

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES
(3) REVISED.	
7/7/2010	<i>[Signature]</i>
DATE	SIGNATURE

Case No: 67725/2009
Date heard: 15/06/2010
Date of judgment: 07/07/2010

In the matter between:

Caroline Street Liquor Store CC

APPLICANT

and

The Gauteng Provincial Liquor Board

RESPONDENT

JUDGMENT

DU PLESSIS J:

In terms of section 23 of the **Gauteng Liquor Act, 2 of 2003** ("the Act"), the applicant applied for a liquor store licence. The respondent refused the application. The applicant seeks an order reviewing and setting aside the respondent's decision. It is not in issue that the decision constitutes "administrative action" under the provisions of the **Promotion of Administrative Justice Act, 3 of 2000 (PAJA)**.

The applicant's proposed licensed premises are situated in Caroline Street, Hillbrow, Johannesburg next to a supermarket owned by the applicant's member. About 90 metres from the proposed premises there is a Spar supermarket wherein a licensed liquor store by the name of Tops at the Spar is conducted. No person or entity, notably not the owner of Tops at the Spar, objected to the applicant's application.

The only reason that the respondent gave for the refusal of the applicant's application is as follows: "Refused contrary to section 30(3)". I shall make fuller reference to section 30(3) of the Act. From the respondent's answering affidavit it is, however, evident that it had refused the applicant's application for no reason other than that the proposed premises is within a radius of 500 metres from Tops at the Spar.

Section 30 deals with the consideration of applications under the Act. In terms of section 30(2) the respondent "shall grant an application" if certain requirements are met. It is not in issue that the applicant met those requirements. Section 30(2) is followed by an enigmatic section 30(3) that provides as follows:

"The Board shall grant an application in the case of premises not situated within a radius of five hundred (500) metres in the vicinity of a place of worship, educational institution, similar licensed premises, public transport facility, or such

further distance as the Board may determine or as may be prescribed from time to time." (My underlining).

Leaving aside for the moment the underlined words, subsection (3) must in my view be understood to constitute a proviso to the peremptory provisions of section 30(2). Read together, the two subsections provide that, if the requirements of section 30(2) are met, the Board shall grant an application provided that it may refuse an application if the proposed premises are within a radius of 500 metres from any of the places mentioned in subsection (3). Put differently, even if the requirements of section 30(2) have been met, the Board still has a discretion to refuse an application if the proposed premises are within 500 metres from a place mentioned in section 30(3). Neither the respondent nor the applicant contended, and rightly so in my view, that section 30(3) means that the Board must refuse an application if the proposed premises are within 500 metres from any of the places mentioned in section 30(3).

The portion of section 30(3) that I have underlined is difficult to understand. Literally its effect is that the Board has a discretion to extend the 500 metre radius to, say, 1 kilometre. If the Board so extends the radius, the result would be that it may refuse an application even if there is no place mentioned in section 30(3) within 500 metres from the proposed premises. Such a literal interpretation, however, makes nonsense of the entire section 30(3). Fortunately, it is unnecessary now to determine the meaning of the underlined words because the Tops at the Spar is within 500 metres from the applicant's

proposed premises. Suffice it to say that the Legislature should in my view seriously consider the rewording of section 30(3).

Applied to the facts of this case, the Board had a discretion to refuse the applicant's application by reason of the close proximity of Tops at the Spar. The close proximity of Tops at the Spar was, however, no reason in itself to refuse the application. By stating the close proximity of Tops at the Spar as its only reason for refusing the application, the respondent conveyed that it did not exercise its discretion but mechanically refused the application due to the close proximity. This conclusion is fortified by the fact that nobody, not even Tops at the Spar, objected to the application.

There are other grounds, but the above conclusion renders the respondent's decision reviewable under the provisions of section 6(1)(e)(i) of PAJA that provides that an administrative action may be review if "the action was taken ... for a reason not authorised by the empowering provision".

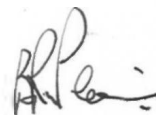
The applicant seeks an order referring the matter back to the respondent for reconsideration. It also seeks an order authorising it to trade pending such reconsideration. I have serious doubt about the competence of the latter order. Section 8(1)(c)(ii)(aa) of PAJA, however, authorises a court that reviews and sets aside an administrative action, in exceptional cases, to substitute the relevant administrative action. The facts in this case are exceptional in the sense that if the matter were remitted to the respondent, the result would be a foregone

conclusion: In view of its initial reason and this judgment, the respondent will be obliged to grant the application. In stead of taking the roundabout route of remitting the application to the respondent and, possibly, authorising the applicant to trade, the same result may be achieved by simply ordering the respondent to grant the application.

In my view the costs, including the costs reserved on 12 April 2010, must follow the event.

In the result the following orders are made:

1. The decision of the respondent not to grant the applicant a liquor store licence in respect of a business to be known as Caroline Street Liquor Store, situated at Shop Number 8, Martiq Building, Erf 3988, 23 Caroline Street, Hillbrow, Region F1, Johannesburg, is reviewed and set aside.
2. The respondent is ordered immediately to grant the applicant's application referred to paragraph 1 above.
3. The respondent is ordered to pay the applicant's costs, including the costs reserved on 12 April 2010.



B.R. du Plessis

Judge of the High Court

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