

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

CASE NO: 2625/2009

In the matter between:

AROMA MANAGEMENT SERVICES (PTY) LTD Applicant

and

THE MINISTER OF TRADE AND INDUSTRY First respondent

THE NATIONAL LIQUOR AUTHORITY Second respondent

JUDGMENT DELIVERED ON 29 MAY 2009

BLIGNAULT J:

INTRODUCTION

[1] Applicant, Aroma Management Services (Proprietary) Limited, is a company which carries on business in the liquor trade. It operates thirty liquor stores in the Western Cape. First respondent, the Minister of Trade and Industry, is cited herein in his capacity as the Minister of the Department of Trade and Industry (“the Department”). He is the member of cabinet responsible for liquor matters in the national sphere of government. Second respondent, The National Liquor Authority, is

the collectivity of officials within the Department to whom first respondent has delegated his powers under the Liquor Act, 59 of 2003 (“the Liquor Act 2003”). Second respondent at all material times herein acted in terms of such delegated powers.

[2] Applicant carries on business as a distributor and retailer of liquor from thirty liquor stores in the Province of the Western Cape. The present application is concerned with the validity of a condition, styled Special Condition No 3, imposed by second respondent as part of the registration, in terms of the Liquor Act 2003, of applicant as a distributor of liquor. The condition in question requires applicant to erect a wall in each of its liquor stores in order to separate its retail operations from its distribution operations. Applicant seeks an order setting the condition aside. Respondents oppose the application.

THE LEGISLATIVE FRAMEWORK

[3] The Liquor Act 2003 came into operation on 13 August 2004. Prior to the commencement of that act the liquor trade was regulated by the Liquor Act 27 of 1989 (“the Liquor Act 1989”). That act applied in the whole of South Africa and it regulated the

three tiers involved in the liquor trade, namely manufacturers, distributors and retailers.

[4] In terms of section 104(1)(b)(ii), read with Schedule 5, of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”), the subject of “liquor licences” falls within the area of exclusive provincial legislative competence. In *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC) the Constitutional Court, however, held that in terms of section 44(2) of the Constitution the regulation of manufacturing and distribution of liquor falls within the legislative powers of Parliament. Liquor licensing in the retail sphere, however, falls within the area of exclusive provincial legislative powers.

[5] The Liquor Act 2003 repealed the Liquor Act 1989. In terms of the provisions of section 46, read with Schedule 1, of the Liquor Act 2003, such repeal is subject to certain transitional provisions some of which are relevant to the present dispute. In terms of item 2(1) of Schedule 1 a provision, *inter alia*, of the Liquor Act 1989 that concerns the retail sale of liquor, remains in force within the Province of the Western Cape until a liquor act is promulgated in

that province. The Province of the Western Cape has since enacted the Western Cape Liquor Act 4 of 2008. It was assented to on 27 November 2008. The relevant part of that act has, however, not yet come into operation. Item 5 of Schedule 1 provides that despite the repeal of the Liquor Act 1989, until the coming into force of provincial legislation, a person who was authorised in terms of that act to engage in the retail sale of liquor may continue to engage in the retail sale of liquor to the extent permitted by his authorisation.

[6] The Liquor Act 2003 regulates the manufacture and distribution of liquor. "Distribute" includes the sale of liquor to a registered person. "Registered person" includes a manufacturer, distributor, micro-manufacturer or retail seller. 'Distributor' means a person registered as such in terms of this Act. In terms of the Liquor Act 2003 registration as a distributor is a pre-requisite for carrying on business as a distributor of liquor.

[7] Chapter 3 of the Liquor Act 2003 deals with the registration as a manufacturer or distributor. Section 11 provides that a qualified person may apply to respondents in the prescribed manner and form to be registered as a distributor. In terms of

section 12 respondents may require further information relative to an application. If an application complies with the provisions of the act they must register the applicant “subject to section 13”.

