IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 61693/2019
Date of hearing: 3 August 2023
Date delivered: 18 September 2023

1. REPORTABLE: **YES** / NO
2. OF INTEREST TO OTHER JUDGES: **YES** / NO
3. REVISED.

In the matter between:

UNIVERSITY OF PRETORIA	**Applicant**
and	
JOLLY ROGER	**First Respondent**
LATINO'S BISTRO	**Second Respondent**
JUKES	**Third Respondent**
FOKOFBAR	**Fourth Respondent**
THE GRIND BAR	**Fifth Respondent**
NIX KAS PROPERTIES CC	**Sixth Respondent**
VARSITY BAKERY (PTY) LTD	**Seventh Respondent**

ERF 8[....] MENLO PARK (PTY) LTD **Eighth Respondent**

OWL EYE TRADING 10 (PTY) LTD **Ninth Respondent**

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Tenth Respondent**

JUDGMENT

SWANEPOEL J:

[1] This application was brought by the University of Pretoria ("the University"), seeking an interdict against a number of pubs that are situated within close proximity of the University, and against owners of the premises from which the pubs operate.

[2] The relief sought is three-fold:

[2.1] Firstly, the University sought an order that the first to fifth respondents, all of which operate pubs, be interdicted from creating a noise nuisance in excess of the permissible noise levels permitted by the Land Use Rights applicable to the premises from which they operate;

[2.2] Secondly, it sought an order that sixth, seventh and eighth respondents, all owners of premises from which the pubs are operated, shall do everything that is necessary to ensure that the pubs occupying the premises do not create a noise nuisance for the University and for its students;

[2.3] Thirdly, the University sought an order that first, second, third and fifth respondents be interdicted from conducting any business from the premises which is in violation of the permissible Land Use Rights as contained in the Pretoria Town Planning Scheme.

[3] In the alternative, the University sought an interim order in the above terms, pending an action which the University will institute within a period determined by the Court.

[4] Applicant has resolved the dispute with fourth and sixth respondents. Second, third and fifth respondents did not oppose the application. In heads of argument seventh and eighth respondents say that third respondent has been evicted from the premises. However, the application was not withdrawn against third respondent, and this information is not given under oath. I shall deal with the matter on the basis that third respondent is still operating from the premises. Ninth respondent trades under the name and style of the Jolly Roger Tavern ("the Jolly Roger"). First and ninth respondents are therefore the same entity. The Jolly Roger opposes the application. The Jolly Roger has also brought a counter-application seeking, in the event that its business activities are held to be in conflict with the Land Use Rights, that the execution of the order be stayed so that it may bring an application to the tenth respondent for proper consent use. Seventh and eighth respondents (to whom I shall refer as "the owners") share a common director, and also oppose the application. Tenth respondent is the City of Tshwane Metropolitan Municipality, which is cited inasmuch as it is responsible for the enforcement of laws relating to the use of the properties, and inasmuch as it may have an interest in the matter. No relief is sought against it, and it did not participate in the matter.

[5] I shall refer to the respondents who oppose the application collectively as "the respondents".

[6] The applicant's case against the Jolly Roger and the second, third and fifth respondents, and the case against the owners, although sharing certain commonalities, are really on a different footing, and I will deal with each separately in this judgment.

THE JOLLY ROGER'S IN LIMINE ARGUMENTS

[7] It may be opportune to deal with the Jolly Roger's preliminary arguments, before dealing with the merits of the matter. The first dispute

relates to the dilatory approach taken by the University and its filing of papers. The application was launched in October 2019. The answering affidavit was delivered within the appropriate time periods. Applicant then took 18 months, until May 2021, to deliver its replying affidavit. In July 2021, as a result of applicant's dilatory approach, and because events had overtaken the application, the Jolly Roger applied for leave to file a supplementary affidavit. That application is not opposed, and the affidavit will be admitted.

