

1IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 31973/06

In the matter between:

12/11/2010

THE PARTNERSHIP CHRISTOS GOUVERIS &
POLIXENY HAJ-PAVIOU

FIRST APPLICANT

THE PARTNERSHIP ROBERTSON, LHOYD &
MALUME NBUYANE

SECOND RESPONDENT

and

THE GAUTENG PROVINCIAL LIQUOR BOARD

FIRST RESPONDENT

LUCAS MARTHINUS SMITH

SECOND RESPONDENT

JUDGEMENT

MAVUNDLA. J;

[1] I need first and foremost apologize to the parties in this matter for this long overdue judgment. The delay is due to circumstances beyond my control, amongst which is predominantly the for ever overwhelming increase of the avalanche of work in this Division.

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
2010-11-12	
DATE	SIGNATURE

[2] The applicant sought to have reviewed and set aside the decision of the First Respondent to grant the Second Respondent a liquor licence in respect of a business to be known as Tops at Bronkhorstspuit on the premises known as 29 Lanham, situated at Erf 508/01/26, Bronkhorstspuit. The applicant also sought that the matter be remitted to the First Respondent for a fresh consideration with due regard to the reasons of this Court in setting aside the aforesaid decision.

[3] The parties have agreed in terms of Rule 33 that I should decide a legal question whether s30(3) of the Liquor Act, Act No. 2 of 2003 ("the Gauteng Liquor Act") gives a protection to the applicants, as they contend, against the issuing of a new liquor licence to premises situated within 500 meters from their liquor stores. In the event I find against the applicants I must dismiss the application. However, were I to find in favour of the applicants, I need then to decide whether in granting the second respondent a liquor licence falling within a radius of 500 meters from the liquor licence premises of the applicants, there was good evidence provided to the first respondent. After the

determination of the last mentioned question, in the event I find to the contrary, I must review and set aside the decision of the first applicant granting the second respondent the licence and remit the matter to the first respondent for the reconsideration of the application.

[4] Section 30(3) of “the Gauteng Liquor Act”) provides that: “The Board **shall**¹ grant an application in the case of premises not situated within a radius of five hundred (500) meters 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.”

[5] The first respondent has discretion in issuing licences. Such discretion must be exercised within certain parameters. In *Foxcroft v Bloemfontein Licence Certificate Board*² it was held that the relevant legislation provides the grounds upon which the grant of a licence may be refused, it cannot be refused on any other ground.

¹ My emphasis.

² 1921 OPD 148.

[6] Section 30(3) expressly states that the Board shall grant a licence if the premises are not within a radius of 500 meters. The applicants do not contend that the first respondent is completely barred from granting a licence where the premises would be within a radius of 500 meters. They do accept that the first respondent does have a discretion to grant such licence; *vide Mendelson and Frost (Pty) Ltd v Pretoria City Council*³; *S v Mjoli and Another*⁴.

[7] The use of the word "shall" in s30 (3) is, in my view, prescriptive. It means that where the premises are beyond 500 the Liquor Board has very limited discretion to refuse the grant of the licence if it the application complies with the provisions of s30(1) and 30(2) of the Gauteng Liquor Act .

[8] In the matter of *Die Bestuursraad van Sebokeng & 'n Ander v Tlelima*⁵ it was held that: "For instance, if legislation states the grounds upon which a licence may be refused, it may not be refused on

³ 1977 (T) 698.

⁴ 1981 (3) SA 1233 (A) 1247.

⁵ 1968[1] SA 680(A).

any other grounds, an approach which is in conformance with the *rule inclusion unius est exclusion alterius*".

See: **Foxcroft v Bloemfontein Licence Certificate Board**⁶. "In addition, where a special affirmative power is given which would not be required because of the fact that there is a general power, it is always read to import the negative and that nothing else can be done".

*Vide Estate McKay v Rand Water Board*⁷.

- [9] Section 30(3) deals with the award of a licence beyond 500 meters but is silent with regard to the radius within 500 meters. On the principle of inclusion by exclusion, and the negative exclusion of the radius ("not within") it can be safely accepted that the Board is implicitly accorded discretion to grant a licence where the premises are within 500 radius. This brings me to the pertinent question of protection.

- [10] The regulation of an industry does not mean that competition within the industry must be stifled but must be promoted.⁸

⁶ 1921 O.P.D. 148.

⁷ 1937 AD 424.

⁸ Payen Components SA Ltd v Bovic 1995 (4) SA 441 (A) 453.