[8] Section 13 of the Liquor Act 2003 lies at the heart of the dispute between the parties. I quote it in full:

“13 Conditions of registration

(1) If the Minister is required to register an applicant in terms of section 12, the Minister must further consider the application, relating to the following criteria:

- (a) The commitments made by the applicant in terms of black economic empowerment;*
- (b) The applicant's proposed contribution to combating alcohol abuse, including whether the applicant has subscribed to any industry code of conduct approved by the Minister; and*
- (c) The extent to which the proposed registration will materially restrict or promote-*

- (i) new entrants to the liquor industry;*
- (ii) job creation within the liquor industry;*
- (iii) diversity of ownership within the liquor industry;*
- (iv) efficiency of operation of the liquor industry;*
- (v) exports; or*

(vi) *competition within the liquor industry.*

(2) *Before proposing any conditions on a registration, the Minister may-*

(a) *consult the Competition Commission when considering the matters set out in subsection (1) (c); and*

(b) *publish a notice inviting public submissions concerning the application.*

(3) *The Minister, having regard to the objects and purposes of this Act, the circumstances of the application, the declared wishes of the applicant in terms of section 11 (1) (b) and the criteria set out in subsection (1), may-*

(a) *propose any reasonable and justifiable conditions on the registration of an applicant who seeks to be registered only as a distributor; or*

(b) *propose any reasonable and justifiable conditions on the registration of any other applicant, including but not limited to, conditions that determine whether, or the extent to which, the applicant may distribute liquor to retail sellers.*

(4) *In addition to the provisions of subsection (3), if an applicant has a director, member, trustee, partner or member of its board or executive body who falls in the category of persons disqualified in terms of section 11 (2), the Minister may propose a condition designed to prevent*

that person from exercising any decision-making authority with respect to the proposed registered activities.

(5) If the Minister proposes conditions on an applicant's registration, the Minister must inform the applicant of the proposed conditions, and the reasons for them in writing.

(6) An applicant who has received a proposal of conditions may respond to the Minister within-

(a) 30 days from the date on which the applicant is informed of the proposal; or

(b) such longer period as the Minister may permit, on good cause shown.

(7) If an applicant who has received a proposal of conditions-

(a) consents to the conditions being imposed, the Minister must register the applicant, subject only to the conditions as proposed; or

(b) does not respond, or responds but does not consent, to the proposed conditions, the Minister must consider any response submitted by the applicant and may-

(i) refuse to register the applicant, if it has not responded; or

(ii) finally determine the conditions to be imposed, and register the applicant.

(8) *The Minister must-*

- (a) *inform an applicant in writing of a decision in terms of subsection (7); and*
- (b) *provide written reasons for that decision if-*
 - (i) *the Minister has refused to register the applicant; or*
 - (ii) *the Minister has amended a previously proposed condition.”*

[9] Section 24 of the Liquor Act 2003 provides as follows:

“24 Review or appeal of Minister's decisions

- (1) *A decision of the Minister in terms of this Chapter is subject to review or appeal to the extent provided for, and in accordance with, the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).*
- (2) *In addition to any other remedy available to a Court conducting a review of a decision by the Minister in terms of this Chapter, the Court may make an order setting aside any condition attached to a registration, if the court is not satisfied that the condition is reasonable and justifiable, having regard to the objects and purposes of this Act, the circumstances of the application or review, as the case may be, and the provisions of section 13”.*

APPLICANT'S APPLICATION

[10] Applicant applied to second respondent on 10 July 2007 for registration as distributor in terms of the Liquor Act 2003. As part of the representations submitted in support of the application applicant described the reason for the application as follows:

“The reason for this application is that in terms of the Liquor Act, Act 59 of 2003 the holder of a liquor store licence in terms of Provincial Liquor Legislation or in terms of the Liquor Act, Act 27 of 1989 may not sell liquor to a buyer for the purpose of re-sale thereof. For a number of years the practise has developed by which liquor stores such as that owned by the Applicant supply restaurants, licensed accommodation establishments and other licensed traders with liquor stock for the purpose of serving liquor in their restaurants and on-consumption establishments as well as for the re-sale. The reason why these establishments buy from the Applicant and other liquor stores is that the quantities in which they trade are so small that it does not make it feasible for them to order their liquor stock from large suppliers and it is far more convenient for them to purchase what they require directly from the liquor stores. The Applicant has therefore built up quite a significant business with the retail trade and therefore requires to be registered as a distributor.”

