IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

14/3/14

CASE NUMBER: 38624/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

2014/03/14 .....
DATE

.....
SIGNATURE

In the matter between:

MOSIMA CHRISTOPHER MPHUMO Applicant

and

THE LIMPOPO PROVICIAL LIQUOR BOARD First Respondent

THE CHAIRPERSON OF THE LIMPOPO PROVINCIAL LIQUOR BOARD Second Respondent

DATE OF HEARING: 04 March 2014
DATE OF JUDGMENT: 14 March 2014

JUDGMENT

CILLIERS AJ

[1] This is an application for the review and setting aside of the decision of the First Respondent not to grant a special on-consumption liquor licence to the Applicant.

[2] The Applicant applied with the First Respondent for the granting of a special on-consumption liquor licence (eating house) in respect of premises situated at F220 Boltman B, Madonsi Village, Malamulele.

[3] The application was brought in terms of the provisions of Section 19 of the Liquor Act, 27 of 1989.

[4] At a time that is not recorded in the papers, but prior to the application for the granting of the special on-consumption liquor licence ("*the liquor licence*") the premises situated at F220 Boltman B, Madonsi Village, Malamulele ("*the premises*") was used as an eating house and a liquor license was issued in respect thereof.

[5] The previous licence under which the Applicant operated lapsed by reason of the non-renewal thereof.

[6] The Applicant rented the premises and he was, at the time of the application for the granting of the liquor licence, of the intention to re-open an eating house at the premises.

[7] Section 19 of the Liquor Act, 27 of 1989 ("*the Act*") still finds application in the Limpopo Province, despite the repeal of the Act by the provisions of Section 46 of the Liquor Act, 59 of 2003. This is so by reason of the fact that the legislator in the Limpopo Province has not yet enacted legislation contemplated in items 2(2) of Schedule 1 to the Liquor Act, 59 of 2003, or that a date determined in accordance with item 2(1) and (2) of the Act was not yet determined and declared by notice in the Gazette for the coming into operation of legislation in the Limpopo Province.

[8] The power to consider and to grant or refuse a liquor licence is derived from the express provisions of Section 22 of the Act. Section 22 of the Act provides, in relevant part as follows:

> *"1. An application for a licence, excluding a temporary liquor licence and an occasional licence, shall be considered by the Board, and it may –*
>
> *(a) refuse the application; or*
>
> *(b) grant the application.*
>
> *2. The Board shall not grant an application under sub-section 1(b) of this section or under section 15(1)(a)(iii) –*
>
> .....
>
> *(b) For any licence –*
>
> *(i) Unless –*
>
> .....
>
> *(cc) If the premises are situated in the vicinity of the place of worship or school or in a residential area, the business will be carried on in a manner that would not disturb the proceedings in that place of*

worship or school or will not prejudice the residents of that residential area.

.... "

[9] In the application for the granting of the liquor license in terms of the provisions of Section 19 of the Act the Applicant furnished comprehensive written representations to the First Respondent. The following sets of information furnished are relevant to this application:

(i) It was declared that the premises is situated within the business area of Malamulele and there are no schools or churches situated in close proximity to the premises. It was, however disclosed that there are other dining facilities and off-consumption facilities in the area where the premises is located;

(ii) It was stated that a licenced on-consumption facility was previously conducted at the premises, that the previous owner failed to pay the annual renewal fees and that the licence lapsed;

(iii) It was disclosed that the Applicant recently rented the premises and was under the impression that the premises was licenced for an on-consumption facility. Pursuant to the Applicant commencing with the alterations and renovations to the premises he discovered that the 2012 renewal of the liquor licence was not paid and that the on-consumption licence therefore lapsed.

[10] Pursuant to the bringing of the application for the granting of the liquor licence the designated police officer filed a report in accordance with section 140 of the Act in which he stated, amongst other issues, the following:

(i) The premises is situated 50m away from Xigombe Eating House;

(ii) 100m Away from Madonsi Eating House;

(iii) 300m Away from Balwani Eating House;

(iv) 300m Away from the Swiss Mission Church;

(v) 300m Away from the Full Gospel Church;

(vi) 500m Away from Khanani Primary School;

(vii) 600m Away from Shingwedzi High School;

(viii) 1km Away from Solly Eating House;

(ix) 1km Away from the Blue Flame Eating House.

[11] It is common cause on the papers that the First Respondent adopted a policy in August 2011 (after holding a routine consultative process with members of the community and all stakeholders in the liquor industry in Limpopo) that a radius of 500m be maintained between liquor businesses and schools and churches.

[12] It is this policy that was evidently followed when the First Respondent decided to refuse the granting of the liquor licence.

