


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

3/11/16

CASE NO: 91046/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
 SIGNATURE	0-3/11/2016 DATE

SNOWMAN RESTAURANT CC

APPLICANT

AND

THE GAUTENG PROVINCIAL LIQUOR BOARD

DEFENDANT

JUDGMENT

THOBANE AJ,

Introduction

- [1] This matter came before me as a review in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The applicant is a close corporation duly registered, trading as TY's at the Menlyn Piazza in Pretoria.
- [2] The respondent, the Gauteng Liquor Board, is constituted as a legal persona by the provisions of the Gauteng Provincial Liquor Act 2 of 2003 ("The Liquor Act"), in particular section 2 thereof.
- [3] According to the notice of motion, the applicant seeks the following relief;
 - 3.1. That the decision of the respondent in terms of section 143 of the Gauteng Liquor Act, 2 of 2003, to convert the special on-consumption liquor license in respect of the premises known as Shop No 2, Menlyn Piazza, situated on the corner of Louis and Glen Manor Roads, Menlyn, Pretoria, to a tavern liquor license, be reviewed and set aside;
 - 3.2. That the honourable court refer the matter back to the respondent and order the respondent to issue to the applicant a section 28(1)(c) on-consumption liquor license clearly stipulating the trading hours as from 10 o'clock in the morning till 4 o'clock of the next morning, and in respect of said address, namely Shop No 2, Menlyn Piazza;
 - 3.3. An order directing the respondent to pay the costs of this application.

- [4] The application is opposed by the respondent.

Background

- [5] The applicant purchased a business known as Boston Tea Party from its owner at the time, a Mr Van Schalkwyk. It is not clear when the business was bought however at the time it was bought it may or may not have had a special on-consumption liquor license. In the papers Burenice Goodman, the deponent to the founding affidavit, states that she was assured by the previous owner that the business had a license which permitted it to trade between 10am and 4am. Other than what appears on the papers, which is what the applicant submits, nothing suggests that it is so. What is apparent from the papers though, is that the license for the year 2012/2013 was in the name of Mr Van Schalkwyk. Nothing appears in the papers about what obtained in the 2013/2014 year. However in 2015/2016 the business license was now in the name of the applicant.
- [6] During October 2015, according to the applicant, their business premises were visited by the police who informed them that their trading hours were, in terms of the then operational license, between 10am and 2am, and that they were in violation of the law. Surprised at this, applicant took legal advise and was informed that their licensing conditions were as advised by the police.
- [7] The initial license that permitted the applicant to sell liquor was issued in terms of the Liquor Act 27 of 1989. The license awarded was a "Special License (On Consumption)" license, with trading hours listed as 10am and 4am of the next morning. The Gauteng Liquor Act 2 of

2003 came into operation on 1 November 2004. All licenses that existed prior the new Gauteng Liquor Act had to be converted so as to be in line with the new Act. The license that forms the subject of this dispute also had to be converted. The conversion would have taken place soon after the Gauteng Liquor Act was promulgated. In terms of the conversion provisions of the new Act, the conditions of licensing would have remained the same. Section 143 (3) thereof provides as follows;

143 Conversion of existing licenses

(1) Subject to subsections (2), (3) and (5), any authorization, permit or licence issued in terms of the Liquor Act, 1989 (Act no 27 of 1989) to engage in the retail sale, micro-manufacture or wholesale of liquor or methylated spirits which was valid immediately before the date of commencement of this Act, shall remain valid.

(2) The holder of an authorization, permit or licence contemplated in subsection (1), shall within the period determined by the Member of the Executive Council by notice in the Provincial Gazette, submit such authorization, permit or licence to the Board for conversion into an authorization, permit or licence under this Act.

(3) A conversion contemplated in subsection (2) shall be made on the same terms and conditions and for the remaining duration of the original authorization, permit or licence.

(4) A converted authorization, permit or licence is deemed to have been issued in terms of this Act.

