Case No 725/91
/mb

IN THE SUPREME COURT OP SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal between:

THE TOWN COUNCIL OF SANDTON ..... APPELLANT

and

GOURMET PROPERTY INVESTMENTS CC ..... RESPONDENT

CORAM : BOTHA, SMALBERGER, KUMLEBEN JJA, NICHOLAS et MAHOMED AJJA

HEARD : 24 MAY 1994

DELIVERED : 19 AUGUST 1994

J U D G M E N T

KUMLEBEN, JA/.....

KUMLEBEN, JA:

The respondent is the owner of a property in Sandton, Johannesburg, on which it conducts a restaurant and a retail business in two separate buildings. A roof was constructed over the intervening space to create what was described as a "conservatory". On completion this covered area was used for additional seating to serve as an extension of the restaurant. The appellant objected on the ground that such use was unauthorized. The respondent maintained that it had the right so to use it. An application to court followed for an order prohibiting the respondent from placing any seating accommodation in that area. It was heard in the Witwatersrand Local Division of the Supreme Court by Eloff JP. The relief sought was refused. With leave of the court a quo, the correctness of this decision is now on appeal.

3 The

facts are common cause. Section 4 of the National Building Regulations and Building Standards Act 103 of 1977 prohibits the erection of a building for which plans and specifications are required without the consent of the local authority, in this case the appellant. (The said roof structure is by definition a "building" and I shall refer to it as such.) An applicant for the required approval is obliged in terms of the regulations to complete an application form and submit it, together with plans and particulars of the proposed building, to the appellant. The architect, on behalf of the respondent, noted on the plans that "no seating [is] to occupy conservatory area". (I shall refer to this self-imposed restriction as the "condition".) It is not disputed that approval was given subject to this condition. On completion of the conservatory, and some other building alterations which for present

purposes are unimportant, the respondent, as I have said, refused to refrain from using the conservatory as part of the restaurant.

In paragraph 19 of the founding affidavit, after recounting the history of the matter and the breach of the condition, appellant alleged;

> "In the circumstances it is submitted that the Respondent is not only acting unlawfully and contrary to the conditions and particulars of the approved building and site development plans in respect of the conservatory, but that the Respondent has committed an offence as contemplated by Section A25(5) of the Regulations."

In reply Carnie Matisonn, a member of the respondent authorised to act on its behalf, said in the answering affidavit:

> "I deny that the Respondent is acting unlawfully and submit that in fact the conservatory is being used for purposes contemplated on the approved plans. I accordingly deny that any offence as alleged has been committed."

The court a quo found it unnecessary to decide the merits, that is, whether the respondent acted unlawfully and contrary to the condition. It concluded, on the strength of what was said in paragraph 19 above, that the appellant had based its cause of action on regulation A25(5) and that the conduct of the respondent, even if unlawful or unauthorised, did not fall within the prohibition therein set out but may fall foul of another regulation, A25(l). On this narrow ground the application failed. Although other defences were raised, they were not pursued in argument. The result of this appeal thus depends on whether the court a quo was correct in its conclusion on this aspect of the case.

Before turning to consider this question it is necessary to comment on the merits, that is, the

respondent's assertion that it acted lawfully and, more particularly, the allegation that "the conservatory is being used for the purposes contemplated on the approved plans."

In this regard the respondent states that:

> "A 'conservatory' is, I am advised, merely an architectural concept and is used to designate any multi-functional domed, or partly-domed room constructed of glass or other plastic see-through materials designed to allow light to pass through as a decorative architectural feature. Whereas a conservatory in its conventional sense facilitates horticultural decoration, it may also serve numerous purposes, eg. an entertainment or restaurant area. In this regard, I refer this Honourable Court to the affidavit of Dr Izac Johannes van der Wat, an expert on South African Historical Architecture, marked 'C'."

Dr van der Wat is a gynaecologist who has made a study of historical architecture. In his affidavit he states:

> "It has become apparent from my studies that the modern architectural conservatory type structure

is a multi-functional domed, or partly domed room constructed of glass or other plastic see-through materials designed to allow light to pass through it as a decorative architectural feature. The conservatory concept in its conventional architectural application, facilitates horticultural decoration, whilst simultaneously serving a multi-purpose usage for either private or public entertainment. Consequently, an architectural plan representing a conservatory will be understood by any person in the building and architectural industry as an architectural concept per se.

