

In the Supreme Court of South Africa  
In die Hooggeregshof van Suid-Afrika

APPELLATE Provincial Division).  
Provinsiale Afdeling).

Appeal in Civil Case.  
Appel in Siviele Saak.

R. VAN DEN BERGH N.O. & C.R. SWART N.O. Appellant,

versus

C.T. SWART

Respondent.

Appellant's Attorney Maeder & N.  
Prokureur vir Appellant

Respondent's Attorney

Prokureur vir Respondent

Appellant's Advocate D. G. G. G.

Advokaat vir Appellant

Respondent's Advocate

Advokaat vir Respondent

Set down for hearing on

Op die rol geplaas vir verhoor op

(1st Div)

Monday, 30th May, 1955

(9.45-10.50)

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① Condonation granted. - Appellant to pay costs of application.

② Appeal allowed with costs. - The order of Court below altered to:  
"Application dismissed, with costs."

— (Reasons will be handed in later)

Gubbins, C.J.,  
Schreiner, J.A.  
Henderson, J.A.

Registrar

30-5-55

IN THE SUPREME COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)

Delivered 7.6.1954

C.J. S W A R T

v

R. van den BERGH N.O.

&

C. R. S W A R T N.O.

DOWLING J. This is an application for a declaration of 10.  
rights.

The petitioner is acting manager of the Iscor Recreation and Social Club, Pretoria, and by virtue of his post is the holder in his own name of a Club Liquor Licence and a theatre liquor licence.

The Petitioner first cited Lieutenant Colonel Aitken as the first respondent in his capacity as District Commandant of Police. This citation was not correct and it is common cause that first respondent should be Colonel van den Bergh in his capacity as Divisional Criminal Inves-20  
tigation Officer of Pretoria. Counsel for the parties are agreed that the petition should be argued on this footing.

Petitioner was threatened with a criminal prosecution if he supplied liquor under the theatre licence at public dances which are periodically held in the main hall of the club buildings, the main hall and certain adjunct rooms and areas being the premises in respect of which the theatre liquor licence was issued. This licence has been in esse for several years and until recently the club 30  
supplied liquor to persons attending public dances in the  
main/

main hall. This hall is hired out to approved bodies for this purpose. Such bodies advertise such dances and sell tickets to members of the public. The hall has what is described as a "stage" which is normally but not invariably occupied by the dancers' band or orchestra which supplies music for the dancers.

Since the police threat was received the club has obtained a temporary licence for the occasion of each public dance, but the petitioner now seeks a declaration 10 of rights that he is entitled under the theatre licence to supply liquor to members of the public attending dances in the main hall.

'Theatre licence' is mentioned twice in the Liquor Act 30 of 1928. (Section 8(1) of the Act enumerates various on and off consumption licences which may be granted under the Act. Section 8(1) provides for the granting of on consumption licences for the sale of liquor to be consumed on the premises where it is sold and enumerates inter alia 'club licences' and 'theatre or sports grounds 20 liquor licences' and 'temporary liquor licences'. No definition is given of the term "theatre liquor licence" or of the word "theatre". The concept of a theatre liquor licence is apparently taken over from pre-Union Transvaal and Orange Free State Ordinances. Section 7(9) of Ordinance 32 of 1902 of the Transvaal and section 7(7) of the Orange Free State Ordinance 8 of 1903 makes substantially identical provisions. These enactments give no definition of 'theatre' or 'theatre licence'. Section 7(9) of the Transvaal Ordinance provides 'A "theatre 30 liquor licence" shall authorise the holder thereof to sell by retail liquor in any building portion of which is used as a theatre during such hours as any entertainment in/....

in such theatre continues on any day excepting Sunday, Christmas Day and Good Friday to be consumed on the premises.' I have not been able to find any assistance in these provisions in relation to the present question of interpretation. They merely pose a similar problem.

It is alleged in the petition that the Pretoria Liquor Licensing Board took the view in granting a licence to some third party that the existence of a "stage" or "platform" from which dance orchestras play warranted the 10 issue of a theatre licence, notwithstanding police opposition to the issue of a theatre licence in such cases. This of course, is hearsay, but I think it must be assumed that when the Liquor Licensing Board granted a licence to the present petitioner it must have formed the view that the main hall and adjuncts of the Iscor Club were apt for and adapted to use as a "theatre" though it might not be exclusively used for that purpose. We have, therefore, the position that the Board has issued and the petitioner is lawfully in possession of a "theatre licence" in respect 20 of the main hall and adjuncts of the Club.

Section 75(9) is the only other provision of the Act referring to theatre liquor licences. That subsection provides: "A theatre or sports ground liquor licence shall not authorise the sale of liquor on any days other than open days upon which any public entertainment or public sporting function takes place upon the theatre premises or sports ground respectively or at any other times on such days than between the time at which any such entertainment or public sporting function commences, not being earlier 30 than 10 o'clock in the morning, and thirty minutes after the time when any such entertainment closes, not being later than half past 11 o'clock at night".

The/.....