[8] In December 2021 applicant also applied for leave to file a supplementary affidavit. Mr van Heerden, counsel for the Jolly Roger, argued that the University had not provided any substantive reason for the delay in filing the replying affidavit, nor for the delay in filing the supplementary affidavit. The University essentially says that the application was launched just before the Covid-19 pandemic struck. The lockdowns resulted in a reduction in noise, and the case was not pursued, but later on the noise levels returned and the University decided to pursue the matter. The lockdown and the resultant reduction in noise levels apparently resulted in the delay in filing a supplementary affidavit. In my view the reasons provided for the delay are superficial and unconvincing. However, I also take into account that the Jolly Roger has had ample time to deal with the applicant's affidavits, and would not be prejudiced by the admission thereof. In any event, as far as the Jolly Roger is concerned, the affidavits do not, in my view, assist applicant's case to any great extent, but it does provide some perspective on the current state of affairs. I will condone the late filing of the replying affidavit, and admit the supplementary affidavit. In my view the Jolly Roger was justified in opposing the application to file a supplementary affidavit. I will, due to its dilatory approach, make an appropriate costs order against the University. It would be proper for the University to pay the costs of the application, even though the application was successful.

[9] As far as the second *in limine* issue is concerned, The Jolly Roger argues that there is a factual dispute which cannot be resolved on the papers. In my view, although there are disputes on certain issues, not all the issues are irresoluble on papers, as will be evident from my analysis

hereunder, and the disputes that do exist do not prevent a proper consideration of the matter. I do not believe that oral evidence is necessary to resolve the dispute.

[10] Thirdly, the Jolly Roger has argued that the founding affidavit did not demonstrate that the deponent to the founding affidavit, the Registrar of the University, was authorized to launch the application and to depose to the founding affidavit. The deponent's capacity as Registrar is also questioned. In the founding affidavit the deponent simply says that she is the Registrar of the University, and that, by virtue of her position she is authorized to depose to the founding affidavit. The Registrar does not say that she was authorized to instruct the University attorneys to institute the application.

[11] The so-called 'authority' attack, which is often employed by respondents, often conflates three concepts, locus standi, the right of a witness to depose to an affidavit, and the authority to bring the application. Locus standi attaches to the party bringing the application. If the party has a direct and substantial interest in the subject matter of the proceedings, it has locus standi. The deponent to a founding affidavit does not have to have locus standi. A witness in an application does not have to be authorized by the party to the proceedings to depose to an affidavit, or in the case of an action, to give oral evidence. The witness' sole purpose is to place evidence before court, which does not require any authorization.

[12] In *Ganes and another v Telecom Namibia Ltd*[1] the Court said:

> "... it is irrelevant whether Hanke had been authorized to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized."

[13] The principle enunciated in *Ganes* has been affirmed in *Masako v* Masako.[2] In this matter the University has a direct and substantial interest in

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[1] 2004 (3) SA 615 (SCA)
[2] [2021] JOL 51783 (SCA)

protecting itself and its students from a noise nuisance. The University also has an interest in ensuring that businesses that operate in its immediate vicinity do so within the confines of the Land Use Rights applicable to them, as a deviation there from may well have a direct effect on the University's use and enjoyment of its property. The University therefore has locus standi. It is so that the City has the sole obligation to prosecute offenders who act outside of the Land Use Rights, but that does not detract from the University's right to protect its interests by way of application.

[14] The final question is whether the institution and prosecution of the application was properly authorized. On 15 November 2019 the Jolly Roger delivered a notice in terms of rule 7 of the Uniform Rules, seeking:

> [14.1] The applicant's resolution by which all of the deponents to affidavits on behalf of applicant were authorized to depose to affidavits, and to act on behalf of applicant;
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> [14.2] The empowering provision by which the deponent to the founding affidavit was authorized to act for applicant;
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> [14.3] The power of attorney by which applicant's attorneys were instructed and authorized to institute the application on behalf of applicant;
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> [14.4] The applicant's resolution by which the signatory to the power of attorney was authorized to sign same.

[15] As I pointed out above, witnesses do not have to be authorized to depose to affidavits, and they do not act for the party on whose behalf they testify by way of affidavit. The request for the 'authority' of witnesses to depose to an affidavit is misplaced.

[16] Rule 7 provides that it is not necessary for the attorneys to file a power of attorney upon issuing an application. However, if an attorney's authority to act is challenged by way of a rule 7 notice, then the attorney may not act until he/she has satisfied the Court that he/she is authorized to do so. The

rule does not prescribe a method by which the authority must be proven. The Court merely has to be satisfied that the attorney is in fact authorized by the party who brings the application.

