

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO : 13941/2010

In the matter between:

KWADUKUZA MUNICIPALITY

Applicant

VS

DEOSHINEE GOVENDER

Respondent

J U D G M E N T

K PILLAY J

[1] The Applicant KwaDukuza Municipality, seeks an interim interdict in the following terms against the Respondent, Deoshinee Govender.

“2.

- a) *that the Respondent is hereby interdicted and restrained from operating a night club or any place of public amusement from the premises known as Erf 6 Shaka’s Kraal or 57 Main Road, Shaka’s Kraal until or unless:*
 - i) *he has obtained a written special consent to do so in accordance with the provisions of the Shaka’s Kraal Town Planning Scheme and the KwaZulu-Natal Planning and Development Act No 6 of 2008; and*
 - ii) *he has obtained a written licence to do so from the Applicant in terms of Section 2 of Business Act No 71 of 1991;*

- b) *that the Respondent is interdicted and restrained from causing or allowing the use of any building on the premises known as Erf 6 Shaka's Kraal or 57 Main Road, Shaka's Kraal until or unless such building has been constructed in accordance with plans approved by the Applicant in terms of the National Building Regulations and Building Standards Act No. 103 of 1997 and a certificate of occupancy in terms of Section 14 thereof has been issued;*
- c) *that the Respondent is to pay the costs of this application on the attorney and client scale;*
- d) *further and/or alternative relief.*

That paragraphs 2(a) and (b) above will operate as interim order, with immediate effect, pending the return day hereof."

[2] It has been submitted that urgent relief was no longer persisted with.

[3] This case essentially turns on whether a restaurant licence permits dancing and therefore does not fall foul of the provisions of the Shakaskraal Town Planning Scheme (the Scheme) or the Businesses Act 71 of 1994 (the Business Act). It is common cause that the Respondent has a licence to operate a restaurant and that dancing is allowed on Friday and Saturday nights. It is also not in dispute that the Applicant refers to his business as Doeshinees Nite Club and that he does not have a licence to operate a nightclub.

[4] The Applicants case is that the Respondent, conducts business from premises known as Lot 6, Shaka's Kraal, which property he claims to own. On 4 August 2009 the Applicant caused a contravention notice

in terms of s 18 of the KwaZulu-Natal Planning and Development Act 6 of 2008 to be served on the Respondent. The reason for the notice was that the following illegal activities were being carried out on the property:

- the business of a night club; and
- the erection of buildings without approved building plans.

It emerged however that buildings were in fact approved although there is some controversy about how they came to be so approved. For the purposes of this dispute I consider that issue irrelevant.

On 7 November 2009, the Applicant lodged a “*special consent application*” to use the aforesaid property as a place of public amusement. In his memorandum in support of the special consent application the Respondent avers that he is currently using the building as a dance hall. The application for special consent was refused.

[5] On 20 August 2009 a prohibition order was served on the Respondent. The Respondent was ordered to discontinue the illegal activities being carried out on the property. Thereafter there were numerous correspondence between the attorneys representing both parties. There was no settlement and hence this application ensued. The application was refused.

[6] In addition, it is submitted that the Respondent is using the building in question in a manner contrary to the approved plans, as the approved plan does not in any way make provision for a dance floor or propose that any part of the building be used for dancing.

[7] It is not in dispute that a Town Planning Scheme in Course of Preparation as contemplated in chapter IV of the Town Planning Ordinance No 27 of 1949, applies in respect of the property and a scheme as defined in Section 1 of the KwaZulu-Natal Planning and Development Act No 6 of 2008 (“PDA”) continues to apply.

[8] In terms of the foregoing the property is zoned “*commercial*”. This means that such property’s use is prescribed in terms of “*table C : use zones*” to the scheme.

[9] Buildings or land on property zoned commercial may therefore not be used as a place of public amusement unless special consent has been obtained.

[10] The Applicant submits that a place of public amusement is a specifically defined used and is distinct from any of the freely permitted uses of property zoned commercial. Put differently, the scheme prohibits the use of property zoned commercial for a purpose which falls within the definition of place of public amusement unless special consent therefor has been granted.

[11] The Applicant contends that what is commonly referred to as a ‘nightclub’, or ‘dance hall’, falls squarely within the definition of place of public amusement.

[12] Further, that Section 2(3) of the Business Act No 71 of 1991 (“the Business Act”) provides that no person may carry on business in connection with, *inter alia*, the sale or supply of entertainment facilities without a business licence. No such licence was applied for or issued to

the Respondent.

[14] The Respondent on the other hand contends that he has the necessary license to trade as a restaurant. He did submit plans for alterations and additions to the property to accommodate a nightclub. He applied, for special consent to operate a place of public amusement on the advice of an employee of the Applicant. This was rejected.

