THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 795/13

In the matter between:

TRUMPER TRADING 166 CC **Appellant**

and

KOUGA MUNICIPALITY

Respondent

Neutral citation: *Trumper Trading v Kouga Municipality* (795/13) [2015] ZASCA 18 (18 March 2015)

Coram: Maya, Cachalia, Saldulker JJA and Van Der Merwe and Mayat AJJA

Heard: 17 February 2015

Delivered: 18 March 2015

Summary: Land Use Planning Ordinance 15 of 1985 – whether municipal zoning scheme regulations permit the operation of a bottle store from premises zoned as 'special business' without the municipality's further consent.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Schoeman and Roberson JJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

MAYA JA (CACHALIA, SALDULKER JJA, and VAN DER MERWE and MAYAT AJJA concurring):

[1] The central issue in this appeal is whether the Jeffrey's Bay Municipality: Zoning Scheme Regulations (the regulations),[1] permit the operation of a bottle store from premises zoned as 'special premises' without the special consent of the respondent (the municipality). The question arose in an appeal brought before the Eastern Cape High Court, Grahamstown (Schoeman and Roberson JJ) against an interdict granted by the magistrate, Humansdorp (Mr FJ Van Zyl) which prohibited the appellant from conducting the business of a bottle store from its premises. The high court held that municipal consent is necessary. This appeal, brought with the leave of this court, challenges that decision.

[2] The appellant is a close corporation and sole proprietor of a bottle store which it operates on Erf 36, Paradise Beach, Jeffrey's Bay (the premises) in terms of a liquor licence granted to it by the Eastern Cape Liquor Board in November 2008.[2] The regulations are applicable to the zoning and land use rights of the

1 Promulgated in terms of s 8 of the Land Use Planning Ordinance 15 of 1985 (LUPO), and published in GN 92, *GG* 403, 28 May 1999.

2 Reference Number. 13836.

premises. In October 2008, the appellant's former member applied to the respondent for special consent for the use of the premises and the buildings thereon as a bottle store, supermarket and coffee shop.

[3] The municipality refused the application 'due to the objections received from surrounding property owners'. As it turned out, the appellant had in the meantime commenced the business of a bottle store without municipal consent and was selling liquor from the premises. When this came to the municipality's attention, it directed the appellant to cease operating the bottle store. However, the appellant continued to trade whilst making further unsuccesful attempts until late in 2010, to obtain the consent. On 16 March 2011 the municipality instituted proceedings in the magistrate's court to interdict the appellant from trading as a bottle store without the necessary consent.

[4] The municipality's application was successful, as was its opposition to the subsequent appeal in the high court. There, the appellant argued, inter alia, that on a proper interpretation of the relevant zoning scheme regulations, the zoning of the premises as a 'special business' brought the bottle store within the ambit of 'primary use' businesses which are conducted without the municipality's special consent. This was so, it contended, because this class of businesses included restaurants and licensed hotels which are more offensive than a bottle store as they allow the consumption of liquor on their premises. It would thus make no sense to require an off-sales bottle store, and not these other businesses, to obtain special consent to trade. And socio-economic factors, such as the safety and welfare of the community were irrelevant considerations as they were taken into account when the initial zoning detemination

was made[3] and when the liquor licence application was considered. As indicated above, none of these submissions found favour in the high court, hence this appeal.

[5] On appeal before us, the appellant's case narrowed to one ground. It contends that by virtue of the zoning applicable to the appellant's premises as 'special business' in the regulations no consent is required to conduct the business of a bottle store. And because 'special business' is defined to include 'shops' as well as 'similar uses' a bottle store is a similar use as contemplated in the definition. The appellant thus did not need the municipality's consent to operate the bottle store for which it has a valid liquor licence, so went the argument.

[6] The municipality's power to regulate land use planning within the Jeffrey's Bay area of jurisdiction derives from the Land Use Planning Ordinance 15 of 1985 (LUPO), in terms of which the regulations are promulgated. According to s 11 of LUPO, the general purpose of a zoning scheme (and the regulations) is to determine and provide for control over land use rights and over the utilisation of land in the area of jurisdiction of a local authority. Section 39(1) obliges local authorities to comply with and enforce compliance with LUPO itself and the provisions incorporated in a zoning scheme in terms thereof. In terms of s 39(2), no person may contravene or fail to comply with the provisions incorporated in a zoning scheme or conditions imposed in terms of LUPO. And s 46(1) makes such contravention or failure to comply an offence.