The Respondent's attitude is reflected in paragraph 9(e) of the Affidavit filed sworn to by Colonel van den Bergh which runs: "I wish to emphasize that at all the dances referred to, the entire floor of the main hall or the greater part thereof is cleared of chairs so that those who attend the dance are seated at tables not facing the orchestra but arranged outside the hall on the side stoeps or inside the hall along the walls thereof. I say further that only dance music is provided at such dances and music is played only when dancing is actually in progress. After each dance in the course of the evening the music stops, the dancers leave the floor and return to their tables where they then converse and enjoy refreshments until the next dance commences, when music is again played by the orchestra and those present resume their dancing on the floor. 10

No music is played during any of the intervals between dances. No theatrical entertainment whatsoever is provided during the course of the evening nor are any performances or exhibitions of a theatrical nature or otherwise presented for the entertainment of those present. The said dances are not held for the purpose of providing those present with musical entertainment for the evening but for the purposes of dancing and to enable those present to dance, an orchestra is necessary to provide the dance music required therefor". 20

Annexure 'D' sets out an opinion given by the Attorney-General of the Transvaal to which applicant's attention was drawn before this application, and which runs as follows :- "I am of opinion that the holder of a theatre liquor license shall not be authorised thereby to supply liquor to persons attending public dances held on the/. 30

ON THE separate premises of a club building, nor shall the licensee be authorised to supply liquor to guests at a wedding reception which he permits to be held on such licensed premises. Any public function taking place must be in the nature of a public entertainment related to entertainment provided in a theatre or cinema to which the public have access exclusively as spectators of the entertainment, and where they do not take part in the entertaining of others."

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Mr. GALGUT who appeared for the Petitioner, sought to persuade the Court that a public dance was an entertainment in the nature of a spectacle. "Theatre" in its primary meaning in modern usage is "an edifice specially adapted to dramatic representations", I quote the Oxford Dictionary. The idea of spectators is implicit in this definition. If the Liquor Licensing Board took the view that because the main hall was equipped with a "stage" or raised platform it could, therefore, be regarded as a theatre, this view might be open to challenge, but such 20 challenge cannot be considered in the present proceedings. At the moment the petitioner is a lawful holder of a theatre licence and all that the Court can consider in these proceedings is whether a public dance is "a public entertainment" within the meaning of that expression as used in section 75(9). It was implicit in the main argument of Mr. Galgut that "public entertainment" must be entertainment which is afforded the persons as spectators, and he argued that a public dance by reason of the excellence of the music and other features affords pleasure 30 and entertainment of the kind to be had at a theatre.

Mr./...

Mr. Galgut has failed to persuade me that this view can reasonably be taken, but that does not conclude the matter. The term "public entertainment" is not qualified or restricted in any way. It is not specifically stated that the entertainment must be one normally to be found in a "theatre" and so involve some dramatic representation. If the term is not so restricted then, in my opinion, "public entertainment" in its ordinary meaning would include a public dance. If any restriction on the meaning of the words 10 exists it can only be by necessary implication, and the only circumstance which is to be considered in this connection is the fact that "public entertainment" is conjoined in the section with "theatre".

A penal sanction is provided for a contravention of this sub-section (see e.g. section 161(j) read with section 167(a). Moreover in certain contingencies a licensee may become disqualified from holding a licence if convicted. (See section . . . . .).

In Rex vs. Taweel and Another (1937 T.P.D.387) 20 BARRY J. delivering a judgment of the Full Court in an appeal against a conviction for a contravention of section 132(1) of the Liquor Act read with section 166(s) said at page 389 "Section 132 read with Section 166(s) imposes a penalty and if there is a reasonable interpretation which will avoid the penalty in any particular case the Court should adopt that construction".

This case has been recently followed and approved by the Full Court of the Eastern Districts' Local Division and by the Full Court of the Natal Provincial 30 Division. (See Rex vs. Meyer, 1942(2) S.A.L.R. 338 and Rex vs. Norris 1949(4) S.A.L.R. 880).

Here/....

Here the position is that the holding of a public dance can properly be regarded as a "public entertainment" in the ordinary meaning of the term though, it is arguable that it could be restricted to public entertainment usually presented in a theatre. In these circumstances the reasoning in Taweel's case would lead to the adoption of the broader meaning of the phrase "public entertainment". In my opinion this ordinary meaning should be attached thereto.

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It may be said, I think, in fortification of this view that whereas in dealing with a sports ground licence the subsection limits the permitted sale to open days on which a public sporting function takes place, repeating the word "sporting" which appears in the discretion of the relevant licence, it does not conjoin and repeat the word "theatre" or "theatrical" in dealing with sales permitted under a theatre licence. This suggests that the "public entertainment" need not be a public theatre performance.

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For these reasons I am of the opinion that the petitioner is entitled to succeed. An order will accordingly issue, declaring that the licence held by the petitioner authorises a supply of liquor to members of the public attending public dances held in the manner described in section 77 of the petition.

The question of costs was not argued and I have therefore assumed that the parties contemplated that the costs should follow the event. I shall therefore order the costs to be paid by the respondents with leave to the respondents to move the Court to substitute some other order as to costs within fourteen days of this date.

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(sgd)/.....

(sgd) Walford Dowling,  
JUDGE OF THE SUPREME COURT.

I agree,

(sgd) L. C. Steyn,  
JUDGE OF THE SUPREME COURT.

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