[15] On instructions of another employee he did not appeal the refusal, as he was informed that the by-laws would be amended and he would no longer require special consent to operate his business.

[16] He contends that the Shakaskraal Town Planning Scheme defines a restaurant as *“a building or portion of a building used primarily for the preparation and sale of food, confectionary and beverages for consumption on the premises”*.

[17] He operates his, establishment within the definition of ‘restaurant’ with one addition, dancing on Friday and Saturday nights. According to him, the scheme does not prohibit dancing in restaurants.

[18] In reply the Applicant attaches various newspaper advertisements which advertise the Respondents business as a nightclub providing music and dancing on Friday and Saturday nights, at a specified fee. No reference therein is made to a restaurant.

[19] There is no dispute that the Respondent has a valid restaurant licence and that on his version on Friday and Saturday nights he runs a nightclub, called Doeshinees Nite Club, which allows dancing. It is also

common cause that the Respondent does not have a licence to operate a nightclub.

[21] The issues for consideration herein therefore are whether the Respondent's business amounts to:

- i) a place of public amusement in terms of the Shakaskraal Town Planning Scheme ('the Scheme') or
- ii) the sale or supply of entertainment facilities in terms of the Businesses Act 71 of 1991 ('the Businesses Act').

[29] The purpose for a zoning scheme was set out succinctly in *Chapman's Peak Hotel (Pty) Ltd & Another v Jab & Annalene Restaurants CC t/a O'Hagans*¹ at para 12 as follows:

“[T]he general purpose of a zoning scheme is to determine use rights and over the utilisation of land in the area of jurisdiction of a local authority. The purpose of zoning and its concomitant restriction on the use rights and over the utilisation of land in the area of jurisdiction of a local authority. The purpose of zoning and its concomitant restriction of the use rights attaching to land is to provide for the orderly, harmonious and effective development of the affected area. It is the duty of the local authority to comply and enforce compliance with, inter alia, the provisions of the Ordinance and the zoning scheme. A zoning scheme is promulgated in the interests of the inhabitants of an area. It is legislative in character and is binding not only on owners and

¹ [2001] 4 All SA 415 (C)

occupiers of land subject to the scheme, but also on the administering local authority.”

[22] According to the scheme the property is zoned as commercial and may not be used as a ‘place of public amusement’ unless special consent has been obtained. Examples for which the property may be used include that of a commercial workshop, shop and restaurant.

The Respondent’s interpretation of the definition of the scheme relies, it seems, on the linguistic definition of “dance hall” contained in the Concise Oxford English Dictionary, which refers to dance hall as “a large public hall or building where people pay to enter and dance. The Respondent contends that this is not the type of business he is operating.

As correctly submitted on an interpretative level the Respondent’s focus on the word “dance hall” and his reliance on a single definition of those words are indeed incorrect.

[23] The scheme defines a ‘place of public amusement’ as a building or land used for public entertainment and includes a theatre, cinema, music hall, concert hall, amusement arcade, dance hall, skating rink, race tracks, sports area, exhibition hall, billiards room and fun fair.

[24] There is however no definition of ‘dance hall’ in the scheme. The Shorter Oxford English Dictionary defines ‘dance hall’ as a place where public dances are held.

‘Websters Third New International Dictionary (1993) defines a ‘dance hall’ as a ‘large room set aside or suitable for dances, a public hall

offering facilities for dancing’.

Online ² dictionaries define a dance hall as a ‘special building or large room for dancing in’ and ‘a building or part of a building with facilities for dancing’. The Applicant submits, correctly in my view, that this definition most reasonably accords with the meaning which should be attributed to the words in the Scheme.

[27] In *Rex v Dracoulis and Others* ³ it was alleged that the accused had on a Sunday wrongfully and unlawfully kept open to the public a place of public amusement or entertainment for the purpose of dancing. On Saturday nights patrons, with the permission of the accused, pushed the tables aside and danced to the orchestra provided. On several Saturday nights dancing had continued to 3 a.m. of the following morning. The accused having been convicted, in an appeal, *Van Winsen AJ* held that the appellants had kept open a place of public amusement for the purpose of dancing. The following was stated ⁴ :

“The question is whether regard being had to this evidence the Crown has established that the accused kept open a place of public amusement for the purpose of dancing. In my view this evidence does establish the charge as laid. I am quite prepared to accept, as contended by Mr Kellaway, who appeared for the appellants, that the accused were carrying on a restaurant in the premises. I can even go further and say that this was without doubt the principal business that the accused were carrying on in the premises at Ebenezer Road. Non constat that they do not also keep

² <http://www.thefreedictionary.com/dancehall>; <http://dictionary.cambridge.org/dictionary/british/dance-hall>;

³ 1951(3) SA 751 (C);

⁴ Supra 754 C-D

open a public place of amusement for the purpose of dancing.”