It is common cause that a conservatory constructed for purely horticultural purposes will require underfloor drainage, underfloor heating, special heat regulating devices to control extreme variations in climatic conditions, special water sprays and a very specific horticultural layout that utilises the benefits of these horticultural features .... Any person connected with the building, architectural or town planning industry would immediately recognize upon sight of the plans herein before referred to that not one of these special features was incorporated. Such persons would immediately and unequivocally conclude that the building was not designed for exclusive horticultural usage and that as it was intended to adjoin an operating restaurant and the plans included an enlargement of the kitchen, storerooms, additional kitchen equipment, tiled floors, and laundry facilities, that the building was indeed intended to become an extension of the existing restaurant."

It may be strictly unnecessary to comment on this opinion since, whatever the designation of the building structure and however the term "conservatory" is interpreted, the unambiguous and acknowledged condition prohibits restaurant seating there. It is however plain that Dr van der Wat's evidence was principally concerned with contrasting, from an architectural point of view, a conservatory type structure, which may doubtless be used for a variety of purposes, with the use of the word conservatory in what respondent rightly refers to as its "conventional sense", namely, an area or building used for the growth, propagation and display of plants and shrubs (whether or not it has the technical appurtenances, such as special heating, which Dr van der Wat is at pains to describe). That said, there is simply no justification for Dr van der

Wat's assertion that anyone conversant with the facts of this case would conclude that the "building was indeed intended to become an extension of the existing restaurant." There are even less grounds for the respondent subscribing to any such conclusion. On the contrary, in the "MOTIVATION FOR THE ADDITION OF CONSERVATORY TO STAND 426", which forms part of the application, it is said on behalf of the respondent that:

> "The proposed conservatory is intended to open up the existing west facing portion of the restaurant onto a garden atmosphere by removing the existing roof over the extension to the original restaurant.
>
> By erecting the conservatory over this area allows a more cohesive bridging between the original restaurant and retail store.
>
> The conservatory allows covered access, which does not presently exist, to the existing toilets at the south of the complex, thus increasing toilet capacity to the restaurant.
>
> The conservatory is not intended as an extended seating area during normal restaurant operating

> periods, therefore the existing parking facilities are sufficient."

(The motivation does not candidly say, as one might have expected if a proper disclosure was intended, that a conservatory type structure is planned which on completion will become an extension of the restaurant.) On the approved building plan the "total restaurant seating area", 44.35 metres square, is that of the existing restaurant and the "proposed conservatory coverage" is separately stated as being an area of 80.7 square metres. On the diagram trees and shrubs are depicted covering about half of the conservatory area but no tables or chairs. Enlargements of the kitchen and other facilities depicted on the plans serve as no indication that the capacity of the restaurant was to be increased: they are as consistent with an intention to have improved facilities of this kind for the existing restaurant.

There can thus be no doubt that on the facts disclosed to the appellant, taken in conjunction with the condition, the conservatory was to be one in the usual and accepted sense of the word: an area in which plants and shrubs would be grown and displayed. On this basis the approval was granted. It is, however, also clear that the respondent never intended using it for such purpose. In the answering affidavit Carnie Matisonn states that "I was of the view that the extension of the restaurant in the form of a conservatory would be most appropriate" and at a later stage more explicitly that "the purpose for (sic) the conservatory was to extend the restaurant facilities" and that "the only reason for proceeding with the construction of the conservatory area was to extend the restaurant".

In the result the inescapable inference is that from the outset the true intention was to

enlarge the restaurant and that the designation of the proposed building as a "conservatory" with reference to its intended purpose was a subterfuge: the whole exercise has the odour of duplicity.

Turning to the disputed issue, both regulations are included in the national building regulations (R1081 published in the Government Gazette of 10 June 1988) and relate to their enforcement. They read as follows:

> A25(l)
> "No person shall use any building or cause or permit any building to be used for a purpose other than the purpose shown on the approved plans of such building, ... whether such plans were approved in terms of the Act or in terms of any law in force at any time before the date of commencement of the Act, unless such building is suitable, having regard to the requirements of these regulations, for such first-mentioned purpose."