(5) If a licensee fails to submit his or her licence as

contemplated in subsection (2), the licence shall lapse.

(6) The Member of the Executive Council may prescribe fees for a conversion."

- [8] Upon becoming aware that the trading hours were reduced by some two hours, the applicant launched current proceedings, initially on an urgent basis. This matter proceeds in the normal course, after urgency was found wanting.

Issues

- [9] The issue for determination is whether the applicant has made out a case for the review and setting aside of a decision by the respondent. This decision which the applicant contends is an error in law, is about the trading hours of the applicant's business.
- [10] Counsel for the applicant argues that the applicant was assured by the previous owner that the license he possessed, at the time when the business was purchased, was a special on-consumption liquor license with trading hours listed as between 10 am and 4 am the next morning. The applicant further attaches a license issued on 26 July 2002, to the founding papers, in support of the contention that the license, all along, had the above trading hours. The previous owner has not deposed to an affidavit confirming that he did in fact confirm, to the applicant, that the license, at the time when the business was sold, had the trading hours of 10 am to 4 am. According to the chairperson of the Gauteng Liquor Board, the applicant's license was converted in 2004¹. What is

¹ Page 34 para 26(c) of the paginated papers.

clear from the papers², is that the date of first issue of the license is stated as 1 April 2011. What is further evident is that as at 26 January 2012 the license was in the name of the previous owner, Mr. J Van Schalkwyk and that it was a tavern liquor license. In the heads of argument³, counsel for the applicant submits that the previous owner converted the license on 3 February 2012. I can only surmise, that the date of conversion, as per the applicant, is inferred from the FNB stamp at the bottom of the annual license renewal advice. On the other hand attorney Marius Blom, Applicant's attorney, deposed to an affidavit on behalf of the applicant and stated therein that conversions only became relevant during 2010⁴. The date of conversion is very significant. For a start it will enlighten the court about the degree of delay in launching the review application so as to assess whether condonation ought to be granted and whether the application has been brought within a reasonable time. The applicant must also articulate the reasons for the delay. The reason advanced by the applicant is simply that having been assured by the previous owner of the trading hours he did not consider the matter any further until the police arrived at the business premises.

[11] The applicant further, chose not to deal with the portion in the affidavit by the Gauteng Liquor Board chairperson that deals with the fact that the conversion took place in 2004. On a reading of the papers there are four possible dates on which the conversion took place , namely;

11.1. 2004 according to the affidavit of the Gauteng Liquor Board chairperson;

11.2. 2010 according to the affidavit of Marius Blom;

² Annexure "B" page 19 and 20.

³ Paragraph 6 and 7.

⁴ Page 43 paragraph 16 of the paginated papers.

11.3. 3 February 2012 according to the affidavit of the Burenice Goodman;

11.4. 1 April 2011 according to pages 19 and 20, of the application bundle, being the advice of annual renewal fees payable.

What this means therefore is that the period of delay, to the day of the launching of the urgent proceedings, would be the following respectively, 11 years, 5 years, 3 years and 2 years. The lapse of time on all permutations can not be said to be reasonable. The critical question that begs an answer therefore is from when should the time period be computed. Is it from the date on which the decision was made, if indeed a decision was made, or is computation to be from the date on which the applicant became aware that a decision, which he is aggrieved at, had been made.

- [12] It is common cause that the "special on-consumption license" no longer exists in terms of the new Act. Therefore when the new Act became applicable, the applicant's license would have had transitional measures applied to it and also would have been subjected to conversion provisions of the Act. In terms of section 143(3) of the new Act, a conversion shall be made on the same terms and conditions and for the remaining duration of the original license. The respondent opposes the application on the basis that after the Gauteng Act became operational, the conversion took place and retained the position as it was at the time of the conversion. Further that when the previous license lapsed, the license that was awarded thereafter provided for trading hours that were in line with the new Act. From the response by the respondent it is not clear whether an administrative decision was taken.

