant/pub. Live music is also a regular occurrence. Even on Sunday nights the music is played very loud until very late. I was exceptionally stressed during exam period in June when the levels of noise and disturbance did not cease. I feel that The Bunker is prohibiting all those who live in our Main Building from reaching their full academic potential. For this reason I kindly request that I may be awarded the opportunity to move into Vergeet-My-Nie, where the noise levels are not as excessive. Please give this matter your urgent attention."

[20] The Bunker was the name of the previous similar business in the premises which Springbok Bar now occupies and conducts. Though the owners and name of the business changed, the type of business and the problems associated with it and the loud noise emanating therefrom, apparently did not. The gist of the complaint against Springbok Bar as it appears in the supplementary affidavits to the founding affidavit and deposed to by the female students, is that the loudness of the noise, consisting of music and shouts and cheering of human beings, accompanied by a thumping beat of the drums and orchestra, keeps them awake until early the next morning when activities at Springbok Bar would cease resulting in them

- a) not being able to properly sleep and rest;
- b) not being able to study properly;
- c) being tired and sleepy in class at the University the next morning; and
- d) becoming stressed.

[21] A firm by the name of CLS Consulting Services (Pty) Ltd. instructed thereto by the University, addressed amongst various other letters, a letter dated the 27th February 2008 to the owner of Springbok Bar wherein the sordid history of excessive noise, the loud shouting of patrons etc. during the tenancy of the previous firm, The Bunker, was detailed and the new owners were requested to co-operate and limit the noise emanating from the premises. In the letter it was confirmed that the matter was

discussed between representatives of the University and the owner of Springbok Bar and the latter's representative promised Springbok Bar's co-operation. This promise was clearly not kept. On the 17th July 2008 Mr. Arthur Gray addressed a complaint to the applicant regarding excessive noise emanating from the premises of Springbok Bar on various evenings complaining that the students could not sleep and were tired in class the next day and wherein he demanded that action be taken by the University against Springbok Bar.

[22] The papers also show that numerous other approaches regarding the excessive noise emanating from Springbok Bar were made on behalf of the University to the first and second respondents, without success. It appeared that the respondents did not care about the noise emanating from Springbok Bar and were apparently only interested in the profits being made.

[23] In paragraphs 90-97 the deponent to the founding affidavit dealt with the statutory framework of the city of Pretoria. Pretoria is regulated by what is known as the Tshwane Town Planning Scheme and it divided the town of Pretoria into different areas and zones and it afforded different land right uses to different areas.

(24) This matter was heard together with matter 75127/09 being a matter that was brought by the same University against another business known as Aandklas which does business in the same vicinity and regarding whom the University also alleged that excessive noise emanated from the premises of Aandklas and that Aandklas was also operated illegally as a place of amusement. The same counsel appeared for the University in the two matters and the same counsel appeared for the first and second respondents in the two matters. The statutory aspects regarding the two businesses, being almost next to each other, was not in dispute and accordingly it was not necessary for the counsel of the University to hand up the whole Town Planning Scheme and everything that goes with it, as the court was advised it would do in paragraph 97.2 of the founding affidavit in matter 75442/09. The contents of the Town Planning Scheme and everything else that goes with it, was thus common cause between the parties.

[25] The zoning of erf 651 in the Town Planning Scheme is that of "SPECIAL" and the following conditions apply:

"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...."

[26] The definition of a **"place of refreshment"** in the Town Planning Scheme is 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."

[27] The definition of a **"place of amusement"** in the Town Planning Scheme is 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."

[28] The first and second respondents did not dispute that the property's zoning was for **"a place of refreshment"** and not for **"a place of amusement"**, and merely contended that they conducted a place of refreshment on the property and not a place of amusement.

[29] **"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.

[30] 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", which is strictly prohibited, 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;"

[31] The respondents met the attack of the applicant against the excessive and disturbing noise and thus the nuisance, mainly, by relying on the report, annexure "F", to the answering affidavit. The court already dealt in paragraphs [8], [9] and [10] *supra* in part with unsatisfactory aspects regarding the report. Paragraph 6 of the report stated that amplified music was played inside Springbok Bar when one measurement was made by the acoustics firm at 97,1 decibels and when another measurement was made by them, at 91.4 decibels, to the measuring point being **"Opposite the road at the boundary with the hostel"** i.e. Asterhof, and the remarks regarding the noise level recorded there read as follows:

"A serious noise intrusion due to the lack of acoustic screening measures;"

(Own accentuation).

[32] Paragraph 8 of the report read as follows and illustrated the fact that the premises of Springbok Bar did not comply with the Noise Control Regulations:

"8. CONCLUSIONS AND RECOMMENDATIONS

The following mitigatory measures are recommended in order to eliminate the audibility of the low thumping sound:

- * The direction of the speakers during the playing of amplified music must face away from the noise sensitive residential areas.
- * The one entrance door, closest to the stage, must remain closed during the playing of amplified music.
- * A lockout system to be installed in the sound system to keep the sound pressure level below 90 dBA at all times.
- * Amplified music to be played on a pre-approved sound amplification system only.

- * **Neoprene Closed cell seals to be applied at all openable doors and windows.**
- * **Beam-fill to be done and the opening on the roof to be sealed and closed.**
- * **Plenum box to be placed over the extract system, which is situated on the side of the building.**

After completion of the above mitigatory measures, a follow-up noise survey will be carried out to determine compliance to the Noise Control Regulations."

[33] The thumping sound was caused by the beat of the music as accentuated by the drums, the amplifiers and loudspeakers used.

[34] No mention was made by the respondents in the answering affidavit as to what was done to rectify the situation since the receipt of the report, and when, and what was found during a follow-up survey, if one was done at all. As the respondents were silent about this aspect the court is entitled to assume that a follow-up survey was not done.

[35] With regard to the zoning of the erf the first and second respondents attached a document emanating from the local municipality as annexure "A" to the answering affidavit regarding the erf on which Springbok Bar conducts its business. From this document it appeared that the zoning of the erf was "**SPECIAL subject to annexure T:B1480.**" It is clear, therefore, from this that the first and second respondents may conduct the business of "**a place of refreshment**" on the premises but not "**a place of amusement**". From the evidence placed before this court in this matter it is abundantly clear that the said respondents conducted the business of a place of amusement on the premises with karaoke songs and a lot of general shouting by amused, shouting and cheering patrons in the evenings. It is clear that the shouting was not induced only by the respondents' serving of refreshments.

[36] The respondents are thus clearly also in breach of the zoning conditions of the erf.

[37] Normally in 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 affidavit of the first and second respondents for clarity sake and in the light of the useful information contained therein which assisted the court.

The costs of opposing the condonation application will be awarded to the applicant.

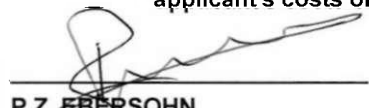
[38] As it is clear that the business of Springbok Bar as a place of amusement was conducted illegally and in any case in such a manner that the noise emanating from its premises created an actionable nuisance (See: *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C)) the application must 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)).

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

[40] The following order is made:

1. **The answering affidavit of the first and second respondents is 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 Erf 651, Hatfield, Pretoria, on which a business known as "Springbok Bar" 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.


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ACTING JUDGE OF THE HIGH COURT

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