(I shall refer to the words italicized as the "proviso".)

A25(5)

"Any person who, having obtained approval in terms of the Act for the erection of any building, deviates to any material degree from any plan, drawing or particulars approved by the local authority shall, except where such deviation has been approved, be guilty of an offence."

The detailed reasoning on which the conclusion of the court a gup was based appears from this passage in the judgment:

"It will be seen that sub-regulation (1) is the one which deals specifically with the use of a building for a purpose other than that shown on the approved plans. Sub-regulation (5) deals with deviations from a plan, drawing or particulars by a person who obtained approval for the erection of a building. That deviation relates, I think, to a deviation in the construction of a building, for the words after 'deviation' follow on 'the approval for erection of a building' (my underlining). It seems to me to be concerned with the situation where the physical construction is not in accordance with 'any plan, drawing or particular'. This conclusion is, I think, reinforced by the fact that sub-regulation (1) is the sub-regulation dealing specifically with the use of a building inconsistent with what the plans show. The

> draughtsman of the regulation could hardly have intended to deal with unauthorised use as opposed to unauthorised construction both in sub-regulation (1) and in sub-regulation (5). Further reinforcement for the conclusion is found by the fact that sub-regulation (1) does not absolutely prohibit a use other than authorised by the plans. It prohibits such unauthorised use where the building is suitable having regard to the requirements of the regulations for the 'unauthorised use'. It is inconceivable that the draughtsman of the regulations could have intended that unauthorised use may, under sub-regulation (1), be tolerated subject to certain conditions, but that unauthorised use is absolutely prohibited by sub-regulation (5).
>
> These sub-regulations have to be reconciled and harmonised. The way of doing it is to construe them, as I have indicated, by interpreting sub-regulation (5) as dealing with the deviation in the physical construction of the building as such. I think too that the wording of sub-regulation (6), which amplifies the provisions of sub-regulation (5), indicate that what those sub-regulations are concerned with is alteration in the physical design of a building."

As appears from this passage, the critical consideration on which the decision of the court a quo was based, was that the offence and prohibition

5 in regulation A25(5) apply only to a deviation in the "physical construction" of the building (the "restrictive interpretation").

The use to which a building may be put is manifestly a consideration - an important one - in deciding whether approval for the erection of a building ought to be granted. (Regulation Cl(l), for instance, requires that "any room or space shall have dimensions that will ensure that such room or space is fit for the purpose for which it is intended". See too s 17(1) (1) of the Act and regulation A20(l) read with Table 1 - OCCUPANCY OR BUILDING CLASSIFICATION, particularly A1 thereof.) In this regard I agree with the submission of counsel for the appellant, Mr Osborn, that a restriction as to the use may be positively or negatively formulated. Both formulations feature in this case. The condition "NO SEATING TO OCCUPY CONSERVATORY" is explicitly imposed

and, as one knows, without seating no restaurant can operate or exist. The designation CONSERVATORY on the plan means, for the reasons stated, a conservatory in the accepted sense of the word and it follows that a dome-like structure used as a restaurant can never be validly or realistically regarded as a conservatory. Thus the condition and the designation (the "stipulations"), particularly if considered jointly, restrict and define the purpose for which the building may be erected and used: they prohibit its use as a restaurant and authorise its use as a conservatory. Thus the respondent's use for the former purpose deviated from the avowed and approved purpose.

Turning to regulation A25(5), it refers to "any plan, drawing and particulars". All details featuring on a plan are part of the plan: for instance, the written instruction on the plan

(Annexure 0 to the replying affidavit) under the caption "ROOF PLAN" that the roof is to be "CONSTRUCTED FROM EPOXY COATED ALUMINIUM etc" is a constituent of the plan. The stipulations noted on it are likewise part of the plan. This is confirmed ex visceribus actus. Regulation A25(l) refers to "the purpose shown on the approved plans" of the building. Furthermore, in my view, the stipulations can also be classified as "particulars" within the meaning of that word as used in regulation A25(5) and in numerous other regulations. Regulation A2(l) specifies the plans and particulars to be furnished in an application and reads as follows:

> "Any person intending to erect any building, excluding temporary building, shall submit to the local authority the following plans and particulars, together with the application:
>
> (a) A site plan;
> (b) layout drawings;
> (c) a drainage installation drawing;

(d) such plans and particulars as may be required by the local authority in respect of -

(i) general structural arrangements, subject to any requirement contained in these regulations with regard to design of the structural system;

(ii) general arrangement of artificial ventilation;

(iii) a fire protection plan;

(iv) any certificate contemplated in these regulations; and

(v) any other particulars."

