

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: 61693/2019

Date of hearing: 23 October 2023

Date delivered: 24 October 2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
24/10/23
DATE SIGNATURE

In the matter between:

UNIVERSITY OF PRETORIA

Applicant

and

JOLLY ROGER
LATINO'S BISTRO
JUKES
FOKOF BAR
THE GRIND BAR
NIX KAS PROPERTIES CC
VARSITY BAKERY (PTY) LTD

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent

ERF 898 MENLO PARK (PTY) LTD
OWL EYE TRADING 10 (PTY) LTD
THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

Eighth Respondent

Ninth Respondent

Tenth Respondent

JUDGMENT

SWANEPOEL J:

[1] First and ninth respondents (collectively referred to as “the Jolly Roger”) have sought leave to appeal against my finding that first respondent has conducted the business of a place of amusement, in contravention of the Pretoria Town Planning Scheme, which only allows the Jolly Roger to conduct a place of refreshment.

[2] Seventh respondent also seeks leave to appeal, in this case, against a finding that seventh respondent is obliged to take all reasonable steps to ensure that second and third respondents do not create a noise nuisance at Erfs 10 and 12 Menlo Park.

[3] The Jolly Roger’s argument, shorn of verbiage, may be summarized as follows: The Town Planning Scheme allows the Jolly Roger to conduct a place of refreshment. This does not include the right to provide entertainment, and music other than background music is not allowed. However, the Jolly Roger also has a tavern liquor license which requires of it to provide entertainment at all times.

[4] The Jolly Roger says that its right to use the premises for entertainment derives from section 2 (2) of the Spatial Planning and Land Use Management Act, 2013 (“Spumla”), which provides that save as provided in Spumla, legislation not repealed by Spumla may not prescribe

an alternative or parallel mechanism in respect of special planning or land use.

[5] Secondly, the Jolly Roger says that its use of the premises is permissible in terms of a secondary land use right allowed in the Town Planning Scheme. Both the above submissions are supported, the Jolly Roger says, by the evidence of one Mr Dacomb, a town planner, who submitted a confirmatory affidavit to the Jolly Roger's answering affidavit. The submissions which Dacomb support are of a legal nature, and I pay no attention thereto. The legal position in each case is the purview of the Court.¹

[6] Furthermore, the contention that the terms of a tavern liquor license can somehow, by virtue of the provisions of section 2 (2) of Spumla, amend the provisions of the Town Planning Scheme, or that the terms of the license may be 'accommodated' within the Scheme, is devoid of any merit. The Scheme says exactly what is allowed and what is not, and the license cannot change that fact. As far as the contention is concerned that the Scheme allows for secondary use rights, that may be so, but the Jolly Roger has to apply for such rights, which it has not done.

[7] A brief issue to deal with is the Jolly Roger's contention that if there is no noise nuisance emanating from the premises, the University suffers no harm if the land use rights are not complied with. That is not correct. In various matters the courts have expressed the view that if an applicant established a contravention of land use rights, it has a clear right to relief, and does not have to show special damage or harm.²

[8] From the above it will be clear that I do not believe that there is a reasonable prospect that another court would find in favour of the Jolly Roger.

¹ Prophet v National Director of Public Prosecutions 2007 (6) SA 169 (CC)

² See: Hetherington & Others v Boathouse Langebaan ZAWCHC 132 (24 May 2023) and the authorities referred to therein.

[9] As far as seventh respondent is concerned ("the landlord"), the following is contended:

[9.1] That there is no evidence that the landlord either expressly or impliedly authorized the lessee to create a noise nuisance or to trade in contravention of the Scheme;

[9.2] That there was no demand made to the landlord before the application was launched, and for that reason the application should be dismissed; and,

[9.3] The Court did not say what steps should be taken by the landlord against the lessee, in order to alleviate the latter's unlawful actions.

[10] I am aware of the approach taken by Mc Kerron, that authority, either express or implied, to act in a certain way, is required in order to hold the landlord liable for the tenant's actions. "Authorisation" implies that the landlord gives the tenant the right to act in a certain way. That, in my view, is not the test. A landlord, having not authorized certain unlawful conduct on his property, but becoming aware thereof at some point in time, attracts a duty to act to address the unlawful conduct. In the case of this landlord, it became aware of the possibility of the conduct being unlawful at the latest in 2019, when the application was served on it. Thereafter it opposed the application instead of addressing the unlawful conduct.

[11] Is a formal demand required? In my view not. It would be exceedingly formalistic to require a formal demand. If the applicant can show that the landlord is aware of the unlawful conduct, but nevertheless does nothing to resolve the problem, that would be sufficient to bring liability for the landlord.

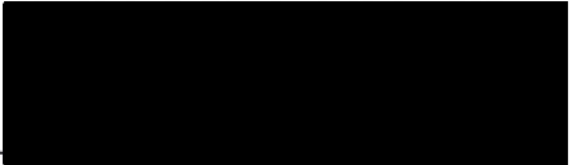
[12] Finally, Mr Louw, acting for the landlord, argued that I should have specified what actions were required of the landlord. He submits that it is

unreasonable to expect the landlord to litigate against the tenant, or to cancel the lease agreement. He suggests, it seems to me, that by forwarding one complaint letter which was received in 2016, the landlord has fulfilled his obligations. That, in my view is incorrect. The lease agreement specifically allows the landlord to cancel the lease should the tenant use the premises in an unlawful fashion. The landlord can also bring an application to enforce the terms of the lease. The fact that it may be inconvenient for the landlord to do so, does not mean that it is unreasonable to expect the landlord to take action.

[13] I do not believe that there is merit in either application for leave to appeal.

[14] I make the following order:

[14.1] The first and ninth, and seventh respondents' applications for leave to appeal are dismissed with costs.


SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

COUNSEL FOR APPLICANT:	Adv. MP Van der Merwe SC
ATTORNEY FOR APPLICANT:	Tim du Toit Inc
COUNSEL FOR FIRST AND NINTH RESPONDENT:	Adv. DJ van Heerden
ATTORNEY FOR FIRST AND NINTH RESPONDENTS:	VDT Attorneys Inc
COUNSEL FOR SEVENTH AND EIGHTH RESPONDENTS:	Adv. M Louw

**ATTORNEY FOR SEVENTH
AND EIGHTH RESPONDENTS:**

Barnard Inc

DATE HEARD:

23 October 2023

DATE OF JUDGMENT:

24 October 2023