[17] In answer to the rule 7 notice, applicant filed a response in the form of a delegation of authority by the Vice-Chancellor of the University to the Registrar. The document records that the Vice-Chancellor was delegated certain functions and authorities in terms of section 9 (3) of the Statute of the University, and that he sub-delegated those functions and authorities to the Registrar, including the power to *"depose to any affidavits in the institution and/or pursuance of the Application brought under case number 61693/2019 in the matter between the University of Pretoria and the Jolly Roger and others and to act for the University of Pretoria in the events leading up to this application."*

[18] The document is not a model of clarity, but its import is clear: that the Registrar was authorized to act for the University in launching the application. Moreover, there is no reason to believe, from the papers before me, that applicant has not instructed its attorneys to act on its behalf. I find it disturbing that the Jolly Roger would attack the authority of a Registrar of a major university simply because it could do so. I respectfully echo the sentiments of Brand JA in *The Unlawful Occupiers of the School Site v The City of Johannesburg*[3]*:*

> "After all, there is rarely any motivation for deliberately launching an unauthorized application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, only be answered in the negative."

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[3] SCA case no. 36/2004 (17 March 2005)

[19] As Fleming DJP pointed out in *Eskom v Soweto City Council*[4], the arguments about the authority of a deponent are unnecessary and wasteful, and should be confined to those cases where there is justified concern about the authority to bring the application. I cannot believe that the Jolly Roger believed this to be such a case in this matter.

[20] As a final point, the Jolly Roger argued that applicant had failed to establish unlawfulness, and that the relief sought is drastic and "incompetent". I will deal with the lawfulness of the Jolly Roger's business activities hereunder. The Jolly Roger also argues that applicant should rather have sought a declaratory order, instead of an interdict. In my view the argument is utterly without merit and requires no further attention. An applicant in these manner of proceedings is well within its rights to seek an interdict.

THE NOISE NUISANCE

[21] Applicant alleges that the first to fifth respondents all occupy premises in what is known as the "Strip", from where they conduct the business of bars and/or nightclubs. These establishments are all located along Lynnwood Road, opposite the University campus. There are four residences located on the University campus who are allegedly affected by the noise emanating from the Strip. These residences house nearly 1000 students.

[22] Although the exact distances between the Jolly Roger and the various residences were in dispute, the difference between the parties' respective versions is be measured in meters and on the Jolly Roger's own version the furthest residence was only some 336.88 m away. Suffice it to say that the factual differences on this issue is, in my view, of no consequence. The argument that the distance between the Strip and the residences was such that the noise from the Strip could not have any effect on the occupants of the residences is belied by the facts, as I will show below.

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[4] 1992 (2) SA 703 (W) at 705 C

[23] The University says that it started receiving complaints from students regarding noise from the Strip in 2016. As a result, the University sought the assistance of a legal services company, which in turn appointed one Mr. Joubert to investigate the matter. On 12 September 2016 Mr. Joubert addressed a letter to the Jolly Roger in which he recorded that the University had received many complaints about the noise emanating from its premises. He sought an undertaking that the noise levels would be addressed. Mr. Joubert also discussed the noise problems with a Mr. Swart, a director of the Jolly Roger, at the end of 2016. Nevertheless, the noise continued unabated. A similar demand was sent on 31 March 2017, without a response being received, although Mr. Swart later denied receiving the second demand.

[24] Applicant then instructed its attorney to deal with the matter, and in a letter to the Jolly Roger the attorney recorded that "pumping" music was being played until late at night. It was also alleged that the Jolly Roger was contravening the Land Use Rights. In a reply dated 19 May 2017 the Jolly Roger denied all of the allegations against it.

[25] Applicant appointed town planners ("EVS") to investigate the various businesses operating at the Strip. In respect of Erf 8[....] Menlo Park, where the Jolly Roger is situated, it was found that property was zoned as "Use 6: Business 1" which allowed for the use of the premises as a "Place of Refreshment", which is defined as:

> "Means land and buildings or a part of a building used for the preparation, sale and consumption of refreshments on the property such as a restaurant, cafe coffee shop, tea room, Tea garden, sports bar, pub, bar, and may include take- aways and a maximum of two table games, two dartboards, two electronic games, or two limited pay-out gambling machines, television screens and soft background music for the customers, which shall not be audible outside the boundaries of the property and excludes live music and a Place of Amusement."

