THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 775/11

Not reportable

In the matter between:

CITY OF JOHANNESBURG	**Appellant**
and	
CANTINA TEQUILA	**First Respondent**
BOWLWEB INVESTMENTS CC	**Second Respondent**

Neutral citation: *City of Johannesburg v Cantina Tequila* (775/2011) [2012] ZASCA 121 (20 September 2012).

Coram: Brand, Lewis, Cachalia, Bosielo and Theron JJA

Heard: **6 September 2012**

Delivered: **20 September 2012**

Summary: **Where a Town Planning Scheme includes among its primary rights the conduct of a hotel business, the scheme cannot be interpreted to permit a stand alone restaurant and bar.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Kolbe AJ sitting as court of first instance):

1 The appeal succeeds with costs including the costs of two counsel. The order of the high court is set aside and the following order is substituted in its place:

'(a) The first and second respondents are interdicted and restrained from using or causing or permitting the use of Erf 1918 Witkoppen Extension 85 Township, Registration Division IQ, Gauteng and situate at Unit 13 Valley View Centre, Campbell Road, Fourways (the property), for the purpose of a restaurant or bar.

(b) The first and second respondents are ordered to forthwith cause the demolition of the corrugated iron structure erected at the entrance to and enclosing the outside patio of the property.

(c) Failing compliance in full by the respondents with the terms and provisions of the order in para (b) above within one week from date hereof, the sheriff of the court is authorised and directed to attend to the necessary demolition and the removal of the rubble arising from the demolition.

(d) The first and second respondents are ordered to pay the costs of and in connection with the necessary demolition and removal of the rubble, jointly and severally.

(e) The first and second respondents are ordered to pay the costs of this application, jointly and severally.'

2 The date contemplated in (c) above is the date of this court's order.

JUDGMENT

CACHALIA JA (Brand, Lewis, Bosielo and Theron concurring):

[1] This is an appeal against a decision of the South Gauteng High Court (Kolbe AJ) dismissing an application by the appellant, a metropolitan municipality, to interdict the respondents from conducting a restaurant and bar business on a property in Sandton allegedly in contravention of the Sandton Town Planning Scheme (the scheme). The high court upheld the respondents' assertion that the business did not contravene the scheme. The appellant seeks to reverse this finding and comes before this court with leave of the high court. The essential dispute between the parties is whether the scheme, properly interpreted, permits the operation of a restaurant and bar business on the property.

[2] The municipality's authority to regulate land use within the Sandton area comes from the Town-Planning and Townships Ordinance 15 of 1986. The principal instrument for carrying out this function is a town-planning scheme.[1] The general purpose of a town-planning scheme – sometimes referred to as a 'zoning scheme' – must be directed towards:

'the co-ordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote the health, safety, good order, amenity, convenience and general welfare of such area as well as efficiency and economy in the process of such development.'[2]

[1] Provided for in Chapter II.
[2] Section 19.

[3] Clause 12 of the scheme is relevant to this appeal. Appendix III to this clause indicates the purposes for which land may be used or on which buildings may be erected and used. The property that is the subject of this dispute is zoned 'Special' in terms of the scheme. This means that the property may be used only for the special purposes identified in the scheme. These special purposes are referred to as 'primary rights' or more appropriately as 'primary use rights' – as the municipality refers to it – and may be exercised without the consent or permission of the municipality. Certain other rights referred to as consent rights may be exercised with the consent of the municipality – an issue that is relevant to the respondents' alternative contention discussed below at paras 10-12.

[4] The annexure to the scheme, referred to in the papers as the amendment scheme 02-1649 (the amendment scheme), identifies the following primary use rights and consent rights that are applicable to this property.

'Offices, showrooms, including motor showrooms, public garages and motor cities, hotels, specialised extensive retail facilities including factory shops, value centres, flea markets, home and garden improvement centres and DIY centres, and with the consent of the local authority, light industrial/commercial purposes, places of amusement, places of instruction, *recreational purposes as may be permitted with the written approval of the Council* and which do not create any nuisance, noise, dust, smoke or smells.' (Emphasis added.)

[5] It is apparent from a plain reading of the amendment scheme that the primary land use rights identified do not include a restaurant or bar. However, one of the rights identified is that of a hotel. The high court upheld the respondents' contention that because hotels usually also have restaurants and bars it follows that the amendment scheme also permits stand alone restaurants and bars. The learned judge reasoned that it would lead to absurdity and

anomaly to interpret the primary use rights to exclude a restaurant or bar because this would mean that a hotel would not be able to have, as an ancillary use, a restaurant or bar.

[6] I disagree with this approach. The language of the clause is plain and unambiguous. It permits only identified primary use rights, not any other uses. Significantly, excluded from the identified uses is any reference to a 'place of refreshment', which the scheme defines as including a restaurant, but not a bar.[3] This must mean that drafters of the amendment scheme probably consciously excluded any 'place of refreshment' – including a restaurant – from the clause.

[7] Had the restaurant and bar business been part of a hotel, there would have been merit in the submission that the business is ancillary to the hotel, and does not detract from the primary right of a hotel. But it does not follow that because a restaurant and bar may be part of the ancillary uses of a hotel, they may also be read into the list of primary rights, as the high court found.

