IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 3488/16

In the matter between:

PETER CHRIS KONTONMINAS	APPLICANT
and	
DUZI RETAILER CC t/a TOPS AT DUZI SPAR	FIRST RESPONDENT
KWAZULU-NTAL LIQUOR AUTHORITY	SECOND RESPONDENT

ORDER

The application for leave to appeal is dismissed with costs, such costs to include the costs of senior counsel.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL 27/10/2016

SEEGOBIN J:

[1] This is an application by the first respondent for leave to appeal against an order made by me on 19 September 2016, the reasons for which were filed on

20 September 2016. The order seeks to interdict and restrain the first respondent from illegally conducting the business of an off-consumption liquor store at Laager Centre, 78 Langalibele Street, Pietermaritzburg, pending the outcome of an appeal which the applicant has lodged with the second respondent which is the KwaZulu-Natal Liquor Authority in terms of section 61 of the KwaZulu-Natal Liquor Licencing Act 6 of 2010 ('the new Act').

[2] In the event of such leave being granted, the first respondent requests that the appeal should lie to the full bench of the KwaZulu-Natal High Court.

[3] The grounds upon which the application is premised are set out in a notice date 24 October 2016. These grounds are the following:

"1.

The Honourable Mr Justice Seegobin, respectfully, erred in that, procedurally, the Applicant was not entitled to the relief sought without:

1.1 The Applicant first exhausting the internal remedies of the Second Respondent;
alternatively
1.2 Demonstrating exceptional circumstances.

2.

The Honourable Mr Justice Seegobin, respectfully, erred in accepting:

2.1 The First Respondent was trading from another premises than that in respect of which the licence was originally issued without the knowledge and consent of the Second Respondent;
2.2 The First Respondent was obliged to lodge an application in terms of Section 75;

2.3 The Applicant has a right to the relief sought, the balance of convenience favours the Applicant and the Applicant is prejudiced, by virtue of the fact that the Applicant trades within the same centre when on the Applicant's own version the Applicant is trading contrary to the provisions of Act 6 of 2010.

3.

The Honourable Mr Justice Seegobin, respectfully, erred in awarding punitive costs against the First Respondent by:

3.1 Finding the First Respondent intentionally deceived the Second Respondent;

3.2 Finding First Respondent always intended to trade from an alternate premises;

3.3 Finding that the Second Respondent's chairperson instructed the First Respondent to rectify the position;

3.4 Finding that the First Respondent persisted in its conduct knowing it was acting unlawfully;

3.5 Failing to have regard to the First Respondent's voluntary suspension of business in order for the Second Respondent to conduct investigations;

3.6 Failing to have regard to the fact that the Second Respondent, after having concluded its investigations, advised the First Respondent that it could commence trading again."

[4] At the hearing of the application for leave to appeal on 27 October 2016, the first respondent was now represented by Mr Rowan SC together with Mr Tucker while the applicant continued to be represented by Mr Naidoo SC.

[5] Having listened intently to the submissions advanced by Mr Rowan on the grounds set out above, I am not persuaded, for the reasons that follow, that any

appeal by the first respondent would have any reasonable prospects of success or that there is some other compelling reason why the appeal should be heard.

[6] There were two fundamental difficulties facing the first respondent:

6.1 The *first* was that the first respondent's application for a liquor licence was lodged with the KwaZulu-Natal Liquor Licencing Authority on the 7 March 2014 in terms of s19 of the old Act in spite of the fact that the old Act was repealed and ceased to exist with effect from 26 February 2014. The new Act came into effect on 28 February 2014. Since the first respondent's application was lodged in March 2014, the transitional provisions contained in s102 of the new Act did not assist the first respondent as the provision applied only to matters which were already before the liquor authority on the date on which the new Act came into operation. Despite this and the fact that the application was made in terms of the old Act, the second respondent saw it fit to grant the first respondent a licence in terms of the new Act. How the second respondent did this is incomprehensible. The result is that the first respondent was issued with a licence irregularly and not in terms of the prevailing legislation at the time.

6.2 The *second* was that the premises from which the first respondent trades were different from those in respect of which the licence was applied for and issued. This much was recognized by the second respondent when it conducted an inspection of the premises in May 2016. This is borne out by the order[1] made by Xolo AJ on 11 May 2016 when this matter came before him on that date. This

[1] Pages 234-235 of the papers.

> inspection flowed from an earlier order[2] which was taken by consent before Maphumulo AJ on 6 May 2016. The operation of the first respondent's business from premises other than those specified in its application constituted an illegality which could not be condoned.

[7] In light of the above and the factual situation which existed at the time the present proceedings were instituted, I considered that the applicant had made out a strong case for the relief sought and therefore granted the order which I did on 19 September 2016.

[8] Mr Rowan's argument regarding the failure on the part of the applicant of first exhausting the internal remedies of the second respondent *alternatively* failing to demonstrate exceptional circumstances is, in my view, without merit. The duty to exhaust internal remedies is not absolute. The point was made by the Constitutional Court (per Mokgoro J) in *Koyabe v Minister for Home Affairs*[3] as follows:

> "The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in s 7(2)*(c)* that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Under s 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute." [My emphasis]

[2] Pages 205A-205B of the papers.
[3] 2010(4) SA 327 (CC).

[9] In the present matter I consider that the applicant's efforts to engage the second respondent on the unlawful issuing of the licence and the fact that the first respondent was operating its business from different premises, to have been futile. The second respondent initially dragged its feet as is evident from the plethora of correspondence[4] which passed between the applicant's attorneys and the second respondent's officials both prior to and after the licence was issued. The second respondent only entered the fray once the present application was instituted but thereafter stepped back and began adopting an ambivalent attitude. In my view and in these circumstances, the applicant's pursuit of any internal remedies with the second respondent would have been futile.

[10] The second main argument advanced by Mr Rowan is that I erred in making a finding of *mala fides* on the part of the first respondent which resulted in a punitive costs order against it. I disagree. I considered that from the very outset of the proceedings, the first respondent (through its professional consultants) had misled the second respondent into believing that it was going to conduct its business from the premises specified in the application whereas it knew that it was not. There are other instances on the papers from which it became evident that the first respondent's consultants were less than frank with the second respondent regarding the involvement of the DPO in the inspection of the premises. The evidence showed that the DPO was never involved and no report was furnished by him. Ms Viljoen's contradictory allegations in this regard were a cause for concern.

[11] It must be borne in mind that the application before me was for an interdict pending the finalization of the applicant's appeal. It was not for a review of the second respondent's decision. On the established facts I was satisfied that the applicant had made out a proper case for the relief sought.

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[4] Annexures 'PC4'-'PC18' to the founding affidavit, at pages 100-125 of the indexed papers.

[12] In the premises I do not consider that the first respondent has shown that it has any reasonable prospects of success on appeal. It follows that its application for leave to appeal must fail.

ORDER

[13] The order I make is the following:

> The application for leave to appeal is dismissed with costs, such costs to include the costs of senior counsel.

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Date of Hearing	:	27 October 2016
Date of Judgment	:	31 October 2016
Counsel for Applicant	:	V. Naidoo SC
Instructed by	:	Carlos Miranda Attorneys
Counsel for 1st Respondent	:	P. Rowan SC assisted by M. Tucker
Instructed by	:	K Swart & Company c/o Stowell & Company