[26] EVS visited the Jolly Roger and found that it played live music and allowed customers to dance. It operated as a night club, which is a Place of

Amusement in the parlance of the Town Planning Scheme, where it is defined as:

> "Means land and buildings or part of a building used for entertainment purposes such as a theatre, cinema, music hall, concert hall, table games, skating rink, dancing, amusement park, gambling (not being a T.A.B.), electronic games or slot machines or limited pay-out gambling machines, night club, an exhibition hall or sports arena/stadium used for live concerts or performances."

[27] As far as the noise nuisance was concerned, EVS suggested that an acoustic engineer should be appointed to investigate the matter.

[28] The University appointed an acoustics expert, Mr. Van der Merwe to compile an environmental noise impact assessment. He visited the Jolly Roger on 17 and 19 July 2017, on both occasions after 22h00. He found that the doors to the Jolly Roger premises were open, and amplified music was clearly audible outside the premises, and within the Hillcrest campus. Mr. van der Merwe was of the view that a noise disturbance had been created at two measuring points on the campus, and that there had been a serious contravention of the Noise Control Regulations.

[29] Further assessments were carried out on 28 November 2017 and 23 February 2018. These assessments included first, second and third respondents. On both occasions the noise levels were found to be excessive. The assessment on 28 November 2017 showed that the measurement taken on the pavement opposite the Jolly Roger exceeded the ambient noise level by 25.3dBA. On 23 February 2018 and on 23 November 2018 the amplified music emanating from the Jolly Roger and from second and third respondents was clearly audible.

[30] Further assessments conducted on 12 and 20 March 2019 respectively found that there was still amplified music playing at the Jolly Roger, and at the premises of second and third respondents. On 12 March 2019 it was reported that the windows of the Jolly Roger were open and amplified music was emanating from the premises. The noise levels emanating from the Jolly

Roger exceeded the ambient noise levels by 11.6 dBA.

[31] The Jolly Roger chose not to answer to the founding affidavit *ad seriatim.* Instead, it made a blanket denial of all averments which it did not deal with specifically in the answering affidavit. It said that its facilities comprised of a sports bar, a dining and games area, a kitchen and ablution facilities. It said that it had a Tavern licence issued in terms of section 23 of the Gauteng Liquor Act, 2003, which required it to provide entertainment on the premises at all times.

[32] The Jolly Roger concedes that the premises are zoned as Business 1, which only allows for the use of the premises as a Place of Refreshment. It argued that the Town Planning Scheme allows for a secondary use of the premises as a Place of Amusement, and that it is entitled to apply for consent use to use the premises as such. It also argued that because it has a tavern licence in terms of the Liquor Act, it may use the premises for entertainment purposes, and that it is in fact obliged to provide entertainment. In other words, the Jolly Roger says that the terms of the liquor licence trump the provisions of the Town Planning Scheme.

[33] This is a specious argument. The terms of the liquor licence can never override the provisions of the Town Planning Scheme. The Jolly Roger tacitly conceded that it is operating as a Place of Amusement, and thus outside of the Land Use Rights. It may operate a tavern, but it must operate within the confines of the Town Planning Scheme. It may not, until it has received secondary consent use, operate a Place of Amusement.

[34] As far as the noise nuisance is concerned, the Jolly Roger disputes the applicant's averment regarding the distance between its premises and the residences. However, as I have said, the difference is measured in meters and cannot make any substantial difference. It also says that when the noise assessments were conducted, it had already installed sound proof glass, had insulated the entertainment area, and had installed a sound limiter and a decibel meter.

[35] The applicant presented a number of affidavits by various witnesses

who say two things. Firstly, they say that they have experienced the noise from the Strip first-hand. They also say that they have been inundated by complaints from students who complain of loud music being played until the early hours of the morning. Many students have complained that they were unable to study or to sleep until the music abated in the early hours of the morning. The Jolly Roger says that these affidavits constitute hearsay. I disagree. The affidavits set out the witnesses' own experience. That evidence, together with the evidence of the noise experts, puts it beyond doubt that there is a noise nuisance caused by the pubs on the Strip.

[36] Not all noise constitutes a nuisance. On the one hand, it is expected of a neighbour to 'live and let live' when there is noise emanating from an adjoining property, but not excessively so[5]. On the other hand, a land owner or occupier is entitled to the reasonable enjoyment of the land. In each case a balance must be found. In *Gien v Gien*[6] the Court pointed out that neighbours may have competing rights. The owner or occupier of property is entitled to use his land as he pleases, and the neighbour is obliged to endure such use. However, whilst an owner or occupier may enjoy free use of his land, he may not do so in a manner which unreasonably interferes with the neighbour's enjoyment of his land. The owner or occupier's right to use the land as he pleases is thus limited, and if he exceeds this limit, his actions are unlawful and may form the basis for an interdict.

