

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO THE JUDGES: YES/ NO
(3)	REVISED.
Signature <i>[Handwritten Signature]</i>	
Date..... <i>28/8/2017</i>	

CASE NO: 3362/2016

In the matter between:

**COMBRETUMPARK HOME OWNERS ASSOCIATION
(ASSOCIATION INCORPORATED UNDER SECTION 21)**

APPLICANT

and

CUBANA LATINO CAFÉ TEN CC**1ST RESPONDENT****BENDOR EXTENSION 68 PORTION 1 (PTY) LTD****2ND RESPONDENT****POLOKWANE LOCAL MUNICIPALITY****3RD RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] The Applicant brought an application against the Respondents in terms whereof the following relief is sought:

- 1.1. Interdicting the First and Second Respondents from engaging in any activity in contravention of the Polokwane Town Planning Scheme and in particular from conducting or allowing to be conducted any form of business falling outside the Land Use Rights afforded in terms of the Polokwane Town Planning Scheme in respect of the property situated at Shop 16, Platinum Park Shopping Centre, 1 Pomelo Street, Polokwane, Erf 5085/1 Bendor Extension 68, Polokwane;
- 1.2. Interdicting the First Respondent from playing loud music on the property and causing loud noise emanating from the property thereby creating an actionable nuisance;
- 1.3. Interdicting the First Respondent from inconveniencing the occupiers of the premises under the control of the Applicant by playing loud music;
- 1.4. The First and Second Respondents to pay the costs jointly and severally.

No order is sought against the Third Respondent, and the Third Respondent is only cited herein as a possible interested party.

[2] In essence the Applicant seeks two forms of relief, namely:

2.2. An order interdicting the First Respondent from engaging in any activity in contravention of the Polokwane Town Planning Scheme and in particular from conducting a night club as opposed to a restaurant on the premises and

2.1. An order interdicting the First Respondent from playing loud music on the property which creates a nuisance for its members.

[3] The application is opposed by the First Respondent. The Second Respondent abide the decision of the Court.

[4] The Applicant is a homeowners association representing all the property owners in the scheme comprising of 315 town house units. The Second Respondent is the owner of the property known as Platinum Park Shopping Centre, which comprises of shops, including the shop used by the First Respondent. The First Respondent is conducting a business known as "CUBANA'S" from the aforementioned premises.

[5] The property from which the First Respondent conducts business is zoned in terms of the Third Respondent's Polokwane / Perksebut Town Planning Scheme 2007. Such zoning permits medical consulting rooms, shops and restaurants.

The First Respondent runs its business in an area that can only be described as an urban district.

[6] The Applicant alleges that the First Respondent is associated with live bands and / or loud music played into the early hours of the mornings. That the high noise levels are a nuisance to the Applicant in that it impairs on the rights of the property owners of the Applicant and it constitutes an unlawful actionable nuisance.

[7] As may be deduced from the nature of the relief sought by it, the Applicant's complaint is founded on what it contends to be the unacceptable level of noise, particularly music, emanating from Cubana, during the performances which take place on a regular basis.

[8] As per its internet website the First Respondent advertises itself as:

"Cubana is South Africa's only authentic Latino Social Caffè and eatery which provides the service of a cocktail bar and cigar lounge with a unique flavoursome cuisine. Our focus is to be a social Caffè and not a club or restaurant"

Furthermore, as part of its entertainment the First Respondent offers "flairing" and "flame shows" which can be described as setting alight alcohol which is spit from a person's mouth.

The aforementioned advertisement and entertainment offer are contained in Annexures "D" and "E1" to the Founding Affidavit.

- [9] The Applicant alleges further that the First Respondent's business can be best described as a night-club / bar. That its customers can often be found in the parking area in front and outside of the premises, continuing with the party atmosphere creating more loud noise. This night-club like atmosphere is a regular occurrence and can be associated with weekends starting in the afternoon and lasting into the early hours of the morning (2 am being a regular occurrence).
- [10] The Applicant alleges further that although these actions by the First Respondent are usually associated with weekends, it is not uncommon during the week to hear loud music emanating from the First Respondent's premises. On Annexure "E2" to the Founding Affidavit it is stated "the night will be switched on" during the 17 March 2016, being a Thursday. The invitation or advertisement further states that Dino Bravo will be featured, clearly referring to entertainment. On this basis the Applicant concludes that the First Respondent is not operating a restaurant in the normal sense of the word but rather a bar or night club.
- [11] The Applicant has annexed eight confirmatory affidavits by some residents of the adjacent town houses in close proximity of the First Respondent's premises marked annexures "F1 – F8". In the said affidavits the residents

complain and state that it is nearly impossible to have a good night rest as the loud music and noise emanating from the First Respondent's premises cause a serious interference to their physical comfort of human existence.