[8] A court is entitled to find that an interpretation is absurd if an omission is so glaring or out of kilter with the overall purpose of the scheme that the result could simply not have been contemplated. But a court may not, under the guise of a concern to avoid absurdity, ignore the clear language of a provision simply because of any perceived harshness or lack of wisdom.[4] Nor may it construe the provision in a manner that the language does not permit, for in so doing it is improperly substituting its will for that of the lawmaker.

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[3] 'Place of refreshment' includes a restaurant, tea room and coffee house, the retail sale of meals and refreshments, fresh produce, cold drinks, foodstuffs and reading matter, but excludes a hotel, residential club, drive-in restaurant and boarding house, and also excludes the sale or supply of liquor other than at tables at which an ordinary meal (as defined in the Liquor Act No 87 of 1977) is being actually supplied to customers.'

[4] *Geue & another v Van der Lith & another* 2004 (3) SA 333 (SCA) para 15.

[9] By concluding that a restaurant and bar should be added to the lawmaker's list of permissible uses so as to avoid absurdity and anomaly, the learned judge improperly substituted her will for that of the lawmaker. Although it may appear odd that the primary rights include hotels but not restaurants and bars, I do not think that this omission is so glaring or out of kilter with the purpose of the scheme that it can be said that such a result could never have been contemplated. On the contrary there may be sound policy reasons why the lawmaker would permit hotels but not bars and 'places of refreshment' such as restaurants. It follows that the high court erred in its conclusion that the primary use rights in the scheme permitted the conduct of the business of a restaurant and a bar.

[10] The respondents contend in the alternative that even if the scheme did not permit these uses, the municipality consented to the first respondent conducting a restaurant business on the property. There is no factual basis for the contention.

[11] These are the facts: On 30 March 2006 Mr H P Roos, a town planner, wrote to the municipality on behalf of the respondents to enquire whether a bottle store, butcher or restaurant is included in the list of permissible uses or whether a rezoning or consent use application would be required for these uses. The municipality responded to the 'query' in the following terms:

'Your query dated 30 March 2006 regarding the inclusion of bottlestore, butcher and restaurant in the current zoning, was discussed [at] a Planning Permission Meeting (PPM) held on the 11 May 2006.

Based on the information provided, the above uses are included in terms of the approved rights.

The applicant's attention is drawn to the following:

- This information does not bind the Municipality in anyway whatsoever to approve any application on the subject property.
- The information in the above regard should not be seen or interpreted as approval in principal of any application that may follow suit on the subject property.'

[12] Relying on this exchange of correspondence, the respondents contend that the municipality's response amounted to a formal approval or consent for a restaurant on the property. The contention is utterly without any merit: first, the letter from the town planner was not an application for the approval of a restaurant business, but merely a 'query' as to permissible uses under the scheme; second, the municipality conveyed the information to the respondents specifically on the basis that it was not bound to approve any *future* application based on this information. At best for the respondents the municipality gave them a non-binding opinion on their prospects for approval of a restaurant – nothing more.

[13] What remains is a dispute over whether the respondents must demolish a structure clad with corrugated iron, which they erected at the entrance to and enclosing the patio of the restaurant, without the municipality's permission.

[14] In terms of s 4 of the National Building Regulations and Building Standards Act 103 of 1977, no structure that falls within the ambit of the definition of a building may be erected without the written approval of the local authority. No approval was obtained for the erection of the structure. The Act defines a building as including:

'*(a)* any other structure, whether of a temporary or permanent nature and irrespective of the materials used in the erection thereof, erected or used for or in connection with –

(i) the accommodation or convenience of human beings or animals;

. . .'

[15] The structure obviously falls within the definition of a 'building'. However, the high court refused to order the demolition of the structure after it found that there was a dispute of fact on the papers as to whether the structure was a building or merely a pergola, for which permission was not required, as the respondents contended. Counsel for the respondents wisely did not press this contention before us as it too is devoid of any merit.

[16] In the result the following order is made:

1 The appeal succeeds with costs including the costs of two counsel. The order of the high court is set aside and the following order is substituted in its place:

'(a) The first and second respondents are interdicted and restrained from using or causing or permitting the use of Erf 1918 Witkoppen Extension 85 Township, Registration Division IQ, Gauteng and situate at Unit 13 Valley View Centre, Campbell Road, Fourways (the property), for the purpose of a restaurant or bar.

(b) The first and second respondents are ordered to forthwith cause the demolition of the corrugated iron structure erected at the entrance to and enclosing the outside patio of the property.

(c) Failing compliance in full by the respondents with the terms and provisions of the order in para (b) above within one week from date hereof, the sheriff of the court is authorised and directed to attend to the necessary demolition and the removal of the rubble arising from the demolition.

(d) The first and second respondents are ordered to pay the costs of and in connection with the necessary demolition and removal of the rubble, jointly and severally.

(e) The first and second respondents are ordered to pay the costs of this application, jointly and severally.'

2 The date contemplated in (c) above is the date of this court's order.

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JUDGE OF APPEAL

APPEARANCES

For Appellant:	J Both SC (with him A W Pullinger)
	Instructed by:
	Moodie & Robertson, Johannesburg
	Claude Reid Inc, Bloemfontein
For Respondent:	L G F Putter
	Instructed by:
	Kuilman Mundell & Arlow, Johannesburg
	Webbers, Bloemfontein