

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 19245/2011

In the matter between-

STELLENBOSCH MUNICIPALITY

Appellant

and

PETER DANIEL ADAMS

First Respondent

MAGDALENE ADAMS

Second Respondent

Court: VAN STADEN, AJ

Heard: 2 DECEMBER 2011

Judgement: 6 DECEMBER 2011

JUDGMENT

VAN STADEN, WnR

1. The Applicant applied urgently for an order interdicting the Respondents from conducting the business of an off-consumption liquor store known as "Die Baksteenhuis" at Erf 8837, Stellenbosch.
2. The Second Respondent however is not the holder of a liquor store licence but a special licence (off-consumption) granted by the Western Cape Liquor Board in 2005, in terms of the Liquor Act, Act 27 of 1989.

3. The said Erf 8837 is allegedly zoned in terms of the Stellenbosch Municipality Zoning Scheme Regulations ("the zoning regulations") for "Group Housing". In about August 2008 the Respondents submitted an application for a special development in terms of Section 10.3.2(d) of the zoning regulations. Such a special development would allow the use of a minor portion of the dwelling unit in question for a home enterprise. This application was refused by the Applicant on 23 June 2009.
4. The Respondents subsequently appealed in terms of Section 44(1) of the Land Use Planning Ordinance 15 of 1985 ("LUPO") to the Minister of Environmental Affairs and Development Planning of the Western Cape Government. This appeal was dismissed on 24 June 2011.
5. In the answering affidavit the Respondents admit that Erf 8837 is zoned for Group Housing as provided for in Section 10.3.1 read with Section 1 of the zoning regulations. These regulations provide that the normal development (primary use?) of the property is one dwelling unit on each group housing erf. The special development (consent use?) that may be applied for includes a home enterprise as referred to above.
6. The Respondents belatedly brought an application to review the Applicant's decision to refuse the said application for a special development. The review was also aimed at the decision of the Department of Environmental Affairs and Development Planning to dismiss the appeal.

7. On 2 December 2011, when the application for an interdict was heard by this court, the parties agreed to postpone the review to 15 February 2011. No agreement could however be reached in respect of the application for an interdict.
8. Mr Jethro, counsel for the Respondents, submitted that in the event of an interdict being granted, the operation thereof should rather be suspended. Mr Papier, counsel for the Applicant, on the other hand referred to *Bitou Local Municipality v Timber Two Processor CC and Others* (CPD), an unreported judgment by Fourie, J delivered on 11 June 2008 and the cases referred to therein.
9. In paragraph 31 of that judgment Fourie J decided that the court does have the discretionary jurisdiction in exceptional circumstances to suspend the operation of a final interdict where it would be just and equitable to do so. He also referred to Rule 45A of the Uniform Rules of Court, specifically empowering a court to suspend the operation of its orders. He concluded that no discretion exists to suspend the operation of a final interdict in the event of the court finding that a Respondent is guilty of criminal conduct. (See *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (CPD)).
10. The Respondents' evidence is that they have been doing the business of selling liquor at Erf 8837 for the last twenty-six years. According to evidence submitted by the Applicant, the Respondents have been selling

liquor at the premises since 1987. I believe that the question may arise at the hearing of the review whether Erf 8837 should not be deemed to have been zoned in accordance with the utilisation thereof at the time when LUPO came into operation, more particularly 1 July 1986.

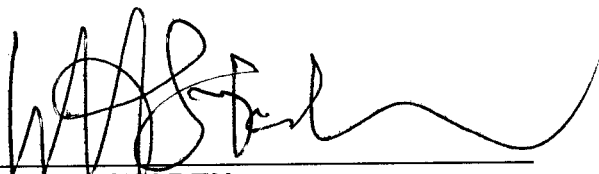
11. It is also not clear why the Applicant has not taken steps to prevent the Respondents from doing their alleged illegal business before 2008. As stated above the Respondents have been selling liquor at the premises since at least 1987 and obtained a liquor licence in 2005.
12. Only a few pages of the zoning regulations was handed to me at the hearing. A proper analysis of the full text of the zoning regulations will probably disclose the requirements of an application for a special development. The Respondents' application for a special development has been referred to as an application for rezoning, but *prima facie* I am not at all convinced that it is such an application. The relevant question appears to be whether an application for a special development (consent use) is an application under Chapter II of LUPO and whether an appeal in terms of Section 44 of LUPO is competent. The Respondents have however not directly challenged the constitutionality of any section of LUPO (See the unreported judgment of Lagoon Bay Lifestyle Estates (Pty) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others (WCHC), judgment delivered on 31 August 2011 by Griesel, J). The question

whether there is an appeal to the said Minister will therefore possibly have to be decided at the hearing of the review. (Also compare *Western Province Sport Club and Others v The Premier of the Western Cape Province*, (CPD) unreported judgment by Farlam, J, delivered on 30 May 1994).

13. It should be noted that the Liquor Act No. 59 of 2003, identifies the facilitation of the entry of new participants into the liquor industry and the promotion of diversity of ownership in the industry as objectives of that act. It is furthermore specifically stipulated in Item 2(b) and 2(b)(i) of Schedule 1 that the provinces have to enact provincial liquor legislation that is consistent with the objects of the Act. The clash between harmonious provincial planning, as provided for in LUPO on the one hand and the objectives of the national Liquor Act 59 of 2003, more particularly the easy entry into the liquor trade of previously disadvantaged liquor traders on the other hand may also become relevant at the hearing of the review. (*Baron and Jester v Eastern Metropolitan Local Council* 2002 (2) SA 248 (W)). The potential clash of the constitutional provincial competence of "liquor licences" and the municipal competence of "municipal planning" and "control of undertakings that sell liquor to the public" may also require consideration.
14. Due to the fact that the Applicant did not take any action for more than twenty years and due to the uncertainties referred to above, an interdict is

not, in my opinion, warranted at this stage. The suspension of the interdict will furthermore serve no purpose. I therefore believe that the interdict applied for should not now be granted. Should the Respondents be unsuccessful with their application for review, the Applicant will probably be entitled to the interdict applied for.

15. In all the circumstance I have decided that the application for an interdict must also be postponed to 15 February 2012. Costs will stand over for later determination.

A handwritten signature in black ink, appearing to read 'W H Van Staden', written over a horizontal line.

W H VAN STADEN
Acting Judge of the High Court
6 DECEMBER 2011