[11] Under cover of a letter dated 15 January 2008 applicant received a set of proposed conditions on the prescribed form

(NLA 6) from second respondent. These conditions were issued in compliance with sub-section 13(3) of the Liquor Act 2003. The proposed conditions read as follows:

“GENERAL CONDITIONS

1. *The liquor products to be manufactured and or distributed should comply with the definition of liquor as provided in section 1 of the Liquor Act No 59 of 2003 and/or the definition of liquor products as provided in the Liquor Products Act No 60 of 1989 as and when amended;*
2. *The manufacturing and distribution activities should be conducted from premises and at a location approved by the relevant local authority. Proof of approval from the local authority should be provided within 1 year from the date of issuance of a registration certificate;*
3. *Liquor may only be distributed to registered persons/entities or other licensees;*
4. *The applicant/registrant must not employ a person who has not attained the age of 16 unless the employee is undergoing training or learnership contemplated in section 16 of the Skills Development Act No 97 of 1998;*
5. *The applicant/registrant must comply with the Customs and Excise Duties Act No 91 of 1964 as amended; and*

6. *The registrant should comply with all the provisions of the Liquor Act 59 of 2003 and/or any other relevant law.*
1. *The applicant should provide the National Liquor Authority with a 1 – 3 years BEE plan that is in accordance with the Broad-Based Black Economic Empowerment Act (BBBEEA) and Codes of Good Practice within a year from the date of issuance of the Registration Certificate. The applicant should further provide the National Liquor Authority with a BEE compliance certificate from an accredited BEE verification agency within 1 year from the date of issuance of the Registration Certificate.*
2. *The applicant should affiliate to an Industry Organization whose code of conduct has been approved by the Minister and provide the National Liquor Authority with proof of subscription within a year from the date of issuance of the Registration Certificate, and annually thereafter.*
3. *Distribution and retail activities should be separated from each other by means of constructing a wall which separates the two activities and provide for separate entrances. The applicant should further provide the National Liquor Authority with a plan and photographs of the building to confirm such separation within 3 months from the date of issuance of the registration certificate.*
4. *The applicant should provide the National Liquor Authority with its projected annual turnover for the distribution activities that are to be registered within 30 days from the*

date of issuance of the Proposal for Conditions of registration.”

Although not described as such the second set of conditions, numbered 1 to 4, are called the specific conditions.

[12] In the letter dated 15 January 2008 second respondent informed applicant in terms of sub-section 13(5) of the reasons for the proposed conditions. This letter reads as follows:

“Enclosed herewith please receive a proposal for conditions of registration (form NLA 6) in terms of Section 13 of the Act.

These conditions are based on the reasons set out below:

General Conditions:

1. *Prohibition of the manufacturing and distribution of illegal liquor products and impotable substances that will have an adverse effect on consumers;*
2. *To ensure that registered activities are carried out at properly zoned areas so as to limit the public's exposure to uncontrolled access to liquor products which may lead to harmful consequences but also to ensure compliance with local authority by-laws;*
3. *To prohibit the direct or indirect sale or supply of liquor products to the public and unregistered persons (natural or juristic);*
4. *Prohibition of child labour;*

5. *Prohibition of illegal importation and exportation of liquor products and evasion of tax;*
6. *To ensure compliance with all relevant South African laws.*

Specific Conditions

1. *The applicant's commitment towards BEE is not comprehensive.*
2. *The applicant did not make a proposal towards combating alcohol abuse.*
3. *To ensure that registered activities are conducted exclusively from liquor retail and other activities.*
4. *The applicant did not provide its projected turnover but rather the actual turnover of Aroma Group."*

[13] The proposal, and later imposition, of Specific Condition No 3, gave rise to the present dispute between the parties. On 6 November 2008 applicant informed second respondent on the prescribed form that it objected to the condition in question and it furnished second respondent with an opinion of counsel setting forth the grounds of its objection. When applicant did not receive any response from second respondent, it launched the present application on 12 February 2009. As second respondent had not yet finally determined the conditions to be imposed, applicant initially sought a declaratory order that second respondent was not authorised to impose Specific Condition No 3.

