Record

IN THE SUPREME COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 8643/94

In the matter between:

HARDY'S CELLAR CC — Applicant

and

THE CHAIRPERSON OF THE LIQUOR BOARD — First Respondent

LIQUOR BOARD — Second Respondent

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JUDGMENT: DELIVERED 25 April **1995**

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JOSMAN, AJ: The applicant in this matter applied on 3 December 1993 for a liquor licence in terms of the *Liquor Act, No 27 of 1989* ("the *Liquor Act*") in respect of premises situated in Uitkyk Handelspos at the corner of Main Road and Van der Stel Street, Strand. No objections were lodged to the application and the required police report which was filed on 10 January 1994 recommended the granting of the application. In particular, the appointed police officer expressed the view that the granting of the licence would be in the public interest.

The application was considered by the first respondent in terms of Section 22(1) of the *Liquor Act* and the application was refused. When requested to furnish reasons

for the refusal the first respondent replied by letter stating that he was not satisfied that the granting of the licence was in the public interest. The applicant accordingly sought to review the decision of the first respondent before this Court in terms of Section 131 of the *Liquor Act*, alleging that he exceeded his powers, or refused to exercise the power which he was obliged to exercise, or exercised those powers in an arbitrary or grossly unreasonable manner. In addition, the application for review alleged that first respondent both took into account matters that were irrelevant and blindly applied a fixed policy in respect of the granting of liquor licences, thereby affecting the exercise of his unfettered discretion.

In its application to the first respondent, the applicant had provided population statistics for the relevant area, gave projections of population growth, described the proposed premises and the area in which it was situated. It emphasised that the suburb of Van der Stel which lay between Somerset West and the Strand was not served by any other liquor outlet and that the nearest outlet, which was two kilometres away, suffered from an acute parking problem and was not convenient for the residents of the area surrounding the Uitkyk Trading Post.

FIRST RESPONDENT'S REASONS FOR REFUSING THE APPLICATION:

The first respondent replied to the application for review stating that he had considered the matter together with two other properly appointed members of the Liquor Board, of whom one had knowledge of the area in question as required by Section 7(1)(c) of the *Liquor Act*. He gave as his reasons for refusing to grant the licence the following:

(a) The applicant was obliged to convince him that the granting of the licence was in the public interest. After careful consideration he came to the *bona fide* conclusion that it had not done so. In particular, he was not convinced that the establishment of yet another liquor store in the area was in the public interest.

(b) He had considered all the relevant facts but was not obliged to afford the applicant an opportunity to clarify issues that were in dispute or doubt. The *Liquor Act*, according to him, did not provide the procedure to do this and the onus was on the applicant to have made full representations in writing in its application. To the extent that it did not do so, it had not discharged the duty of convincing the first respondent that the application should be granted.

(c) With regard to the police report he stated that he had given due consideration to its contents but concluded that in terms of the *Liquor Act* the appointed officer was not authorised to recommend the granting of the licence. Nor was his comment, that the granting of the licence was in the public interest, binding on first respondent.

(d) The gravamen of the first respondent's reply is contained in his statement that it was implied in the duty imposed upon him that control should be exercised over the number of liquor outlets in a specified area in order to ensure the orderly supply of liquor. The applicant had not provided the required information but he was aware from other sources how many liquor outlets

there were in the Strand and Somerset West. He was concerned about the over-supply of liquor in a highly competitive market because, he stated, in his experience this gives rise to all kinds of undesirable problems and conditions. He then listed a number of malpractices found in the retail liquor industry.

(e) From his independent knowledge the first respondent noted that there were twelve liquor stores in the Strand and nine in Somerset West. There were other outlets such as grocers' wine licences, totalling a further nine. He noted too that liquor is a potentially dangerous commodity and that the uncontrolled supply thereof gives rise to serious socio-economic problems. For this reason it should be regarded as a luxury item and not comparable with other commodities. He concluded:

> *"Dit is gevolglik in die openbare belang dat drank nie om elke hoek en draai beskikbaar moet wees nie, maar slegs by plekke waar daar in die volle spektrum van die publiek se behoeftes voorsien word. Dit is verkieslik dat drank in die onmidellike omgewing waar voedsel (kruideniersware) aangeknoop word, beskikbaar moet wees."*

(f) In amplification of the requirement that liquor outlets should be situated close to food outlets, he referred to the fact that in the proposed centre where the applicant's premises would be situated there was a paint store, two restaurants, a butchery and a printer.