The word "particulars", particularly in (v) above, is thus used in addition to, and in contra-distinct ion to, plans and specifications. It plainly includes the purpose for which the building is to be used. In the regulations preceding regulation A25(5) there is reference to "plans and particulars" (Al(2)), "plans, particulars" and "drawings or specifications"

(Al(5)) and "plans and particulars" (A2). From this one infers that in the regulations it was intended that the words "plans", "drawings" and "particulars" are each intended to bear a distinct and different meaning. Mr Subel, who appeared for the respondent, conceded that "particulars" when used elsewhere in the regulations would include the designation of the building and implicitly its intended use - or vice versa - but submitted that in regulation A25(5) this word was to have a different and more restricted meaning. I can find no good reason for such a distinction.

The question, however, remains whether regulation A25(5) is to receive the restrictive interpretation since, if so, the fact that the stipulations are part of the plan, or are particulars within the meaning of the regulation, cannot avail the appellant.

 I, with respect, find the reasons for the restrictive interpretation in the judgment of the court a quo, and which were relied upon by counsel for the respondent in argument before us, unconvincing. I turn to discuss them seriatim, (i) The words "the erection of any building" in the regulation, relate to the nature of the approval sought and not to the prohibited deviation. They therefore, as counsel conceded, do not lend support to this interpretation. (ii) As to regulation A25(6), there is to my mind no reason why the empowerment "to stop the erection" should be limited to constructional deviations. In the instant case, had the true facts come to the knowledge of the appellant during the course of erection (viz that the stipulations were to be disregarded and that the building was to be a restaurant) there is no reason why the appellant should not have been entitled to

stop the erection of that building. This would have been the appropriate remedy to prevent an abuse of the approval given - and perhaps saved the respondent certain expenses. The proviso to this regulation does in the nature of things refer to a constructional deviation, but it does not follow that a restrictive meaning is to be placed upon the substantive portion of the regulation. (iii) Finally, it was considered necessary to interpret regulation A25(5) restrictively to reconcile and harmonise it with the provisions of regulation A25(l). This would appear to be the principal reason relied upon by the court a quo. But in my view the two regulations deal with two different situations. The latter applies to a building which has been erected iji accordance with the approval given (that is inter alia "for a purpose ... shown on the approved plans") and which is subsequently used for a

purpose "other than the purpose shown on the approved plans," In such a case the proviso may be invoked to establish that the building is suitable for such other unauthorised use. Regulation A25(5) on the other hand is concerned with a contravention of (deviation from) of an express stipulation on which the grant of approval was based. They are thus compatible: in casu the former regulation would have entitled the respondent to use a conservatory for some other suitable purpose, whilst the latter regulation continues to preclude its use as a restaurant. It could never have been contemplated that an owner intending from the outset to use his building for purpose A, could apply for the approval of a plan reflecting purpose B and, having obtained approval, put the building to use for purpose A and thereafter claim that the unauthorised use is permitted on the strength of the proviso. Thus, in

the case of constructional deviation, a person could hardly build at variance with the specifications of an approved plan and thereafter claim that the building erected is suitable for some other purpose. In short, the proviso does not override or eviscerate regulation A25(5).

I am accordingly of the view that regulation A25(5) was correctly invoked to restrain the respondent from what was plainly a contravention of its provisions.

In the circumstances it is unnecessary to consider whether the self-imposed restriction coupled with the planned deception is in any event a ground for granting the relief without regard to whether or not the correct regulation was cited in the founding affidavit as the basis of the cause of action.

It is accordingly ordered that: (i) The appeal is upheld with costs, such costs

to include the costs of two counsel.

(ii) The order of the court a quo is set aside,

(iii) An order is granted in terms of prayers 1 and 2 of the notice of motion.

