

S.J. & M.M. HILCOVE (PROPRIETARY) LIMITED

t/a KENTUCKY FRIED CHICKEN

MISSISSIPPI (PIETERMARITZBURG) (PROPRIETARY)

LIMITED t/a MISSISSIPPI SEAFOODS

and

THE CITY OF PIETERMARITZBURG

SMALBERGER, JA -

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

S.J. & M.M. HILCOVE (PROPRIETARY) LIMITED

t/a KENTUCKY FRIED CHICKEN

First Appellant

MISSISSIPPI (PIETERMARITZBURG) (PROPRIETARY)

LIMITED t/a MISSISSIPPI SEAFOODS

Second Appellant

and

THE CITY OF PIETERMARITZBURG

Respondent

CORAM:

CORBETT, SMALBERGER, NESTADT, JJA,

et NICHOLAS, KUMLEBEN, AJJA

HEARD:

7 MARCH 1988

DELIVERED:

29 MARCH 1988

J U D G M E N T

SMALBERGER, JA :-

I have had the privilege of reading the

judgment of NICHOLAS, AJA. I am, however, in respectful

disagreement /

disagreement with the conclusion reached by him that the construction carried out in and around the intersection of Church and Boshoff Streets ("the intersection") has resulted in a closure of part of Church Street as envisaged by section 211(2) of the Ordinance.

The plans, Annexures "I" and "J", show the nature of the changes that have been brought about to Church Street immediately to the east of the intersection, and adjacent to the appellants' fast food outlets, as a result of the construction of the "tunnel" and "ramp". Most of the salient features have been described in the judgment of NICHOLAS, AJA.

I would add the following : Before construction commenced the relevant part of Church Street carried two lanes of traffic

in /

in either direction, (i.e. from west to east and vice versa),

and was bounded on its northern and southern sides by pavements.

On the southern side of Church Street, almost directly

opposite the appellants' premises, there were four metered

parking bays flanked, on the west, by a loading bay, and, on

the east, by a bus bay. There were no parking bays on the

northern side of Church Street outside the appellants'

premises; in fact the parking, and at peak hours even the

stopping, of motor vehicles on the northern side of Church

Street was forbidden. As a result of the construction carried

out the relevant section of Church Street now comprises only

one lane of traffic in either direction. The parking and

loading facilities on the southern side of Church Street have

not /

not altered significantly. On the northern side the ramp and its protective walls have been interposed between the northern lane carrying traffic from west to east, and the pavement outside the appellants' premises. East of the intersection, what previously comprised the northernmost traffic lane in Church Street, now consists of a concrete "deck" extending for approximately 30 metres (over part of which vehicles leaving from the Selgro Centre parking area pass before proceeding east in Church street) followed by the "open section" (which comprises the ramp) extending for a distance of some 80 metres.

The cardinal issue in the present appeal, in my view, is whether the re-arrangement of the physical features

of /

of Church Street as outlined above constitute no more than an alteration of Church Street (within the meaning of section 209(1)(a)), or a closure of part of Church Street (within the meaning of section 211(2)). To answer this question one must adopt an approach consonant with the spirit and intention of the Ordinance as reflected in its relevant provisions.

The word "alter" in section 209(1)(a) is not defined in the Ordinance. In keeping with the customary canons of construction it must be given its ordinary, grammatical meaning. The Oxford English Dictionary (Vol 1, p 255) gives the primary meaning of "alter" as "to make (a thing) otherwise or different in some respect : to make some change in character, shape, condition, position, quantity, value, etc

without /

without changing the thing itself for another; to modify,

to change the appearance of". In Webster's Third New

International Dictionary (Vol 1, p63) its primary meaning is given

as "to cause to become different in some particular characteris=

tic (as measure, dimension, course, arrangement or inclination)

without changing into something else". The notion of alter=

ing a street in terms of section 209(1)(a) therefore postulates

changing its configuration or physical features while retaining

its essential characteristics. Where such change results in

the partial closure of a street within the meaning of section

211(2), the provisions of that section have to be complied with.