3 In terms of s 36 of LUPO which, in addition to the safety and welfare of the community concerned, requires the consideration of the preservation of the natural and developed environment concerned or the effect of the application on existing rights concerned when zoning and subdivision applications are determined.

[7] The zoning, ie reservation of an erf for a specific use or uses, 'special business', which is applicable to the premises, is defined in the regulations as meaning 'a site or building or structure on or in which business is conducted and includes shops, offices,[4] financial institutions or restaurants or sites, buildings or structures for similar uses, but does not include places of assembly,[5] institutions,[6] public garages,[7] industries[8] or noxious uses'.[9]

[8] Part III of the regulations incorporates Table A which indicates the purpose for which land may be used in the various zones[10] that it lists. According to the table, land and buildings thereon either have 'primary use','secondary use' or 'consent use'. And a 'special business' zoning has three use rights: (a) primary use which includes special

4 Defined as 'a room or set of rooms or a building utilised for the performance of an administrative, professional, financial or similar function but excludes a shop'.
5 Defined as 'a site or building or portion of a site or building utilised or intended to be utilised for gatherings, entertainment, recreation, sports or exhibitions, and includes a billiard salon and an amusement arcade and also includes a training centre for more than five persons at a time but does not include a place of worship, an institution, a pub/tavern, place of instruction, a private open space or a restaurant'.
6 Defined as 'a building or portion of a building utilised or intended to be utilised as a social or welfare institution including the administration thereof and includes a nursing home or clinic, whether private or public, but does not include any hospital, sanitarium, clinic or institution for the treatment of infectious or contagious diseases or for the detention or treatment of persons who are mentally handicapped or ill'.
7 Defined as 'a building, including is the site, for an undertaking which offers a complete range of services for motor vehicles, including panel beating, blacksmithing, spray painting, body building and a shop'.
8 Defined as 'the use of land as a factory within the meaning of relevant other legislation controlling the use of land for a factory which may include other activities incidental and subordinate to the main use such as offices, caretakers accommodation and employee restaurants, but does not include a noxious industry or activity'.
9 In terms of the regulations 'noxious use' means '(a) an offensive use or any other use which constitutes a nuisance as envisaged in regulations promulgated from time to time in terms of section 33 and 34 of the Health Act, 1977 (Act 63 of 1977), read with paragraphs (f) and (g) of the definition of "nuisance" in section 1 of the said Act; (b) the operation of a scheduled process, as defined in s 1 of the Air Pollution Prevention Act, 1965 (Act 45 of 1965); and (c) the manufacture of explosives, as defined in section 1 of the Explosives Act, 1956 (Act 26 of 1956)'.
10 'Zone' is defined in s 2 of the regulations as meaning an area consisting of one or more erven for which a specific land use or uses is demarcated on the scheme map kept by the Council which indicates the zoning of each erf in the scheme area.

business, warehouse,[11] service station[12] and licensed hotel;[13] (b) secondary use, which includes general residential buildings,[14] place of assembly, and place of instruction,[15] (irrelevant for present purposes); and (c) consent use which includes all uses other than those mentioned in (a) and (b), excluding noxious uses. Under the 'special business' zoning, the municipality's special consent is required for all uses other than those categorised under primary uses.

[9] Of immediate relevance, the regulations define 'bottle store' as 'a shop in which mainly alcoholic beverages are sold in the retail trade and includes an off-sales facility which is under the same management as a licensed hotel'. 'Shop', on the other hand, is defined as 'a site or building, or portion of a site or building, utilised or intended to be utilised for the operation of a retail business, and includes a licensed restaurant[16] and a workshop[17] on the same premises, which is connected and is incidental and subordinate to the retail business, but does not include a service or filling station, bottle store, pub/tavern,[18] public garage or industry'. Notably, a bottle store is expressly excluded from the definition of a shop.

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11 Defined as 'a building used for the storage of goods, or as a depot for a wholesale business, or as a place for the storage of commercial material, in so far as such a building does not fall within the scope of a shop'.