(iv) The respondent is ordered to pay the costs of the application in the court a quo, such costs to include the costs of two counsel.

M E KUMLEBEN JUDGE
OF APPEAL

BOTHA JA
SMALBERGER JA - Concur
MOHAMED AJA

J U D G M E N T

NICHOLAS AJA.

NICHOLAS AJA:

Erf 426 Parkmore is situated at 136 Eleventh Avenue Parkmore in the municipal area of Sandton. There is on the erf a restaurant and a retail shop. Between these buildings there was formerly an open space.

The owner of the erf (hereinafter called "the property") is Gourmet Property Investments CC ("the owner"), which conducts the restaurant under the name of "Freddies Tavern".

At the beginning of 1989 the owner had in contemplation the erection in the open area of a "conservatory". In March its architects submitted to the Sandton Town Council ("the Council") what was described as a "site development plan" which showed the existing buildings and the proposed conservatory. There appeared on the plan a note which read, "No seating to occupy conservatory area".

On 4 April 1989 the Management Committee of the Council resolved that -

> "The site development plan be approved, subject to the conservatory area having no seating accommodation."

(The emphasis is mine.) On 26 June 1989 the owner submitted to the Council an "application for approval of plans" for the conservatory which was accompanied by two drawings: one was a duplicate of the site development plan which had already been approved; the other was entitled "Roof Plan" and it too contained the notation "No seating to occupy conservatory area". The Council approved the application on 21 September 1989.

The owner then proceeded to erect the conservatory in accordance with the approved plan. After completion however the owner caused to be placed

in the conservatory area seats for about 90 people. On 21 May 1990 Sandton's Director of Town Planning addressed a letter to the owner, calling upon it "to remove all seating in this area immediately, failing which legal action will be instituted". The owner did not comply with the demand and on 19 October 1990 a further letter was sent to the owner advising inter alia that the Council intended to institute legal action to remove the cause of complaint.

On 1 March 1991 the Council instituted motion proceedings against the owner in which it claimed

> "1. That the Respondent be directed to remove all the seating accommodation in the conservatory area of its premises on Erf 426 Parkmore, 136 - 11th Avenue, Parkmore, Sandton; alternatively that the Sheriff or his deputy be authorised and directed to remove all the seating accommodation in the conservatory area of the Respondent's premises on Erf 426

Parkmore, 136 - 11th Avenue, Parkmore, Sandton.

2. That an interdict be granted prohibiting the Respondent from placing any seating accommodation or allowing any seating accommodation to be placed in the conservatory area at its premises on Erf 426 Parkmore, 136 - 11th Avenue, Parkmore, Sandton.

3. That the Respondent be ordered to pay the costs of this application."

The applicant relied on subregulation (5) of reg A25 of the regulations made in terms of sec 17(1) of the National Building Regulations and Building Standards Act, 103 of 1979 ("the Act") . The regulations were contained in R1081 which was published in the Government Gazette of 10 June 1988. A subsequent amendment is not now relevant. Regulation A25 is in the following terms:

"A25. GENERAL ENFORCEMENT

(1) No person shall use any building or cause or permit any building to be used for a purpose other than the purpose shown on the approved plans of such building, or for a purpose which causes a change in the class of occupancy as contemplated in these regulations with regard to fire protection or means of escape, whether such plans were approved in terms of the Act or in terms of any law in force at any time before the date of commencement of the Act, unless such building is suitable, having regard to the requirements of these regulations, for such first-mentioned purpose.

(2) Any person who contravenes a provision of subregulation (1) shall be guilty of an offence, and the local authority may serve a notice on such person calling upon him forthwith to cease with contravention.

(3) Where the erection of any building was completed before the date of commencement of the Act and such erection was in contravention of the provisions of any law in force before such date, the local authority

may take any action it may have been competent to take in terms of such law.

(4) Where any building was being erected before the date of commencement of the Act in contravention of the provisions of any law in force before such date and the erection of such building is continued on or after such date in contravention of such provisions or of the provisions of the Act, the person who continues so to erect such building shall be guilty of an offence.

(5) Any person who, having obtained approval in terms of the Act for the erection of any building, deviates to any material degree from any plan, drawing or particulars approved by the local authority shall, except where such deviation has been approved, be guilty of an offence.