[37] The factors to be considered in determining whether the disturbance is of such a degree that it is actionable were set out in *De Charmoy v Day Star Hatchery:*[7]

> "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, the locality involved and the times when the noise is heard. The test, moreover, is an objective one in the sense that not the individual reaction of a delicate or highly sensitive person

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[5] See: Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club 2008 (3) SA 134 (SCA) at para 21 and the authorities referred to
[6] 1979 (2) SA 1113 (T) at 1112
[7] 1967 (4) SA 188 (D) at 192

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 the ordinary standards of comfort and convenience, and without any particular sensitivity to the particular noise, would find it, if not quite intolerable, a serious impediment to the ordinary and reasonable use of his property."

[38] In *PGB Boerder [8] v Beleggings (Edms) Bpk and Another v Somerville 62 (Edms) Bpk the Court* adopted the test as expressed by JRL Milton[9], that in considering whether conduct should be interdicted, one should *"[compare] the gravity of the harm caused with the utility of the conduct which has caused the harm."*

[39] In this case, the evidence shows that the noise emanating from the Strip is excessive. The pubs operate daily, and music is played at high volume until 02h00 to 03h00 in the morning, with a high bass component. One head of residence stated that he had on occasion thought that the noise was so loud that it had to be emanating from within the residence, and only upon investigating did he realize that the noise came from the Strip, some 121.3 m away. The noise was continuous, but was especially pronounced between 22h00 and 23h00. There is no doubt in my mind that these noise levels are not reasonable, especially given the fact that the area is at least partially residential in nature.

[40] The further question is: from where is the noise currently emanating? The Jolly Roger provided a report by a sound expert of its own. The expert conducted sound measurements on 6 November 2019 at three different localities. At 21h44 to 22h09 and at 22h32 to 22h47 no music was audible from the Jolly Roger. The expert did not detect any noise at the boundary of the Jolly Roger premises. The expert also made the point that the other pubs were also playing music, and that it was impossible to measure the noise from the Jolly Roger in isolation from the other pubs.

[41] The Jolly Roger submitted that it had installed sound proof windows in

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[8] 2008 (2) SA 428 (SCA)
[9] Milton, Concept of Nuisance in English Law, 329

December 2019. It had also installed air conditioners to avoid the necessity of opening windows.

[42] In the supplementary affidavit the Jolly Roger presented a notice issued by an inspector of the City of Tshwane on 18 June 2021 which recorded the following:

> "Alleged noise nuisance emanating from the premises (Jolly Roger). Many measure (sic) were taken and the premises comply"

[43] There is no indication who took the measurements, how they were taken, and at what time. In my view the note has no probative value. The affidavit also confirmed that the Jolly Roger had taken various noise abatement measures. However, the Jolly Roger carried out a further noise assessment on 8 June 2021. This assessment confirmed that the Jolly Roger had taken noise mitigation measures in the form of double- glazed windows, an indoor ventilation system, and the installation of a sound limiter operating in conjunction with the sound system. Two outside measuring points were used. At one point the noise from the Jolly Roger was lightly audible. At the other the noise was not audible at all. The report also made the point that it was difficult to measure the noise from the Jolly Roger in isolation. However, according to the report, the music from the Jolly Roger was not audible at its boundaries, and therefore no noise complaints would be expected in respect of the Jolly Roger.

[44] The applicant's supplementary affidavit contained three noise assessments conducted on 28 November 2021, 18 May 2022 and 10 June 2022 respectively. The first was intended to assess, inter alia, the noise mitigation measures adopted by the Jolly Roger. During the assessment on 18 May 2022 and 10 June 2022 the expert found that only second and fifth respondents were playing amplified music that was audible on its boundary. The noise emanating from second respondent exceeded the ambient noise level at all measuring points, exceeding the admissible level by between 3.4 dBA and 14.3 dBA.