[11] In answering the question whether s30(3) provides a protection to the applicants, it is necessary to look at the Constitution of the Republic of South Africa, *vide Constructional & Statutory Interpretation* by JR De Ville par 8.3 at pages 59-60 and the authorities therein cited, *vide also Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others*.⁹

[12] The first respondent is seized with the duty of regulating the liquor trade industry, issuing licenses, and ensuring that the industry is not overpopulated¹⁰. Implicitly the duty on the first respondent includes the obligation of protecting those who ply their business in the liquor industry by ensuring that it is not overpopulated¹¹.

[13] The applicants' rights to trade flow from the licences issued to them by the Liquor Board. This right to trade is also enshrined in S 22 of the Constitution which provides that:

⁹ 2001 (1) SA 545 (CC) at 558D-559F (paras [21]-[24]).

¹⁰ Vide preamble of the Gauteng Liquor Act.

¹¹ Vide preamble of the Gauteng Liquor Act.

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

[14] Through the licence the appellants exploit the licence to trade and derive economic benefit. The interest derived from so trading flows from the exercise of the fundamental right enshrined in s22. The incidence of this right is that it qualifies to be protected. This fact is better reflected in matters dealing with trade restraint clauses which the courts have held that they are enforceable; vide *Affordable Medicine Trust v Minister of Health*¹². The interest derived by the applicants as licence holders in exercising their right to ply their business is in my view protectable;¹³ vide *Reddy v Siemens Telecommunications (Pty) Ltd*¹⁴.

[15] The first respondent is seized with the duty of regulating the liquor trade industry, issuing licenses, and ensuring that the

¹² 2006 (3) at 247 (CC) at 287B-C.

¹³ Vide *Gardener v Whitaker* 1996 (4) SA 337 (CC) at 341 B-F.

¹⁴ 2007 (2) SA 486 (SCA) at 497A-B.

industry is not overpopulated¹⁵ thereby implicitly protect¹⁶ the rights of other licence holders against such; *vide* also *Himonides v Rhodesia Liquor Licensing Board*¹⁷. I am of the considered view that s30 (3) indeed accords the applicants protection. This brings me to the second questions to be decided as agreed upon by the parties.

[16] The granting of the licence is of course dependant on whether the provisions of subsections (1) and (2) of s30 have been met. Section 30 (3) places an obligation to the Licensing Board to grant a licence if it is not within 500 meters of the places referred therein, (*vide* para 4 *supra*). Implicitly, the first respondent is not obliged to grant a licence for premises falling within 500 metres.

[17] Where the first respondent decides to grant the licence notwithstanding that the premises fall within 500 meters, the consideration to grant such a licence, in my view, certainly

¹⁵ Vide preamble of the Gauteng Liquor Act.

¹⁶ Vide Constitutional & Statutory Interpretation by JR de Ville at page 130 and the authorities therein cited.

¹⁷ 1968[1] SA 310 [AD] D-H at 312H-313A.

cannot be limited to the mere compliance with the provisions of subsections 1 and 2 of s30. Otherwise it would render the specified limitation nugatory. Since the granting of a licence in such instance is a departure from the specified, there should be cogent reasons for such departure. The first respondent in such case must also have regard to the duty it has towards those licence holders outside the 500 meters, and their proximity to the new licence premises seekers; *vide inter alia, Granville Estates v Ladysmith Town Council*¹⁸. The approach in deciding whether to exercise its discretion would therefore have to be much stricter in such an instance and require much.

[18] Where the statute sets out the grounds upon which a licence may be granted, it cannot be granted for any other reason. The maxim *inclusio unius est exclusio*; *vide Mendelson and Frost (Pty) Ltd v Pretoria City Council (supra)*; *S v Mjoli and Another (supra)*.

¹⁸ 1974 (3) SA 44 (A).

[19] The review court can only interfere with a discretionary decision of a functionary if such decision was capriciously arrived at; *vide Shidiack v Union Government*¹⁹. In *Madore v Durban Corporation*²⁰ it was held that the reviewing court cannot interfere whether the administrative act has been arrived at on a mistaken basis if it is a thing which is within the scope of their authority, in the absence of some averment of *mala fides*. Otherwise the intervention of the court would no longer be that of a review but that of appeal. The mere fact that the authority has wrongly decided is also no basis for intervention by the reviewing court.

[20] In *CIR v City Deep Ltd*²¹ it was held that an incorrect interpretation of the law does not invalidate the decision taken by the authority.