(6) The local authority may serve a notice on any person contemplated in section 4(4) of the Act or subregulation (4) or (5), ordering such person forthwith to stop the erection of the building concerned or to comply with such approval, as the case may be:

Provided that where any deviation is found to be necessary during the course of construction of such building, the local authority may authorize the work to continue but shall require that an amended plan, drawing or particulars to cover such deviation is submitted and approved before a certificate of occupancy is issued.

(7) Whether or not a notice contemplated in subregulation (6) has been served the local authority may serve a notice on the owner of any bulding contemplated in subregulation (4) or (5), ordering such owner to rectify or demolish the building in question by a date specified in such notice.

(8) ...

(9) ...

(10) ..."

In construing the regulations, they must be viewed against the background of the relevant provisions of the Act under which they were made.

Section 4 of the Act provides:

"4. (1) No person shall without the prior approval in writing of the local

authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.

(2) Any application for approval referred to in subsection (1) shall be in writing on a form made available for that purpose by the local authority in question.

(3) Any application referred to in subsection (2) shall -

(a)

(b) be accompanied by such plans, specifications, documents and information as may be required by or under this Act, and by such particulars as may be required by the local authority in question for the carrying out of the objects and purposes of this Act.

(4) Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on

which he was engaged in so erecting such building."

Sec 6(1)(a) provides for the making of recommendations by a building control officer regarding any plans, specifications, documents and information submitted to a local authority in accordance with sec 4(3). Sec 7 deals with approval by local authorities in respect of the erection of buldings. It provides -

"7. (1) If a local authority, having considered a recommendation referred to in section 6(1)(a)-

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i)is not so satisfied; or

(ii)is satisfied that the building to which the

application in question relates-

(aa) is to be erected in such manner or will be of such nature or appearance that-

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal;

(2) ...

(3) ...

(4) ...

(5) Any application in respect of which a local authority refused in accordance

> with subsection (l)(b) to grant its approval, may, ... subject to the provisions of subsection (1) be submitted anew to the local authority within a period not exceeding one year from the date of such refusal -
>
> (a) (i) if the plans, specifi= cations and other documents have been amended in respect of any aspect thereof which gave cause for the refusal; and (ii) if the plans, specifi= cations and other documents in their amended form do not substantially differ from the plans, specifications or other documents which were originally submitted; ..."

The owner resisted the application on a number of grounds. Most of them were dismissed by the Court a quo, so that ultimately only one question remained for consideration, namely, whether the owner, by installing seating in the conservatory area,

"deviated to a material degree from any plan, drawing or particular approved by the local authority", within the meaning of sub-regulation (5).

ELOFF JP considered that the owner's conduct was not hit by the sub-regulation, and dismissed the application with costs. The Council now appeals with leave granted by the Court a quo.

The learned Judge-President considered that on a proper interpretation sub-regulation (5) dealt with deviations "in the physical construction of the building as such".

One of his reasons was that in the regulation the word "deviates" follows on the phrase "having obtained approval in terms of the Act for the erection of any building ". I do not think with respect that this circumstance provides support for the learned Judge President's interpretation. The phrase simply follows the wording of sec 4(1) of the Act which

provides that "No person shall without the prior approval in writing of the local authority in question erect any buildings ...." He thought too that "the wording of sub-regulation (6), which amplifies the wording of sub-regulation (5), indicates that what those sub-regulations are concerned with is alteration in the physical design of the building". Again I respectfully disagree. Sub-regulation (6) merely empowers the local authority, where that is appropriate, to make an order as set out therein. It does not throw any light on the meaning of sub-regulation (5).

ELOFF JP said in his judgment:

> "It will be seen that sub-regulation (1) is the one which deals specifically with the use of a building for a purpose other than that shown on the approved plans. Sub-regulation (5) deals with deviations from a plan, drawing or particulars by a person who obtained approval for the erection of a building. That deviation relates, I think, to a deviation in the construction of a building, for the words

> after 'deviation' follow on 'the approval for erection of a building" (my underlining). It seems to me to be concerned with the situation where the physical construction is not in accordance with 'any plan, drawing or particular'. This conclusion is, I think, reinforced by the fact that sub-regulation (1) is the sub-regulation dealing specifically with the use of a building inconsistent with what the plans show. The draughtsman of the regulation could hardly have intended to deal with unauthorised use as opposed to unauthorised construction both in sub-regulation (1) and in sub-regulation (5)."