[12] The allegations as set out in paragraphs 6 to 11 above, have not been denied or disputed by the First Respondent in its answering affidavit. Consequently the facts relied upon by the Applicant are accepted as true and correct.

[13] The issues to be decided in this matter are the following:

13.1. Whether the First Respondent is engaging in any business activity in contravention of the Polokwane Town Planning Scheme, in particular conducting or allowing to be conducted any form of business falling outside the Land Use Rights afforded in terms of the Polokwane Town Planning Scheme;

13.2. Whether the Applicant has made out a proper case why it is entitled to an interdict directing the First Respondent to desist from playing loud music on the property causing loud noise which is an actionable nuisance.

[14] The property occupied by the First Respondent is zoned by the Third Respondent in terms of the Polokwane / Perskebult Town Planning Scheme 2007 for "Business 3" use, which allows the premises to be used for Single

Family Residence, Offices, Medical Consulting Rooms, Shops and Restaurants. This much can be seen from annexure “G” to the Founding Affidavit being a copy of the Zoning Certificate issued by the Third Respondent dated 3 March 2016.

[15] In terms of Part 2, under Definition of terms in the Town Planning Scheme:

“6.78 PLACE OF AMUSEMENT – means land used or a building designed or used, with a view to profit, as a public hall, theatre, cinema, music hall, concert hall, billiards room, sports stadium, skating rink, dance hall, night club, strip club, sport club, for trade or industrial exhibitions or for other recreational purposes”

“6.91 RESTAURANT – means a building or part of a building used for the preparation and sale of meals and refreshments, confectionary for consumption on the property and includes the subservient serving and consumption of liquor on the property, can also include a place of refreshment as well as a drive-through restaurant, but excludes a “PLACE OF AMUSEMENT as a primary right”

[16] If cognizance is given to the definition of a “RESTAURANT” it explicitly excludes a “PLACE OF AMUSEMENT”. In my view the First Respondent falls within the definition of a night club and therefore falls outside the definition of a restaurant. It can best be described as a place of amusement as per its own definition of cocktail bar and flame shows or flairing coupled with the fact of live bands or music playing into the night which is usually associated with the word “night-club”.

- [17] Clause 9.3 of the Polokwane / Perskebult Town Planning Scheme 2007 reads as follows:

“9.3. No person shall without consent being granted in terms of clauses 21, 22 or 24 hereof use, or cause or permit to be used, any building or part thereof for purposes other than the purpose for which it was zoned”

No such permission was given by the Third Respondent, as evident from the zoning certificate.

- [18] I accordingly make a finding that the First Respondent operates its business activity in contravention of the Land Use Rights afforded by the Polokwane Town Planning Scheme.

- [19] The First Respondent does not deny that as at the time the present proceedings were instituted against it, that is on 15 August 2016, it played loud music. The music played on the premises cannot be described as “Background” music that you would normally find in a restaurant.

- [20] Such music can be described as a disturbing noise as was aptly said in the matter of **University of Pretoria v The Partnership, Firm or Association known as Springbok Bar and Others (75442/2009) [2011] ZAGPPHC 86 (16 February 2011)** at paragraph 29 wherein Ebersohn AJ stated the following:

“At all relevant times there existed the NOISE CONTROL REGULATIONS – GAUTENG.....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 noise levels for ambient noise in districts, indicated in Table 2 of SANS 10103”

- [21] The factors which have been regarded as material in determining whether the disturbance is of a degree which renders it actionable, include (where the disturbance consists of noise) the type of noise, the degree of its persistence, locality involved and the times when the noise is heard. The test, moreover, is an objective one in the sense that not an individual reaction of a delicate or highly sensitive person who truthfully complains that he finds the noise to be intolerable is to be decisive, but the reaction of the reasonable man – one who, according to ordinary standards of comfort and convenience, and without any peculiar sensitivity to the particular noise, would find it, if not intolerable, a serious impediment to the ordinary and reasonable enjoyment of his property.
- [22] The above legal principle and test applied in determining whether a disturbance or noise is of a degree which renders it actionable were set out by Miller J (as he was then) in **De Charmoy v Day Star Hatchery (Pty) Ltd 1967 (4) SA 188 (D & C.L.D) at 192 D – F.**

[23] I proceed, then, to consider whether, in the light of the principle set out above, the evidence justifies the Applicant's assertion that we are here dealing with a serious and substantial invasion of the rights of its members.