[28] The Judge continued at:⁵

“It seems to me, therefore, that if the proprietors of a restaurant provide an orchestra to which the patrons can dance and they on several occasions allowed their patrons to use their floor for the purpose of dancing, it is very difficult to escape the conclusion that they are keeping open a public amusement for the purpose of dancing. Mr Kellaway did not contend that allowing the public to dance to music did not constitute a form of public amusement. Even if the dancing was of the nature alleged by him, namely, that couples danced in one spot, once must assume that at any rate the couples concerned derived some amusement from their exercise.”

[30] I accordingly conclude that a restaurant where dancing takes place regularly as does the Respondent, is a place of public amusement, as referred to in the Scheme. Without special consent, which it is common cause that the Respondent does not have, he acts in contravention of the Scheme by continuing to operate as night club.

[31] Mr Seery who appeared for the Respondent, argued that, the scheme, in its definition of restaurant, does not prohibit or exclude dancing. This argument cannot be sustained. If it were the case then there would be no need for nightclub licences or need for special consent to run a place of public amusement. Anyone with a restaurant licence would simply be permitted to allow dancing at any time.

⁵ 755 E-G

[32] Section 2 (3)(a) of Businesses Act 71 of 1991 provides:

“No person shall, with effect from the date specified in a notice under subsection (1) in respect of a specific licensing authority carry on any business in the area of that licensing authority.

(9) Unless, in the case of a business referred to in item 1(1) or 2 of Schedule, he is the holder of an apposite licence issued to him by the licensing authority in respect of the business premises concerned.

Item 2 of the aforesaid Act deals with the provision of certain types of health facilities or entertainment. Item 2(f) refers to “keeping or conduction a nightclub or discotheque”

[33] The parties have argued the matter on a full set of papers. Thus, if the Applicant has succeeded in making out a case, for final relief, there is no reason why this Court should not grant such final relief.

[34] It is trite that the requisites for the right to claim a final interdict are:

- (a) a clear right;
- (b) an injury actually committed or reasonably apprehended; and
- (c) the absence of similar protection by any other ordinary remedy.

[35] As correctly submitted a local authority is entitled to an interdict to curtail an infringement in respect of which it is the enforcement authority.

The Applicant's 'clear right' flows from its position as representative and guardian of its citizens.

See *Tzaneen Local Transitional Council v Louwet Uxor and Another*⁶

If the municipality concerned were unable, in the interests of public safety, to regulate this type of industry within its jurisdiction, its power to comply with its statutory obligations would be seriously undermined. It would be consequently more difficult to prevent a similar tragedy to the one that befell the well-known Throb Nightclub, if it were unable to regulate the businesses that fell within its jurisdiction.

[38] In my view there is no alternative remedy available to the Applicant.

In the circumstances I make the following order:

- (a) **that the Respondent is hereby interdicted and restrained from operating a night club or any place of public amusement from the premises known as Erf 6 Shaka's Kraal or 57 Main Road, Shaka's Kraal until or unless:**
 - iii) **he has obtained a written special consent to do so in accordance with the provisions of the Shaka's Kraal Town Planning Scheme and the KwaZulu-Natal Planning and Development Act No 6 of 2008; and**
 - iv) **he has obtained a written licence to do so from the Applicant in terms of Section 2 of Business Act No 71 of 1991;**
- (b) **that the Respondent is interdicted and restrained from causing or allowing the use of any building on the premises known as Erf 6 Shaka's Kraal or 57 Main Road, Shaka's Kraal until or**

⁶ 1996(2) SA 860 @ 831 I

unless such building has been constructed in accordance with plans approved by the Applicant in terms of the National Building Regulations and Building Standards Act No. 103 of 1997 and a certificate of occupancy in terms of Section 14 thereof has been issued;

(c) that the Respondent is to pay the costs of this application.

K PILLAY J

Date of Judgment: 22 July 2011

Counsel for Applicant: **Advocate G D Goddard**

Instructed by : SHEPSTONE & WYLIE
Applicant's Attorneys
24 Richefond Circle
Ridgeside Office Park
Umhlanga Rocks
c/o 35 Samora Machel Streets
(formerly Aliwal Street)
DURBAN

Counsel for Respondent : **Advocate T E Serry**

Instructed By: RAVIN SINGH, ASHEENA SINGH &
COMPANY
Respondent's Attorneys
c/o Vinay Yetwaru
Suite 1301, 13th Floor
Denor House
Cnr Joe Slovo & Anton Lembe Streets
DURBAN