With respect I do not think that there is any call for a reconciliation of sub-regulation (1) with sub-regulation (5)- Each has its own subject matter: sub-regulation (1) deals with use of a building for a purpose other than the purpose shown on the approved plans; sub-regulation (5) deals with deviations from "any plan, drawing or particulars". In the present case the purpose for which the conservatory was to be

used was not shown on the plan - although the representation of the proposed structure was labelled "conservatory", I do not think that the word was there used with the relevant meaning given in the Oxford English Dictionary, 2nd ed. s.v. Conservatory 5, viz.

> "A greenhouse for tender flowers or plants; now, usually, an ornamental house into which plants in bloom are brought from the hot-house or green-house."

On the plan the word was used to connote a structure of the nature of a conservatory which would provide an amenity for the restaurant which it would adjoin. It was described in the motivation which accompanied the application for approval as follows:

> "The proposed conservatory is intended to open up the existing west facing portion of the restaurant onto a garden atmosphere by removing the existing roof over the extension to the original restaurant.

> By erecting the conservatory over this area allows a more cohesive bridging between the original restaurant and retail store. The conservatory allows covered access, which does not presently exist, to the existing toilets at the south of the complex, thus increasing toilet capacity to the restaurant. The conservatory is not intended as an extended seating area during normal restaurant operating periods, therefore the existing parking facilities are sufficient."

In the context the word "conservatory" was descriptive of the structure; it was not definitive of the use to which it was to be put.

Building plans and drawings ordinarily set out details of construction which are required for the erection of the proposed building. In the case of large buildings they are accompanied by a specification which contains particulars. In the case of smaller buildings, however, such particulars may be noted on the

drawings themselves, as in this case, where it is stated on the plan "Conservatory to be constructed from epoxy coated aluminium or steel and high (impact laminated glass". Similarly with the notation "No seating to occupy conservatory area".

Such particulars do not necessarily relate only to constructional details. That they may concern other matters appears from sec 7(1)(b) of the Act, which provides that if a local authority is (i) not satisfied that the application in question complies with the requirements of the Act or (ii) is satisfied that the building to which the application in question relates, is to be erected in such manner or will be of such nature or appearance that the consequences set out in sub-paras (aaa), (bbb) or (ccc) will or may follow, the local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal. From this it is manifest that the local

authority may have regard not only to the structural details of the building but also to its nature or appearance, including the effect of the building on the value of adjoining or neighbouring properties (para (ccc)). Sec 7(5) provides that where approval of an application has been refused in terms of sec 7(1)(b), the application may be submitted anew to the local authority

> "(a) (i) if the plans, specifications and other documents have been amended in respect of any aspect thereof which gave cause for the refusal."

It is clear from the terms of the Management Committee's approval that but for the notation on the plan "No seating to occupy conservatory area", the application to construct the conservatory would have been refused. The probability is strong that the notation on the plan was made in order to avoid a

refusal of the application on the ground that the buiding would "probably or in fact derogate from the value of adjoining or neighbouring properties" by reason of on-street parking congestion. In the affidavit by Mr Matisonn filed on behalf of the owner, it was said:

> "As I understand the reason for the imposition of the restriction on seating in the conservatory area, it was to limit the number of vehicles which would be drawn to the area of the building (brought by patrons of the restaurant) and thereby alleviating or, at least, avoiding an exacerbation of parking problems in the said area."

In a letter by the Council's Director of Town Planning dated 19 October 1990 reference was made to discussions with Matisonn:

> "It was discussed that a reason for the Council not allowing seating in the

> conservatory area of the restaurant is due to the critical parking problem in Eleventh Street Parkmore."

In my opinion therefore the action of the owner in placing seats in the conservatory area, deviated to a material degree from the "plan, drawing or particulars approved by the local authority".

I would uphold the appeal with costs including the costs of two counsel and set aside the order of the Court a quo, substituting an order in terms of prayers (1), (2) and (3) of the notice of motion, including the costs of two counsel.

H C NICHOLAS AJA.