(g) In reply to the applicant's statement that there was a market for a further liquor store in the area he stated that he was not satisfied that there was any need for a further outlet, having regard to the nearest other outlet. He went on to express his conclusion that having regard to the population and the number of outlets, in his opinion there was already an over-supply. There are 32 000 people in the Strand and 25 000 in Somerset West, and about half are adults.

THE BASIS OF FIRST RESPONDENT'S CONCLUSIONS:

(a) Inasmuch as the first respondent concluded that the proposed liquor store would not be situated close to other food outlets, he was simply not correct. This appears from the applicant's replying affidavit. The complex in question is not complete and a bakery and a small supermarket will soon be opening. Fifty metres away across the main road is another shopping complex which already has a mini-market selling food and groceries. The member with local knowledge ought to have known of this. To this extent, therefore, he did not properly apply his mind to the issue in question. In addition it is necessary to consider whether the implementation of such a policy is consistent with the spirit of the *Liquor Act*. (No pun intended).

(b) With regard to his conclusion that there was an over-supply of liquor stores in the area the first respondent clearly had no direct evidence of such over-supply but was seemingly implementing a quota system based on the size of the population of an area. It is necessary to examine the validity of this

approach.

(c) Finally, the first respondent's refusal to give the applicant an opportunity to reply to these issues must be considered.

HISTORY OF LEGISLATION CONTROLLING THE SUPPLY OF LIQUOR:

Before dealing with the first respondent's conclusions it is helpful to review the history of legislation relating to the supply of liquor in this country and to determine what policy, if any, is to be gleaned from the current enabling statute. Under the original *Liquor Law of 1928*, supply was tightly controlled and applications had to be renewed annually. According to Malcolm Avery, the second Deputy Chairman of the Liquor Board in Pretoria, there has been a gradual change in emphasis throughout the years relating to considerations of the public interest, with the focus turning to the people immediately affected by the grant or refusal of such a licence. (See: Avery: *Applications for Liquor Licences - An A to Z*, *De Rebus*, May 1991, p 353). There has also been a gradual relaxation of the laws so as to make the granting of licences easier. In the *Liquor Act, No 87 of 1977*, the number of liquor stores and off-sales licences was determined by a quota system based on the number of parliamentary voters in a magisterial district. For example, in an urban area one liquor licence was granted for every 2 000 (white) parliamentary voters. In 1983 this was amended with the removal of racially based supply laws, and free market principles were applied increasingly in relation to the supply of liquor. Dr Avery concludes, in respect of the current *Liquor Act*, that:

"A principle borne in mind when drafting the Act was that free enterprise within the framework of the Act should be encouraged."

He added that:

"Attention was paid to the need to promote entrepreneurship within the framework of the free operation of the market mechanism."

And finally:

"The repeal of the last vestige of a quota system and the opening up of all areas, clearly conveys the legislative intent in permitting the principles of free marketing to come into play. More competition may be expected as the public interest is served, especially in hitherto prohibited areas."

A free market approach generally abhors protectionism. This should be borne in mind when considering applications for a liquor licence and objections concerning over-trading. Whilst acknowledging that gross over-trading can lead to offensive business practices, the fact of such over-trading is not to be inferred and must be clearly established. What is desirable is an orderly distribution pattern, and the market mechanism is still the most effective way of achieving this.

PROCEDURE:

To understand how applications of this nature are considered in terms of the Act, it is necessary to consider some of its provisions:

1. The Act introduces a simplified application procedure. Power is given to the Chairman to determine procedures under Section 13(2) of the Act and this indicates the legislature's intention that meetings are to be informal and that accessibility to the chief functionaries of the Act is to be facilitated.

2. Unlike the previous Act which required applications for licences to be considered by the Board itself, Section 22 of the *Liquor Act* allows applications to be considered by the Chairman who is required to consult with no fewer than two other members of the Board *"of whom one shall be a member appointed under Section 7(1)(c) for the area in which the premises which are the subject of the application, are situated."* The Chairman may then refuse the application or, where no objections have been made or the objections relate to distribution or control of the distribution of liquor generally, grant the application. The Chairman may also in appropriate circumstances refer the application to the Board for consideration. Although the Act originally required the Chairman to make recommendations to the Minister, since 1992 the Chairman may himself grant or refuse the application.

3. Section 22(1) specifies certain criteria to be considered when granting a

licence, and sub-paragraph (ee) in effect requires the competent authority, be it the Chairman or the Board, to be satisfied that the granting of the licence is in the public interest before so doing.