[14] By way of a letter dated 20 March 2009 second respondent submitted a number of questions to applicant for purposes of considering its application for registration as a distributor. Applicant replied to these questions in a letter dated 2 April 2009. These questions, and the answers thereto, are not relevant to the present dispute.

[15] On 5 May 2009 second respondent advised applicant in writing that second respondent had taken a decision in terms of section 13(7) of the Liquor Act 2003 to register applicant as a distributor subject to the conditions proposed in the NLA 6 form “for the reasons set out in our letter to you dated 15 January 2008”. Applicant was further advised that since the conditions proposed in the LNA 6 form and the reasons therefor remain unchanged, no further or additional reasons were required.

[16] Following the registration of applicant as a distributor, applicant amended the relief sought by it in this application to read as follows:

- “1. An order setting aside Specific Condition 3 and directing Respondents to delete Specific Condition 3 from Form NLA*

8 dated 5 May 2009 and to deliver the amended Form NLA 8 to the Applicant.

2. *A mandamus in terms of which Respondents are ordered to issue Form NLA 9 to the Applicant within 7 (seven) days of payment of the prescribed initial registration fee of R5 000,00.*
3. *An order that First and Second Respondent pay the costs of this application on an attorney and client scale, the one paying the other to be absolved. Costs to include the cost of two counsel."*

[17] The application was heard by me on 21 May 2009. Adv W H van Staden SC, assisted by Adv P B Fourie, appeared on behalf of applicant. Adv N Arendse SC appeared on behalf of respondents.

"REASONABLE AND JUSTIFIABLE"

[18] Applicant based the relief sought by it primarily upon the provisions of section 24(2) of the Liquor Act 2003. The crisp question to be determined is therefore whether Specific Condition No 3 is "reasonable and justifiable" within the meaning of section 24(2).

[19] In terms of section 24(2) the onus is clearly on second respondent to satisfy the court that the condition in question is “reasonable” and “justifiable”. The meaning of “reasonable” in administrative law has been the subject of various recent decisions. An authoritative definition is that of O’Regan J in the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (1) SA 490 (CC) para [44] at 513 A/B. In terms thereof a decision would be “unreasonable” if “it is one that a reasonable decision-maker could not reach”.

[20] As to “justifiable”, it is instructive to have regard to the decision of the Labour Appeal Court in *Carephone (Pty) Limited v Marcus N O and Others* 1999 (3) SA 304 (LAC). The court considered the standard of review in the light of the provisions of section 24(d) of the interim Constitution of the Republic of South Africa, 200 of 1993 (“the interim Constitution”) which provided that administrative action must be “justifiable in relation to the reasons given for it”. In para [37] at 316 D-E Froneman DJP proposed the following test:

“I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other

than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?"

[21] The *Carephone* test, it may be noted, was considered by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC). It was, however, distinguished as it dealt with the position under the interim Constitution. See para [106] at 58H - 59B of the judgment:-

"The Carephone test, which was substantive and involved greater scrutiny than the rationality test set out in Pharmaceutical Manufacturers, was formulated on the basis of the wording of the administrative justice provision of the Constitution at the time, more particularly that an award must be justifiable in relation to the reasons given for it. Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse s 145 of the LRA".

[22] For purposes of this judgment it is not necessary to consider whether and to what extent the standard of reasonableness differ from that of justifiability. The conditions in question must comply with both. I propose to concentrate on the standard of justifiability

and to apply the *Carephone* test in analysing the reasons given by respondents.

ANALYSIS OF RESPONDENTS' REASONS

[23] Specific Condition No 3 requires applicant to separate its distribution and retail activities from each other by means of the construction of a wall which separates the two activities and to provide for separate entrances. It is accordingly necessary to consider the reasons furnished by respondents as justification for the imposition of this condition.