[45] Applicant's attorney deposed to a confirmatory affidavit, in which he

confirmed that he had visited the Strip. He stated that there was still noise emanating from all of the pubs. He says that the noise mitigation measures carried out by the Jolly Roger were ineffective and inadequate. I am not satisfied that the attorney's observations are at all helpful. He is not an expert, and he is merely voicing his own subjective opinion which he gleaned from his alleged observations. His observations are in direct conflict with the observations of the experts as relayed in the reports attached to the supplementary affidavits. Where there is a dispute of fact such as this, I have to accept the respondent's version.[10]

[46] Before I am able to grant an interdict, I have to find that the University has a reasonable apprehension of irreparable harm resulting from the Jolly Roger's conduct. It may have had such an apprehension when the application was launched, but that is not necessarily the case at this point in time. It is undisputed that the Jolly Roger has taken substantial steps to mitigate the noise, and on the evidence of the experts, they seem to have succeeded. I cannot find that, as far as the noise nuisance is concerned, the Jolly Roger is at this stage acting unlawfully. The claim for an interdict in respect of the noise nuisance must, as against the Jolly Roger, fail.

[47] However, as far as the claim that the Jolly Roger is doing business in contravention of its Land Use Rights is concerned, that claim has been established. It is not sufficient for the Jolly Roger to say that it may be entitled to apply for secondary use rights. The fact is, it does not have such rights, and, as I have pointed out above, the terms of the Jolly Roger's liquor licence cannot override the Land Use Rights. The claim for an interdict against the violation of the land use rights by the Jolly Roger must succeed. The Jolly Roger filed a counter-application conditional on a finding that it was conducting business in contravention of the Land Use Rights, seeking a suspension of the order pending an application to the tenth respondent for consent use. The Jolly Roger has not furnished any substantial reason why the order should be suspended. It has had some four years, since this application was launched, to apply for consent use, allowing it to operate a night club. I see no reason why the order should be suspended.

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[10] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Ply) Ltd 1984 (3) SA 623 (AO) at 634 (H)

CLAIM AGAINST THE LANDOWNERS

[48] Seventh respondent owns Erf 1[....] Menlo Park from which second respondent operates its business. Eighth respondent owns Erf 8[....] Menlo Park, from which the Jolly Roger operates. The case against the land-owners is set out in an extremely pithy manner. The University says that the landowner cannot close its eyes and allow the properties to be used in violation of their land use rights, nor can it allow the property to be used in a manner which is unlawful at common law. The University argues that the landowners have an obligation to ensure that no unlawful conduct is perpetrated from their properties.

[49] Is an owner of property liable for a nuisance created by a lessee? Mc Kerron[11] says that the basis for liability for a nuisance is possession, and not ownership, and that a lessor is not liable for the nuisance committed on the leased premises by the lessee unless the lessor has expressly or impliedly authorised the creation or continuance of the nuisance.

[50] Mc Kerron is of the view that if a landlord becomes aware that the leased premises are being used in such a manner as to create a nuisance, its failure to take steps to prevent the nuisance may be construed as authorisation thereof.

[51] The University pointed me to two judgments in this Division in which interdicts were granted against landlords in circumstances virtually identical to this case. In the first, *University of Pretoria v Partnership, Firm or Association known as Springbok Bar*[12] the landlord did not oppose the relief and the learned acting Judge granted an interdict against the landlord without considering the basis for the order.

[52] In the second matter, *University of Pretoria v Freefall Trading* CC *t/a Aandklas*[13] the same learned Judge granted an interdict against the landlord because it allowed an actionable nuisance to continue on its property. In

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[11] The Law of Delict 7th Ed 231
[12] [2011] ZAGPPHC 86 (16 February 2011)
[13] [2011] ZAGPPHC 85 (16 February 2011)

finding that the landlord was responsible for the nuisance created by the lessee, the Honourable Judge relied on *Porter and Another v Cape Town City Council*[14]. In the latter case the Court held that a municipality was just as liable to prevent a nuisance as a private individual, and where third persons created a nuisance on municipal property of which the municipality had become aware, it had a duty to take reasonable steps to abate the nuisance. In reaching this conclusion the Court relied on Mc Kerron (supra) and on *Cape Town Council v Benning*[15] and *Sedleigh-Denfield v O'Callaghan*[16]. In *Benning* Solomon JA said:[17]

'The allegation in the declaration, therefore, upon which this action is entirely based, that the defendant allowed the debris to be deposited on the brickfield has not been established; for the word allow implies knowledge and consent on the part of the person concerned. If indeed the defendant had known of what was being done and had permitted it to continue, it may very well be that it would have been in no better position than if it had itself committed the acts complained of."