[21] In *South African Railways v Swanepoel*²² the Appeal Court held that: "It is trite that where a statute commits a matter to determination of

¹⁹ 1912 AD 651.

²⁰ 1912 NPD 102.

²¹ 1924 AD 307.

²² 1933 AD 378.

an administrative official, his determination is final and the court cannot interfere, even if his discretion is exercised on a mistaken view of the law... There are certain exceptions to this general rule, e.g. if the administrative officer has ignored an express provision of a statute... or if the administrative officer fails to appreciate the nature of his discretion through misreading the Act which confers the discretion...the Court can only inquire whether the official has decided rightly or wrongly".

[22] In *Union Government v Union Steel Corporation (South Africa) Ltd*²³ the Appeal Court held that where an administrative officer who is accorded a discretion, fails to appreciate the nature of his discretion through misreading the Act which confers him the discretion, cannot exercise such a discretion properly. In such a case the review court can set aside the decision and refer the matter back and draw the attention of the officer to the actual question he should consider.

[23] The parties agreed, *inter alia* that the application for the licence complied with all statutory requirements. They further agreed that: "The first respondent considered the application of the Second

²³ 1928 AD 234.

Respondent for the liquor store licence in accordance with the contents of 'LQ-1' and approved the application on 29 August 2006.

6. The existing liquor store business of the Applicants are situated within 500 metres from the proposed liquor store premises of the Second Respondent;
- 7 A copy of the founding affidavit of the First Respondent is attached as annexure 'LQ-5';
- 8 The factual evidence that was presented to the First Respondent which resulted in the decision of the approval of the liquor store licence applicable is contained in the following:
 - 8.1 The application for the liquor store licence as per Annexure 'LQ-2' 'LQ-3 and 'LQ-4'."

[24] The parties have agreed that should I find that s30 (3) affords the applicant a protection, I should remit the matter for reconsideration. It has not been agreed upon by the parties that were I to remit the matter to the first respondent; the parties can supplement their affidavits. Further the reason upon which the first respondent's decision is premised has not been presented to this Court, save that he considered everything placed before him. The only consideration would be whether it is in the

general interest of the public that the licence should be granted notwithstanding the protection the applicants have.

[25] In the matter of *Boksburg Town Council*²⁴ it was stated that: "It is not an easy matter to decide when and under what circumstances a wrong interpretation of a statute will be a ground for review." In *CIR v City Deep Ltd*²⁵ it was held that the question is whether commissioner has *bona fide* and honestly considered the matter, and not whether his view was wrong or right.

[26] The protection afforded the applicants is not absolute. The applicants are not protected against competition. The only thing the protection does is to demand, in my view, a much stricter approach to the consideration in instances of application for a licence falling within 500 meters of the points of reference mentioned in s30(3). The relevant statute does not spell out what considerations must be borne in mind in such instance. I am of the view that the Courts must be slow in reading into

²⁴ 1964 (4) SA 73 (T) 74B.

²⁵ 1924 AD 307.

statutes what the Legislature has not spelt out. The courts must not elevate their opinions into statutes and arrogate for themselves legislative powers. Notwithstanding the invitation by the parties that I should do so, I shall refrain to opine what considerations the first respondent should have regard to in exercising its discretion in instances where the application is for a licence falling within 500 metres.

[27] Besides, *in casu*, it was accepted that the first respondent considered, *inter alia*, that the application falls within a radius of 500. It has not been agreed upon that supplementary affidavits would be filed so as to place further evidence before the first applicant. If the matter was to be remitted, the same evidence would still be considered. There is no guarantee that were the matter to be remitted for reconsideration a different result would be arrived at, bearing in mind the difficulty referred to in *Boksburg Town Council (supra)*. I am loath to remit the matter if it has not been shown on the papers that remitting the matter would offset the decision arrived at²⁶. Put differently, the

²⁶ Vide *Khan v Rural Licensing Board and Others* 1964 (4) SA 181.

applicants have not demonstrated that the second respondent has not *bona fide* and honestly exercised its discretion in awarding the licence to the second respondent.

[28] I am consequently of the view that in the circumstances of this case I should make the following order:

1. That the review application is dismissed.
2. That the applicants, jointly and severally, the one paying the other to be absolved are ordered to pay the costs of this application.


N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 12/11/2010

APPLICANT'S ATT : MARIUS BLOM & G GERMISHUIZEN INC

APPLICANT'S ADV : ADV. AJ LOUW SC

RESPONDENT'S ATT : EMIL SVCHEEPERS

RESPONDENT'S ADV : ADV. E P VAN RENSBURG