[24] Adv van Staden submitted that the reason provided by second respondent in terms of section 13 (5) of the Liquor Act 2003 namely to ensure that distribution activities are conducted exclusively from retail liquor retail and other activities, is not really a reason at all. It is simply a restatement of the condition itself. In my view there is merit in this submission. The erection of the wall required by second respondent is intended to separate the distribution and retail activities from each other. Such separation would logically and necessarily entail that the distribution activities are conducted exclusively from the retail activities. Applying the

Carephone-test *supra* there is simply not a rational objective basis justifying the connection between the reason and the condition imposed by it.

[25] In respondents' answering affidavit they sought to justify Specific Condition No 3 with reference to additional reasons. This referred first to General Condition No 2 and the reason supplied by second respondent for its imposition. Applicant, they argue, did not object to the imposition of this condition nor did it question the reason furnished for it.

[26] It seems to me, however, that applicant's response or lack of response to General Condition No 2, or the reason for it, cannot justify the imposition of Specific Condition No 3. In terms of General Condition No 2 applicant is obliged to conduct its distribution activities from premises and at a location approved by the relevant local authority. The gist of the reason given for General Condition No 2 is that it will ensure that the registered activities are carried out at properly zoned areas. It seems to me that applicant could hardly object to a condition which requires it to conform to the zoning and other lawful requirements of the local authority. Nor did it object to it. This condition, and the reason for

it, however, have nothing to do with the separation of applicant's retail and distribution activities by means of a wall. If this was indeed one of the reasons for the imposition of Specific Condition No 3 then second respondent appears to have misdirected itself in this regard.

[27] The second additional reason advanced by respondents is that the conduct of the two activities from undivided premises will make it impossible or difficult for the inspectors to monitor and ensure compliance with the provisions of the two statutes in question. The distribution activities would be subject to the provisions of the Liquor Act 2003 but the retail activities would be subject to the provisions of the Western Cape Liquor Act. Different inspectors or liquor officers would be enforcing different statutory provisions in respect of the same premises. Respondents asked rhetorically: How would applicant's distribution business be affected if a designated liquor officer order the closure of "licensed premises" in terms of section 70 of the Western Cape Liquor Law?

[28] The first answer to the second additional reason advanced by respondents is that prior to the filing of the answering affidavit second respondent never furnished this as a reason for the

imposition of Specific Condition No 3. Had it been a material factor one would have expected it to have been mentioned in the section 13(5) notification. The second answer to this additional reason is that the onus is clearly on respondents to satisfy the court that the condition in question is “reasonable” and “justifiable”. Their attempt to discharge this onus can hardly succeed when they do not identify the precise nature of the reason relied upon. Respondents did not identify the provisions in question, nor did it explain why the enforcement of such provisions would be difficult to monitor or enforce. In the absence of such particularity it is not possible for applicant to respond meaningfully to the reason for the imposition of the condition in question, nor can a court consider whether it meets the required standard at all. The answer to the rhetorical question posed above is that it appears obvious that the closure of the premises in terms of either statute will affect both activities. It is not clear however, why such closure would affect second respondent or the monitoring and enforcement of the Liquor Act 2003. The rhetorical question is therefore of no assistance.

CONCLUSION

[29] Having considered the reasons advanced on behalf of respondents I am accordingly not persuaded that Specific Condition No 3 is “reasonable and justifiable” within the meaning of Section 24(2) of the Liquor Act 2003.

[30] Applicant is accordingly, subject to two qualifications, entitled to the relief sought by it. The first qualification is that respondents should be afforded a period of 15 court days to comply with the mandamus. The second is that I am not persuaded that applicant is entitled to attorney and client costs as opposed to party and party costs. Respondents are public bodies performing public functions and there is no suggestion that they acted irregularly or irresponsibly.

[31] In the result I grant the following orders:

1. An order setting aside Specific Condition 3 and directing Respondents to delete Specific Condition 3 from Form NLA 8 dated 5 May 2009 and to deliver the amended Form NLA 8 to applicant.

2. A mandamus in terms of which respondents are ordered to issue Form NLA 9 to applicant within 15 (fifteen) days of payment of the prescribed initial registration fee of R5 000,00.
3. An order that first and second respondents pay the costs of this application, the one paying the other to be absolved. Costs are to include the cost of two counsel.


A P BLIGNAULT