[53] The enquiry as to whether the lessor is liable entails a consideration of the following:

[53.1] Is the occupier creating a nuisance on the leased property?

[53.2] Was the owner made aware of the nuisance, or was he asked to remove the nuisance?

[53.3] Was the owner reasonably able to prevent the nuisance?[18]

[54] It is common cause that the University did not engage on the noise problem with the landowners. Seventh respondent received one complaint regarding the second respondent from a third party in January 2018. The complaint was forwarded to the second respondent, and no further complaints were received until this application was served on seventh

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[14] 1961 (4) SA 278 ©
[15] 1917 A.D. 315
[16] 1940 A.C. 880
[17] At 319
[18] See: Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 (A)

respondent. Eighth respondent also received one complaint regarding the Jolly Roger from a third party in January 2016. It relayed the complaint to the Jolly Roger, which undertook to take steps to remedy the problem. The landowners say that they took all reasonable steps to remedy the problem, and they could not have been expected to know that the problem persisted.

[55] The landowners also say that there are enormous disputes of fact relating to the use of the premises, and regarding the alleged noise nuisance, and that they could not have been expected to make a determination as to whether the Jolly Roger and the second respondent were creating a noise nuisance. The difficulty with the landowners' argument is that when the application was served some four years ago, it must have been clear that there was a noise problem, and one would at least have expected the landowners to enquire into the true state of affairs. Once one reads the noise assessments two things become very clear. Firstly, there was, at that time, a noise nuisance emanating from the Jolly Roger and from second, third and fifth respondents, and although the Jolly Roger had taken remedial action, the noise continued to come from second, third and fifth respondents. Secondly, the landowners would have realized that the Jolly Roger was violating the premises' Land Use Rights.

[56] In these circumstances the landowners should, in my view, have taken steps to remedy the problem. Both lease agreements, in respect of the Jolly Roger and in respect of second respondent, contain a clause[19] that reads:

> " The tenant shall not use or permit the leased premises to be used for illegal or improper purposes, nor shall the tenant do or omit to do or permit any act or thing, which may be or become an annoyance or cause damage or disturbance to the occupants of adjoining properties."

[57] The landowners were, therefore, entitled to enforce compliance with this clause. Instead, they remained supine, and it is appropriate that an order be granted against them.

COSTS

[19] Clause 9.2 of the lease agreements

[58] As far as costs are concerned, the normal rule, that costs follow the result should apply. However, for the reasons set out above, the costs in respect of the University's application to supplement should be awarded to the respondent.

[59] In the result, I make the following order:

[59.1] First, second, third, fifth and ninth respondents are interdicted and restrained from conducting any business in violation of the permissible land use rights as contained In the Pretoria Town Planning Scheme, on Erf 8[....] , Erf 1[....] and Erf [....]0 Menlo Park respectively.

[59.2] Second, third and fifth respondents are interdicted and restrained from creating, or allowing anyone to create a noise nuisance at Erfs 1[….] and Erf [....]0 Menlo Park respectively, and without limiting the generality of the aforesaid, any noise in excess of the permissible noise levels permitted by the Land Use Rights applicable to the particular properties.

[59.3] Seventh respondent is ordered to take all reasonable measures to ensure that second and third respondents do not create a noise nuisance at Erf 1[....] and 10 Menlo Park respectively.

[59.4] First respondent's counter-application is dismissed with costs.

[59.5] Applicant shall pay the costs of the applicant's application in terms of rule 6 (5) (e) dated 5 December 2022 on the opposed scale.

[59.6] The first, second, third, fifth, seventh, and ninth respondents shall pay the costs of the application jointly and severally, the one paying the other to be absolved.

SWANEPOEL J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

COUNSEL FOR APPLICANT:	**Adv. MP Van der Merwe SC**
ATTORNEY FOR APPLICANT:	**Tim du Toit Inc**
COUNSEL FOR FIRST AND NINTH RESPONDENT:	**Adv. DJ van Heerden**
ATTORNEY FOR FIRST AND NINTH RESPONDENTS:	**VDT Attorneys Inc**
COUNSEL FOR SEVENTH AND EIGHTH RESPONDENTS:	**Adv. M Louw**
ATTORNEY FOR SEVENTH AND EIGHTH RESPONDENTS:	**Barnard Inc**
DATE HEARD:	**3 August 2023**
DATE OF JUDGMENT:	**18 September 2023**