I accept that the word "close" in section 211(2) means, prima

facie, "close for all traffic", with the necessary concomitant

that /

that what has been so closed no longer constitutes a street, or part of one. This I conceive to be the notion underlying the words "be free of further use as a street" in section 211 (2)(h). As a matter of logic and law, therefore, closure of a street, or part thereof, cannot occur if the affected area still forms part of a street, or can be used as a street.

If, in the present instance, the ramp had not been constructed, but the open section had been built upon, this would have amounted pro tanto to a closure of part of Church Street (cf. Sheray Investments (Pty) Ltd v Town Council of Springs and Others 1984(4) SA 80 (W)). This is because a section of Church Street would effectively have been excised, and would no longer be capable of use as a street.

Non/.....

Non constat that the position which in fact exists in Church Street at present leads to the same conclusion. The ramp is being used by vehicular traffic, at least by the Council's busses, and may also be used by "ordinary motorists" in terms of the extended use envisaged by Mr Cornell. That pedestrians, and certain vehicles, are debarred from using it does not in my view detract from the fact that the ramp is being used as a street serving the traffic requirements of Pietermaritzburg, albeit in a specialised form. Such user amounts to limited or controlled user of part of Church Street as opposed to a closure of part of Church Street, which presupposes a prohibition of all user. The Ordinance empowers the Council to limit and control the use of streets. Under

section /

section 208 the management and control of all streets

vests in the Council. In terms of section 266 the Council

may make bylaws (provided they are not inconsistent with or

repugnant to the provisions of the Ordinance), inter alia,

"regulating or restricting traffic on and the use of public

streets and public places (including pedestrian traffic

on footpaths and pavements) " (subsection

(1)(r)(i)). In terms of these powers the Council

could have reserved the use of the northernmost lane of

Church Street (prior to the construction work being carried

out, and over the area which has been effected by it) for

use by busses only, if needs be by providing railings or

guards to prevent other vehicles or pedestrians

from /

encroaching on the reserved area. Although pedestrians and other traffic would have been deprived of the use of the reserved portion of the street, the Council's conduct would not, in my view, have resulted in a closure of that portion of Church Street reserved for busses. This situation does not differ materially from that which pertains if the ramp were to be used exclusively by the Council's busses.

Where previously a horizontal portion of Church Street approximating the area of the deck and open section above the ramp could have been reserved for use by busses only, now the ramp, which has been substituted for the horizontal portion, is. If the ramp is used, or to be used, by other motorists as well, the position would remain the same, for use

would /

would then be limited to motor vehicles generally. The mere exclusion of pedestrians from a section of a street cannot constitute a closure of that section of the street.

In the result I am of the view that, on a proper interpretation of the relevant sections of the Ordinance, the construction work carried out at the instance of the Council amounts, in essence, to no more than a re-arrangement of the physical features and configuration of Church Street in the area in question and, as such, an alteration of Church Street in terms of section 209(1)(a) of the Ordinance. The construction of the open section or ramp does not, in my view, amount to, or bring about, a closure of part of Church Street within the meaning of section 211(2) of the Ordinance.

There /

There remains to be considered whether the alteration to Church Street has resulted in "the deprivation or substantial deprivation of the public of the enjoyment of its rights in or to any public street or public place" in the sense contemplated by section 209(1). "The public" means the community in general (cf. The Oxford English Dictionary : Vol VIII, page 1558), and is not limited to those members of the community who seek to patronize the appellants' food outlets. The word "deprivation" in its context means "total deprivation" as opposed to "substantial deprivation". There can be no question of the general public having been totally deprived of their enjoyment of their rights in or to Church Street, or the affected part of Church Street, as a result of the /.....

the alterations. Nor can it be said that they have been substantially deprived of such rights. From the point of view of both motorists and pedestrians the situation that exists may be less convenient than before. To that extent the enjoyment of their rights may have been reduced, but such deprivation cannot be regarded as substantial. Motorists can still travel in Church Street in both directions, pedestrians may still walk on its pavements, or cross it, except where the ramp construction prevents them from doing so, and the public may use the ramp, if not as motorists or pedestrians, then at least as passengers in the Council's busses.

It follows that in my view the appeal should be dismissed with costs, including the costs of two counsel.