4. The procedures to be followed when matters are heard by the Board are found in Section 13 of the Act. Sub-section (9)(a) specifies that in any matter referred to the Board by the Chairman under Section 22, the Board may of its own accord *"take cognisance of any matter which in its opinion may be a ground for an objection to the granting of the application."* If so, the procedure prescribed by sub-section (9)(b) is as follows:

> *"The Chairman shall inform the applicant concerned of the matter contemplated in paragraph (a) and shall, if the applicant so requests, postpone the consideration of the application for such period as the Chairman may think fit so as to afford the applicant the opportunity of stating his case in connection therewith."*

5. The procedure prescribed for the hearing of applications by the Chairman is dealt with in by Section 185 of the Act. This section refers to the *"competent authority"* which, by definition, includes the Chairman. It provides that the competent authority is to take cognisance of the application and the police report, where one is filed; documents lodged in support of the application, together with objections, representations and replies, if any; as well as *"any*

matter which in the opinion of the competent authority ought to be taken into consideration." It does not specify, as does Section 13(9)(b) in relation to the proceedings of the Board, that interested persons need to be notified of matters raised by the Chairman of his own accord. Though Section 185(c) of the Act does not make the same provision for interested parties to be informed, as does Section 13(9)(b), the principles of natural justice would require an applicant or interested party to be informed of such a matter.

This conclusion is supported by the case of *Morelettasentrum (Edms) Bpk v Die Drankraad* 1987(3) SA 405 (T). In that matter two of the members of the Board, one having special knowledge of the locality, reported on undesirable aspects relating to the location of the proposed venue. (This case was considered in terms of the 1977 *Liquor Act* in terms of which applications were heard by the Board and not the Chairman). The applicant had not been given an opportunity to comment on the reports or counter any of the damaging allegations. It was contended on behalf of the Board that the applicant could reasonably have expected that the Board would obtain the information from another source and that applicant's failure to deal with the information could only be ascribed to its own inadequate vigilance. The Court refused to accept the Board's argument, however, holding that there was no clear reason why applicant should have anticipated that the Board would make use of such information. Furthermore it could not be determined whether that information furnished to the Board was reliable or not.

6. It seems clear that whenever the Chairman considers an application under Section 22 and wishes to take cognisance of a matter not dealt with by the applicant, but which may be a ground for objection to the granting of the application, he should afford the applicant an opportunity to comment or refer the matter to the Board in terms of Section 22(c). The Board can then, as required by Section 13(9), inform the applicant concerned and postpone the matter or proceed in terms of that section. Failure to do this would constitute a breach of the fundamental principles of natural justice referred to in the *Morelettasentrum* case.

7. In an as yet unreported judgment in the Transvaal, [*Makro SA (Pty) Ltd v The Chairman of the Liquor Board* (first Respondent), *The Liquor Board* (second respondent) and *The Minister of Trade & Industry* (third respondent) (Case No 14608/93 - judgment delivered on 19 May 1994)], Van der Walt, J considered the application of the new *Liquor Act* and the duty imposed on the Chairman when hearing an application, and said that Section 13(9)(b) is clearly a manifestation of the *audi alteram partem* principle. Even though a corresponding duty is not expressly imposed upon the Chairman when considering an application under Section 22(1):

> *"... I venture to suggest that when the Chairman has in mind anything detrimental or has an objection of which the applicant may not be aware, the Chairman should likewise, if he does not*

refer the matter to the Board for consideration, afford an applicant an opportunity of controverting that objection."

8. The learned Judge also considered Section 185(c), which requires the competent authority to take cognisance of *"any matter which in the opinion of the competent authority ought to be taken into consideration"* and commented:

> *"I interpose here that this strengthens my view that I have just expressed as to the duties of the Chairman because here the Chairman is also a competent authority and he is obliged to take into account replies to objections, which would presuppose, in my view, objections of his own. Therefore* [he] *should also call for a reply."*

9. In that case too, the Chairman of the Board had complained about the lack of information and detail from the applicant. Acknowledging that more detail could have been given, Van der Walt, J pointed out, however, that the Act does not provide or specify what detail should be given. The Board and its personnel have knowledge of the liquor trade and the Chairman is required to consult a member designated because of his local knowledge. The lack of detail should be supplemented by the general knowledge of the Chairman and *"if that general knowledge does not apply ... then I would suggest that the first respondent should inform the applicant of that fact."*

10. In yet another unreported case, *Asko Beleggings v Die Voorsitter van die Drankraad N O* (Eerste respondent), *Die Drankraad* (Tweede respondent), *Salomie Strauss* (Derde respondent) (Case No 819/93 - NK), a dispute had arisen which the Chairman had not referred to the Board. Steenkamp, J said the following in this respect:

> *"Dit verbaas my dat die eerste respondent sê dat hy hom nie aan die dispuut gebonde ag nie en te sê dat hy sy eie oordeel vorm tot die vraag of die verlening van die lisensie in die openbare belang sal wees of nie. Hoe kan die eerste respondent hoegenaamd hierdie besluit neem op 'n aansoek waarvan die kerngeskil in dispuut is?"*

POLICY DECISIONS IMPLEMENTED BY THE CHAIRMAN/BOARD:

In the *Morelettasentrum* case the Board had taken a particular view against the establishment of licensed premises in small shopping centres. The Court held that it was entitled to intervene in the matter because the Board had blinded itself by applying a policy in the face of facts justifying a departure therefrom. Since the *Morelettasentrum* case the new *Liquor Act* which strives to enhance the application of free market principles relating to the granting of licences, has come into operation. Accordingly, the application of policy decisions which counter the operation of free market principles is to be guarded against equally vigilantly.

Another case in which the Court voiced its disapproval of the application of a predetermined policy which was not in accordance with the requirements in the *Liquor Act* is the as yet unreported judgment of Mynhardt, J in the Transvaal, of *Hugo v The Minister of Trade and Industry* (first respondent) and *The Chairman of the Liquor Board* (second respondent), (Case No 1663/91 - judgment delivered on 31 January 1992). The proposed premises were at a site which constituted a last stop for the travelling public before entering two adjacent homelands. There was a large flow of workers and the nearest liquor outlet was a restricted area. The proposed site was on the main road between Middelburg and what was then the PWV area. The nearest place to purchase liquor for the proposed outlet was Middelburg, more than 50 kilometres away, and it was accepted that there was clearly a demand for liquor to be sold at the proposed outlet. There were also no objections to the granting of the licence. In this respect, Mayhardt, J said the following:

> *"Die vraag is dus of op hierdie getuienis en inligting wat voor die tweede respondent geplaas was, daar 'n verklaring is vir die slotsom waartoe die tweede respondent gekom het anders as die feit, soos die applikant sê, dat die tweede respondent hom teen 'n bepaalde beleid blind gestaar het en daarom inderdaad nooit sy funksie uitgeoefen het wat hy behoort uit te geoefen het nie, naamlik om onbevange die aansoek te oorweeg in die lig van dit wat voor hom geplaas was en 'n bevinding te maak daaroor of die toestaan van die lisensie in die openbare belang sal wees aldan nie."*

The policy that the Chairman was applying in this fashion is described by Mynhardt, J as follows:

> *"Ek meen dat dit duidelik blyk uit die oorkonde dat die Drankraad, soos dit gestel was by monde van die voorsitter, begaan was daaroor dat dit nie toelaatbaar sal wees of gangbaar sal wees dat drankwinkels orals langs die paaie bedryf moet word by sogenaamde klein sentrums nie."*

The only issue for the Chairman to decide in that matter was whether it was in the public interest that a liquor licence should be granted in respect of the premises in question. The Chairman had apparently tried to determine the lawmaker's policy relating to the granting of liquor licences in rural areas. It was the wrong approach to try to determine if there is any such fixed policy since the only true test prescribed by the Act is the public interest. Mynhardt, J had this to say about the determination of what is in the public interest:

> *"Dit word nie verskaf deur een of ander beleid wat die tweede respondent of bepaal het of moes bepaal het nie."* [p 19 of the judgment]

FREE MARKET PRINCIPLES:

A case in which the application of free market principles was pertinently considered is that of *Asko Beleggings (supra)*. This matter concerned an application for a liquor

licence at Hartswater in which the Chairman found that the grant of the licence was not in the public interest. He expressed concern that allowing too many outlets in a small area such as that would create excessive competition and that this would lead to unacceptable marketing methods in relation to a potentially dangerous commodity. This, he concluded, would not be in the public interest. Accordingly, the Chairman refused to hear any further evidence and refused to refer the matter to the Board. Steenkamp, J expressed himself strongly in favour of allowing free competition in the absence of clear evidence that it would be undesirable. He said the following:

