

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

11/02/2011

CASE NO: **41833/10**

In the matter between:

**HERBERT WILLIFRED MANDLBAUR**

Applicant

and

|                                          |                    |
|------------------------------------------|--------------------|
| DELETE WHICHEVER IS NOT APPLICABLE       |                    |
| (1) REPORTABLE: YES/NO.                  | YES                |
| (2) OF INTEREST TO OTHER JUDGES: YES/NO. | YES                |
| (3) REVISED                              | ✓                  |
| 9-2-2011                                 | <i>[Signature]</i> |
| DATE                                     | SIGNATURE          |

**THE MINISTER OF POLICE**

1<sup>st</sup> Respondent

**THE GAUTENG PROVINCIAL LIQUOR BOARD**

2<sup>nd</sup> Respondent

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**JUDGMENT**

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[1] The Applicant in this matter seeks the following relief:

"1. A declaratory order that the provisions of section 39 of Act 27 of 1989 and section 40 of Act 2 of 2003 (Gauteng):

1.1 do not require of a natural person who is the holder of a liquor licence, to appoint somebody else as responsible person for the management of such

*licensed business to be on the premises during periods of time that the natural person who is the licensee, cannot be present on the premises;*

*1.2 do not require of a holder of a liquor license, which is not a natural person, to appoint more than one responsible person under the license in order to ensure that an appointed person will at all times be on the licensed premises;*

*1.3 do not require that a licensee or its nominated responsible person, must at all times be present on a licensed premises."*

Applicant requested that First Respondent be directed to pay the costs of the application and if the Second Respondent opposes the relief sought, that First and Second Respondents be directed, jointly and severally and in solidum with each other, to pay the costs.

[2] First Respondent did not file any affidavit opposing, but the Second Respondent did. At the hearing of the matter, Second Respondent was represented by Ms. Makhubele.

[3] The Applicant is a businessman doing business and trading, either in person or through legal entities, in four liquor licensed businesses. The deponent on behalf of the Applicant is an attorney, Mr Marius Blom, who indicates that he has been practising as an attorney specialising in liquor related matters for the past 33 years. The Applicant alleges that he, in his aforementioned capacity, is suffering "an ongoing persecution by the First Respondent through his force members" in respect of his various businesses. The alleged persecution pertains to the interpretation of the aforementioned sections and in particular, whether a person in control of a liquor licensed business, not being appointed as such and not being the licensee, can be prosecuted for not being so appointed. The Applicant and his deponent to the founding affidavit both allege that the members of the South African Police Service maintained that, not only should there be appointed a responsible person for the management of a liquor licensed business, but that such person must at all times be present on the licensed premises. Should there be a person in control who has not been appointed as a responsible person / manager at a given time, such person is often arrested and charged as the latter is allegedly acting in contravention of the aforesaid sections. In many cases, so it is alleged, the business is then closed down by the members of the First Respondent's service and all stock on the premises is seized and subsequently forfeited to the State. However, these cases more often than not do not come before a

court of law as they are "*chucked out*". The seized items are never returned to the relevant person as they have allegedly been destroyed.

- [4] The Second Respondent (hereinafter referred to as "*the Respondent*") essentially seems to agree with the Applicant's version. Respondent alleges in its answering affidavit that "*I do not understand the provisions of the Act to imply that a manager must, at all times, be physically present at the premises. The consequences for the appointment, as provided in the Act is that the manager has the same responsibilities as the license holder and is equally accountable. Should an offence be committed by the license holder, the manager is equally liable. It is impossible to be in the premises at all times. There may be compelling reasons why a person is not in the premises such as sickness or other unforeseen circumstances.*" The Respondent is, however, opposed to a situation where one particular person is appointed as the responsible person concerning various licensed premises. In this regard, the Respondent submits that "*there are certain things, such as allowing drunkenness or selling liquor to under-age persons which could only be monitored by a responsible person or manager who is based in the licensed premises, and not a roving manager who may only visit the licensed premises once a year.*"

[5] It may be added that the Second Respondent's opposition to the relief sought, stems not from a difference in interpretation regarding the aforementioned, but is based on other grounds. So, for example, it was submitted by Ms. Makhubele that the Second Respondent had never been approached by the Applicant to express its views regarding the relief currently sought; that the court in any event has powers of review which could be exercised in appropriate instances and that granting the current relief would amount to prejudging the issues or inhibiting the court's discretion in proper instances. The Respondent reiterates that it differs, however, concerning the interpretation suggested by the Applicant i.e. that one responsible person could be appointed with a view to various premises.

[6] With regard to the approach to be followed in applications for a declaratory, brought in terms of section 19(1)(a)(iii) of the Supreme Court Act, No. 59 of 1959, the Supreme Court of Appeal has recently expressed itself as follows:

*"[16] Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the Court that he/she is a person*

*interested in an 'existing, future or contingent right or obligation' and nothing more is required ...*

*[17] It seems to me that once the applicant has satisfied the Court that he/she is interested in an 'existing, future or contingent right or obligation', the Court is obliged by the subsection to exercise its discretion. This does not, however, mean that the Court is bound to grant a declarator, but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors."*

The Learned Judge of Appeal then dealt with certain remarks made by Watermeyer JA in a previous case, and continued:

*"[18] Put differently, the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If a Court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either*

*to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry.”*

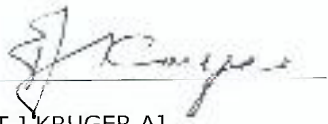
- [7] In the current instance it is evident that the Applicant has adhered to the initial prerequisites. What remains, is for me to exercise my aforesaid discretion. In the papers before me a notion such as “*to manage and be responsible*” as that notion appears in the relevant sections, has not been fully canvassed and contextualised. To adhere to a request to grant relief which lays down how the said notion should be interpreted and understood, would amount to the rendering of an opinion, which I decline to do. In any event, the said notion has not been properly canvassed and contextualised on the papers. There is, however, a narrow area of agreement between Applicant and Second Respondent. I am prepared to exercise my discretion regarding such area of mutual agreement whilst not traversing on areas which have not been properly canvassed and contextualised. The narrow area of agreement pertains to the approach followed by the First Respondent’s members i.e. that appointed responsible person (or licensee, as the case may be) must at all times be present on the relevant premises. From the relief which I intend granting, it follows that the approach followed by First Respondent’s Members with regard to the arrest of non-appointees (as alluded to supra), will henceforth be illegal. In my view the granting of such relief does not

amount to the mere rendering of an opinion or indulgence on areas which have not been properly canvassed. As such relief may have an effect on the way in which the First Respondent and its members interpret and apply the relevant sections, it should be remarked that the First Respondent had the opportunity to file affidavits which it preferred not to do.

- [8] Regarding costs I am of the view that Second Respondent was entitled to place its views before the court. In fact, without the clarity provided by the Second Respondent regarding its position and views having been put before the court, the making of an order would have been virtually impossible. I therefore do not intend to make a costs order against the Second Respondent.

I make the following order:

1. It is declared that the provisions of section 39 of Act 27 of 1989 and section 40 of Act 2 of 2003 (Gauteng) do not require that a licensee (whether a natural person, or not) or its nominated responsible person (if applicable), must at all times during business hours be present on a licensed premise.
2. I make not order as to costs.



T J KRUGER AJ