Legal Framework

[13] Section 33 of the ***Constitution of the Republic of South Africa Act, 108 of 1996*** ("the Constitution") deals with "just administrative action". It reads as follows:

"33. *Just administrative action.* –

- (1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
- (2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
- (3) *National legislation must be enacted to give effect to these rights, and must-*
 - (a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
 - (b) *impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
 - (c) *promote an efficient administration."*

[14] In terms of section 1 of PAJA "administrative action" is defined as follows:

"administrative action' means any decision taken, or any failure to take a decision, by-

- (a) *an organ of state, when-*
 - (i) *exercising a power in terms of the Constitution of a provincial constitution; or*
 - (ii) *exercising a public power or performing a public function in terms of any legislation; or*
 - (b) *a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-*
- (then a whole lot of exclusions are listed.)

[15] "Decision" in turn is defined as follows in section 1 of PAJA:

"decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

- (a) *making, suspending, revoking or refusing to make an order, award or determination;*
- (b) *giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
- (c) *issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
- (d) *imposing a condition or restriction;*
- (e) *making a declaration, demand or requirement;*

- (f) *retaining, or refusing to deliver up, an article; or*
- (g) *doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;"*

[16] It is clear from the above that the information placed before this court is inadequate for purposes of the court fulfilling its review duties. In paragraph 6.5 of the founding affidavit the applicant states the following;

"I am further advised by Mr Blom that it is not possible to try to arrange a settlement between the Respondent and the Applicant as the Respondent is functus officio and that this application must be brought, though it can be settled by the parties by agreement asking the Honourable Court to make such an agreement an order of court. I trust this will be possible."

It would have been of great assistance to the court if proper facts were placed before it and not the opinions of an attorney, however experienced in this area of the law he might be. To be called upon to make a determination on the basis of conjecture and speculation has potential hazards which the court is not willing to invite. The avenue to unlock the cryptic nature of the information placed before this court in an attempt to resolve the dispute lies in section 5 of the of PAJA. The section provides as follows;

"5 Reasons for administrative action

- (1) *Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after*

the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

- (2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.*
- (3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason."*

[17] Having set out above the legal framework which is clear and well established as well as the facts presented, the question is whether the court has been furnished with sufficient information to enable it to make a determination. I am of the view that the information is not adequate for the following reasons;

17.1. It is not clear when the conversion from Special on-Consumption to Tavern Liquor License took place, based on the numerous contradictory submissions. On the reading of the papers it appears when the business was bought by the applicant, it already had a Tavern Liquor License. This can be deduced from the "Advise of Annual Renewal Fees Payable" on page 19 of the papers.

17.2. It is not clear how the conversion was made. Did the board sit to consider all conversions, including the one in issue, or did all conversions take place by operation of the law?

17.3. It is not clear what is the date of first issue of the license.

17.4. The fact that no reasons were requested or advanced makes it premature for the court to presume, in terms of a section 5(3) of PAJA, that the decision was taken without good reason.

[18] The reviewing court has various remedies at its disposal. Those are listed in section 8 of PAJA. The section provided as follows;

"(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

(a) directing the administrator-

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

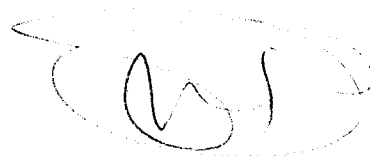
(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

- (bb) directing the administrator or any other party to the proceedings to pay compensation;*
- (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;*
- (e) granting a temporary interdict or other temporary relief; or*
- (f) as to costs."*

[19] I therefore make the following order;

1. The respondent is directed to disclose within 30 days hereof whether a conversion contemplated in section 143 of the Gauteng Liquor Act No 2 of 2003 took place as well as;
 - 1.1. the date of the conversion and;
 - 1.2. the terms and nature of the conversion.
2. The respondent is directed to give reasons, in the event a conversion took place, for such conversion;
3. No order as to costs.



SA THOBANE
ACTING JUDGE OF THE HIGH COURT