> *"Gesonde mededinging is die lewensbloed van ekonomiese vooruitgang en het gewoonlik tot gevolg dat daar mededingende pryse is en 'n beter diens aan die gemeenskap verskaf word. Dit is in die openbare belang dat daar gesonde mededinging bestaan aangesien die gemeenskap daardeur slegs bevoordeel kan word. Hiermee wil ek nie voorgee dat oorvoorsiening nie 'n faktor is wat by 'n aansoek van hierdie aard in ag geneem moet word nie, maar prysoorloë is gewoonlik in die guns van die gemeenskap en wat my betref, moet daar buitengewone opstande van die hede bestaan alvorens gesonde mededinging nie in die openbare belang sal wees nie. Daar bestaan geen ekonomiese redes waarom bestaande drankwinkels teen mededingings beskerm moet word en sodanige beskerming kan selde in die openbare belang wees."*

ONUS:

The first respondent in this matter considered that there was a duty on the applicant to convince him that the granting of the licence was in the public interest. In the *Hugo* case referred to above, Van der Walt, J considered the reference in argument to the onus and decided that it was an overburdened phrase, even though an applicant has to present facts and arguments to persuade the Board on the probabilities. In particular the Court took into account in that matter that the designated police officer had filed a report in which he had indicated that there were no other liquor outlets in the immediate vicinity and accordingly it was incorrect to suggest that the applicants had not discharged an onus in relation to the matter. The Chairman had also failed to give due weight to the fact that there were no objections.

CONCLUSION:

1. The first respondent clearly applied a policy that the number of liquor stores had to be limited according to the existing population. In so doing he relied upon arbitrary statistics and implemented a quota system which is contrary to the underlying principles in the current *Liquor Act*. There are thirty liquor outlets of different types in the Strand/Somerset West area. How could it be said that the grant of one more licence will result in over-supply? There was no direct evidence about over-supply and, to the contrary, there was evidence that the particular site is not serviced at all by a liquor outlet and that the nearest available outlet is two kilometres away at a shopping centre where parking is a problem. Whether or not there was demand for the outlet in

question was not in doubt.

2. Even assuming that first respondent was correct that a further outlet would contribute towards an over-supply in the Somerset West/Strand area, it does not follow that this application should be refused. It may well be that there is intense competition in other parts of the magisterial district and that the over-supply exists in those areas. The establishment of a licensed store at this site is hardly likely to influence that situation. Even assuming that there are too many liquor outlets in the area, the laws of supply and demand forecast that the store most likely to close would be the one which serves the least purpose or is least efficiently run. The end result, as pointed out by Steenkamp, J, is that healthy competition serves the public interest and results in a better distribution of liquor in the whole area.

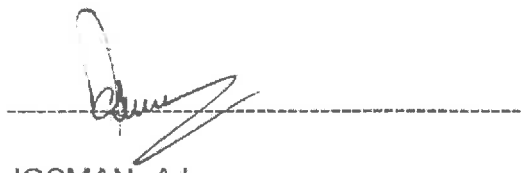
3. The first respondent's findings relating to the absence of food outlets in the vicinity were incorrect resulting in him not properly applying his mind to the question before him.

4. By not affording the applicant an opportunity to reply to the issues raised *mero motu* by the first respondent he clearly acted unreasonably and contrary to the dictates of natural justice.

5. In the *Morelettasentrum* case *(supra)*, Roux, J decided that since there was no reason why the application should not be granted the first respondent's

order was altered to one recommending to the Minister the grant of the applicant's licence for a bottle store licence. Under the new Act the Chairman himself has power to grant the licence and an appropriate order would therefore would be one directing the first respondent to grant the licence. A similar order was made in the *Hugo* case. Since there were no objections and the designated police officer approved of the licence, and since the Chairman did not raise any issues of any substance which should be referred to the Board, it is our conclusion that this matter should be disposed of by directing the Chairman to grant the licence.

In the result, I would order that the first respondent's refusal of the application for a liquor licence be set aside, and that he is directed to grant the licence in question. The respondents should also be ordered to pay the applicant's costs of this application for review.



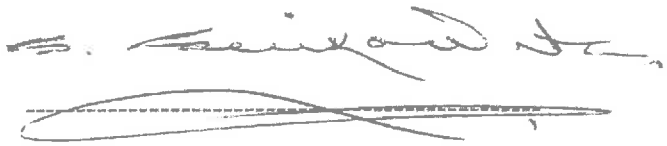
JOSMAN, AJ

I agree. It is ordered that:

1. The decision of the first respondent to refuse applicant's application pursuant to the terms of Section 22 of the *Liquor Act No 27 of 1989* is set aside.

2. Second respondent is ordered to grant the application forthwith.

3. Respondents are ordered to pay the costs of this application,



SELIKOWITZ, J