[13] In this regard the reason for the refusal is contained in the letter from the First Respondent dated 6 May 2013, and recorded as follows:

> *"The application was considered and **refused** by the Limpopo Provincial Liquor Board at its sitting of the 29/04/2013.*
>
> ***Reason(s) for refusal:***
>
> - *The proposed premises is 300m away from Swiss Mission Church; 300m away from Full Gospel Church and 500m away from Khanani Primary School."*

[14] The provisions of Section 22 of the Act do not provide for the imperative refusal of an application for the granting of a liquor licence if the premises are situated in the vicinity of a place of worship or school or in a residential area, without more. In addition, the said provisions certainly do not provide for the blanket refusal of the granting of an application for a liquor licence based on a policy that a distance of 500m should be maintained between liquor businesses and schools and churches.

[15] The provisions of Section 22(2)(d)(i)(cc) provide for the imperative that the First Respondent shall not grant an application for any licence unless the business will be carried on in a manner that would not disturb the proceedings in that place of worship or school or will not prejudice the

residents of that residential area, if the premises is situated in the vicinity of place of worship or school or in a residential area;

[16] On a proper interpretation of the above it simply means that, if the premises in respect of which the application for the granting of the liquor licence is brought is situated in the vicinity of a place of worship or school or in a residential area the Board is obliged not to grant an application for any licence unless the business will be carried on in a manner that would not disturb the proceedings in that place of worship or school or will not prejudice the residents of that residential area.

[17] It follows from the aforesaid that a two-tier approach is to be followed, namely, firstly to determine whether the premises are situated in the vicinity of a place of worship or school or in a residential area and, if so, whether the business will be carried on in manner that would not disturb the proceedings in that place of worship or school or will not prejudice the residents of that residential area.

[18] The word "*vicinity*" is defined in the Shorter Oxford Dictionary to mean, either:

"*the state, condition, or quality of being near in space; proximity. or*

The area within a limited distance from a place; a nearby or surrounding district; the neighbourhood."

[19] In my view the word "*vicinity*" is, within the context in which it is used in Section 22(2)(d)(i)(cc) inherently a relative concept. In this regard the proximity of the premises to a place of worship or school or in a residential area may vary according to, amongst other factors that may be present, the density of buildings in the area and the type of activities undertaken within that particular area where the premises is situated.

[20] Within the context of Section 22 of the Act no basis exists to rigidly apply a particular distance, for example 300m or 500m, to interpret the word "*vicinity*", other than in its ordinary meaning – bearing in mind the relative meaning that it may carry in different areas.

[21] I am, however, without deciding the issue prepared to accept in favour of the First Respondent that the premises can be regarded as being in the vicinity of a place of worship or school or in a residential area.

[22] Even on the aforesaid assumption that the above is so, it was not the end of the enquiry.

[23] The relevant part of Section 22 of the Act also requires consideration of the issue whether the business will be carried on in a manner that would not disturb the proceedings in the place of worship or school in the vicinity and whether it will prejudice the residents of that residential area.

[24] It is clear from the report from the designated police officer (filed in accordance with Section 140 of the Act) that the issue whether the business will be carried on in a matter that would not disturb the proceedings in that place of worship or school was not considered by him and he made no representations in that regard. This much is evident from the fact that the issue was not addressed in his report at all.

[25] The reason for the refusal that is provided by the First Respondent is limited only to a token statement that the premises is 300m away from two places of worship and 500m away from a school. No indication is to be found in the reasons furnished that consideration was at all given to the issue whether the business will be carried on in a manner that would not disturb the proceedings in that place of worship or school.

[26] A cause of action for the judicial review of administrative action now ordinarily arises from the provisions of the promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*") and not directly from the right to just administrative action in Section 33 of the Constitution.[1]

[27] The grounds for judicial review on PAJA are contained in Section 6 thereof, which reads in relevant part:

> *"(1) any person may institute proceedings in a Court or a tribunal for the judicial review of an administrative action.*

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[1] **Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA (CC) at para 73; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at paras 25-26.**

(2) a Court or tribunal has the power to judicially review and administrative action if –

(a) .....

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the Action was taken –

i. .....

iii. because irrelevant considerations were taken into account or relevant considerations were not considered;

vi. arbitrarily or capriciously;

(f) the action itself –

i. ....

ii. is not rationally connected to –

(aa) .....

(bb) The purpose of the empowering provision

(g) .....

(i) the action is otherwise unconstitutional or unlawful."

[28] It is apparent from Section 6 that unfairness in the outcome or result of an administrative decision is not, apart from the unreasonableness ground, a ground for judicial review of administrative action. The section gives legislative expression to the fundamental right to administrative action that

is lawful, reasonable and procedurally fair under Section 33 of the Constitution. It is a long-held principle of our administrative law that the primary focus in scrutinising administrative action is on the fairness of the process, not the substantive correctness of the outcome.[2]

[29] I return to dealing with the facts.