[24] There is no evidence from the First Respondent to gainsay the Applicant's allegations that the First Respondent is associated with live bands and / or loud music played into the early hours of the mornings.

[25] The First Respondent in its answering affidavit does not depose to the absence of noise but simply indicate that such noise levels fall within acceptable levels.

[26] It has been stated by Binns-Ward AJ (as he then was) in the matter of **Laskey and Another v Showzone CC AND Others 2007 (2) SA 48 (C) para 19** as follows:

"Everyone is in general permitted in common law to use their property for any purpose they choose, provided only that the use of the property should not intrude unreasonably on the use and enjoyment by the neighbours of their properties. What constitutes reasonable use in any given case is dependent on various factors, including the general character of the area in question, persons living and working in an urban area would, for example reasonably be expected, in general, to be more forbearing about a higher level of noise intrusion into their lives than neighbours living in a rural housing estate. Social utility is another factor that might affect what owners and occupiers of property might reasonably be expected to put up with from their neighbours"

[27] It is admitted by the First Respondent that they do have DJ's that select and play music. Furthermore the First Respondent did not deny that such music is amplified. In my view, if such music is amplified there can be no distinction

between a live band and a DJ playing such music over loud speakers. The First Respondent does not deny the existence of noise pollution but state that such noise levels are within acceptable levels.

- [28] The Applicant has succeeded in showing that the noise generated from the First Respondent's night club is excessive and thus unreasonable. The test for reasonableness was expressed by Prof J.R.L Milton as follows:

"The determination of when an interference so exceeds the limits of expected toleration is admitted by invoking the test of what, in a given circumstances, is reasonable. The criterion used is not that of the reasonable man, but rather involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred. The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference with the comfort of his existence or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm." See **LAWSA, Joubert et al (first re-issue) Vol 19 Nuisance at para 189 pages 135 – 6.**

- [29] The First Respondent relies on three executive summary reports (noise measurement reports) to justify its contention that the noise levels were within acceptable levels. The first report is dated 14 February 2015 and compiled by one GR Dekenah. The second survey was done on 7 October 2015 and generated by Ship Practitioners (Pty) Ltd under the executive summary compiled by GR Dekenah. The third survey was done on 19 September 2016 and generated by Ship Practitioners (Pty) Ltd under the executive summary compiled by Andre Van Zyl and signed off by GR Dekenah.

[30] In my view the three reports cannot be relied upon to substantiate the reasonableness of the noise generated by the First Respondent. The three noise measurement reports refer to the municipal zoning area as the CBD (Central Business District) which is incorrect because the area from which the First Respondent operates their night club can only be described as an urban district. This then means that the environmental noise survey was conducted from the premise that the area from which the First Respondent conducts its business is a CBD whilst the area is actually an urban district. Accordingly, these noise measurement reports are irrelevant for purposes of the present case and same should therefore be disregarded.

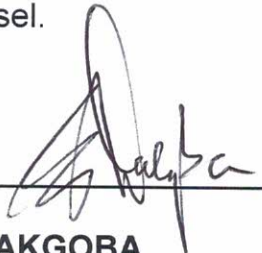
[31] I come to the conclusion that the Applicant made out a proper case that the sound contribution by the First Respondent, from a residential suitability perspective, is such a nuisance that it constitutes an unlawful and actionable nuisance.

[32] In the result I grant the following order:

- (1) The First Respondent is interdicted from engaging in any activity in contravention of Polokwane Town Planning Scheme and in particular from conducting or allowing to be conducted any form of business falling outside the Land Use Rights afforded in terms of the Polokwane Town Planning Scheme in respect of the

property situated at Shop 16, Platinum Park Shopping Centre, 1 Pomelo Street, Polokwane.

- (2) The First Respondent is interdicted and restrained from inconveniencing the occupiers of the premises under the control of the Applicant by playing loud music. Without derogating from the generality of the meaning or description of a loud music, the First Respondent shall not cause a noise pollution or sound contribution in excess of the acceptable rating of 45 dBA (decibels).
- (3) The First Respondent is interdicted and restrained from playing loud music, with the sound thereof measuring in excess of 45 dBA on the property and causing loud music emanating from the property thereby creating an actionable nuisance.
- (4) The First Respondent shall pay the costs of the application which shall include the costs of Senior Counsel.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Heard on	:	18 August 2017
Judgment Delivered	:	29 August 2017
For Appellant	:	Adv. J J Hattingh SC
Instructed by	:	Bosman Attorneys Polokwane
For Respondents	:	Adv. R S Van Riet SC
Instructed by	:	Pepler O' Kennedy c/o Rheeder Attorneys Polokwane