12 Defined as 'a building in which motor vehicles, fuel and accessories are sold and in which repairs may be effected and includes a shop, but excludes panel beating, spray painting, body building and blacksmithing'.

13 Defined as 'a purpose built building in which lodging, meals and beverages are provided, which is readily accessible to the public and complies with the requirements of a hotel in terms of the Hotels Act, 1965 (Act 70 of 1965), but does not include an off-sales facility or bottle store'.

14 Define as 'a building which consists of a number of dwelling units or rooms which can be let or owned separately and includes a block of flats, an accommodation establishment, a group house, a town house, a retirement village and a home for aged persons, but does not include any hostel, institution or dwelling house'.

15 Defined as 'a school, college, technical institute, academy, lecture hall, cloister, public library, art gallery, museum, gymnasium, crèche, or any other similar use regarded by the Council as of an educational nature, but excludes a university, reformatory, industrial school or a school for the mentally handicapped'.

16 Defined as a shop in which mainly prepared food and refreshments are sold and served and which is licensed in terms of the Liquor Act, 1977 (Act 87 of 1977), as amended from time to time.

17 Defined as 'a building or portion of a building which does not exceed 200 m^2 in nett floor area and in which any one or more of the activities referred to in definition of "industry" is or are conducted, but does not include a public garage, service station and noxious use'.

18 Defined as 'a shop in which mainly alcoholic beverages are sold or are attainable, exclusively for on-site consumption'.

[10] The question then is whether it is a ‘similar use’ to a shop as contemplated in the definition of ‘special business’ as the appellant contends it is. The words ‘similar use’ are not defined in the regulations. Counsel for the appellant submitted that in ordinary parlance, ‘similar’ means ‘of the same kind in appearance, character or quantity without being identical; having a marked resemblance or likeness’.[19] Relying on this meaning, he argued that a bottle store is distinct from a ‘shop’ as defined, but nonetheless bears a close resemblance and is similar to it in the manner envisaged in the definition of ‘special business’. We were thus urged to find that the wide language of the definition of shop, and particularly the use of the word ‘includes’, suggest an intention to enlarge the meaning of the categories of business that would constitute ‘similar use’ to that of a shop. And there is thus no reason logically not to include a bottle store in the category that would fall within such similar usage, so it was argued.

[11] The appellant’s contentions seem attractive at first blush. I accept that ordinarily a bottle store would fall within the category of similar uses to that of a shop. But this conclusion ignores the admissible context provided by reading the relevant provisions in the light of the regulations as a whole.[20] As indicated above, a ‘bottle store’ is expressly defined in the regulations. It is also expressly excluded from the definition of a ‘shop’. In my view it is highly unlikely that the legislature would exclude a bottle store expressly from the definition of a shop but then allow it under the category of similar uses.

[12] There are other indicia in the regulations that suggest that a bottle store is not a similar use to that of a shop. Clause 4 of Part 1V of the regulations deals with the development parameters and land use restrictions applicable to each use

19 The Shorter Oxford English Dictionary vol 2 (1998); Concise Oxford English Dictionary 12 ed (2011).
20 *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

right which

are not attached to a specific zoning and will change according to the use rights allowed in the zoning. Clause 4.6.1 contains the definition of ‘bottle store’ set out above. Clause 4.6.2 covers the relevant land use restrictions and provides that ‘[t]he land use restrictions applicable to a shop … will apply if a bottle store is allowed in the restricted business zone and *the land use restrictions applicable to special business … will apply if allowed in the special business zone’*. (Emphasis added.) The use of the words ‘if allowed’ amply demonstrates that a zoning of a ‘bottle store’ in a ‘special business’ zone does not automatically endow it with primary use status and discharge its obligation to seek municipal consent.

[13] In my view, the meaning which the appellant seeks to ascribe to the definition of ‘special business’ does not find support in the regulations. In the circumstances, the appellant is not permitted to conduct the business of a bottle store without the municipality’s consent. The decision of the high court was correct. The appeal must, accordingly, fail.

[14] In the result, the following order is made.

The appeal is dismissed with costs.

MML Maya

Judge of Appeal

APPEARANCES

APPELLANT:	JD Huisamen SC
	Slabbert & Rossouw Attorneys, Jeffrey's Bay
	Bock & Van Es Attorneys, Bloemfontein
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