[30] The adoption of the policy in August 2011 not to permit liquor businesses within a 500m radium from churches and schools and the applying of that policy on the present application renders the administrative decision to fall foul when scrutinised in terms of PAJA, for the following reasons:

(i) It was procedurally unfair (as contemplated by Section 6(2)(c) of PAJA);

(ii) it was materially influenced by an error of law (as contemplated by the provisions of Section 2(d) of PAJA).

(iii) it was taken for a reason not authorised by the empowering provision (as contemplated by Section 6(2)(e)(i) of PAJA);

(iv) it was taken in circumstances that irrelevant considerations were taken into account (as contemplated by the provisions of Section 6(2)(e)(iii) of PAJA);

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2 **Allpay Consolidated v Chief Executive Officer, SASSA 2014 (1) SA 604 (CC) at 620-621, para 42.**

(v) it was taken arbitrarily and capriciously (as contemplated by the provisions of Section 6(2)(e)(vi) of PAJA) and;

(vi) the action is accordingly otherwise unlawful (as contemplated by the provisions of Section 6(2)(i) of PAJA.

[31] The evident failure by the First Respondent to at all consider and take into account whether the business will be carried on in a manner that would not disturb the proceedings in the places of worship or school in the vicinity also renders the administrative decision to fall foul if scrutinised in terms of PAJA, for the following reasons:

(i) it did not comply with the mandatory and material condition prescribed by the empowering provision (Section 22 of the Act) and accordingly in contravention of the provisions of Section 6(2)(d) of PAJA.

(ii) relevant considerations were not being considered (as contemplated by the provisions of Section 6(2)(e)(iii) of PAJA) and this failure caused the decision not to be rationally connected to the purpose of the empowering provision, namely to establish whether the granting of a licence in respect of a premises situated in the vicinity of a place of worship or school would cause a business to be carried on in a manner that would disturb the proceedings in that place of worship or school

(as contemplated by the provisions of Section 6(2)(f)(ii)(bb) of PAJA.).

[32] It follows from the aforesaid that the decision of the First Respondent not to grant to the Applicant a special on-consumption liquor licence (eating house) in respect of the premises is liable to be reviewed and set aside. Once a ground of review under PAJA has been established there is no room for shying away from it.[3]

[33] Section 172(1)(a) of the Constitution of the Republic of South Africa, 108 of 1996 requires the decision also to be declared unlawful.[4]

[34] The consequences of a declaration of unlawfulness must then be dealt with in a just and equitable order under Section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the constitutions "just and equitable" remedy.[5]

[35] **In the result the following order is made:**

1. **The decision not to grant to the Applicant a special on-consumption liquor licence (eating house) in respect of the premises described as Matimo Eating House, situated at F220 Boltman B, Madonsi Village, Malamulele is declared invalid and it is reviewed and set aside;**

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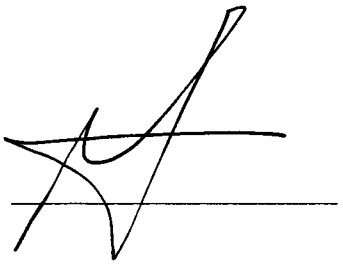
3 **Allpay Consolidated v Chief Executive Officer, SASSA (supra) at p 164, para [25].**
4 **Allpay Consolidated v Chief Executive Officer, SASSA (supra) at p 164, para [25].**
5 **Allpay Consolidated v Chief Executive Officer, SASSA (supra) at p 164, para [25] and the authorities in footnote 19.**

2. **The application for the granting of a special on-consumption liquor licence (eating house) in respect of the premises described as Matimo Eating House, situated at F220 Boltman B, Madonsi Village, Malamulele is referred back to the First Respondent with the direction to specifically consider whether the premises is situated in the vicinity of a place of worship or school and whether the business to be conducted from the premises will be carried on in a manner that would not disturb the proceedings in that place of worship or school;**

3. **The First Respondent is directed to consider the application for the granting of a special on-consumption liquor licence (eating house) in respect of the premises described as Matimo Eating House, situated at F220 Boltman B, Madonsi Village, Malamulele within a period of 60 (sixty) days from the date of granting of this order and to communicate the decision to the Applicant within a period of 60 (sixty) days from the date of the granting of this order, together with full and comprehensive reasons for the decision.**

4. **The First Respondent is ordered to pay the costs.**

SIGNED AT PRETORIA ON THIS 14 DAY OF MARCH 2014.



Cilliers, AJ

Acting Judge of the High Court of South Africa

Appearances:

For Appellant:	Adv.: C J Welgemoed
Instructed by:	Mr M Blom
For Respondent:	Adv.: Z Z Matebese
Instructed by:	State Attorney: Mr L Kopman