

REPUBLIC OF SOUTH AFRICA



11/3/2011

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

CASE NO: 46818/10

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
2011-03-11	
DATE	SIGNATURE

In the matter between:

MOBYLINK TRADING CC

Applicant

and

THE GAUTENG PROVINCIAL LIQUOR BOARD

First Respondent

**THE CHAIRPERSON OF THE GAUTENG
PROVINCIAL LIQUOR BOARD**

Second Respondent

J U D G M E N T

MAKGOKA, J

[1] This is an application to review and set aside the decision of the first respondent (the Board) not to grant a restaurant liquor licence in respect of the applicant's business known as *747 Restaurant and Sports Bar*, situated at erf 231 Kempton Park. The application was made in terms of section 23 of the Gauteng Liquor Act 2 of 2003 (the Act).

[2] The application is opposed. Ms. L Pretorius appeared for the applicant, while Ms. CH Msiya appeared for both respondents. Ms. Msiya adopted the heads of argument drafted by Mr. DT Skosana.

[3] The formal application requirements for a liquor licence are set out in section 24 of the Act. In terms of section 24(3), the application was required to advertise its intention to apply for the licence in one edition each of a newspaper and the government gazette, wherein among others, he would state the names and nature of "educational institutions and places of worship within 1 kilometre from the proposed premises from which he would serve liquor. In its advertisements, which were published on 5 and 7 August 2009, in the newspaper and the government gazette respectively, the applicant mentioned two educational institutions: Birnam College and Boston City Campus and two places of worship: Full Gospel and Anglican churches.

[4] In an affidavit dated 6 September 2009 accompanying the application, Mr. Tobias A Okeke, a Nigerian native and the sole member of the applicant, stated that he was not aware of any school, educational institution or church within the radius of 500 m from the proposed premises.

[5] On 14 August 2009 a Liquor Trade Inspector, Adv Xolani Justice Masango, visited the premises for an on-site inspection. In paragraph 13.2 (b) of his report dated 14 August 2009, he noted that the interior of the premises consists of a non-

smoking area, a Bar area, a pool table and a DJ area. He further noted that there are two churches within 500 meter radius: International Assemblies of God, which is within 50 meters from the proposed premises, and NG Kerk, which is 350 meters from the proposed premises, and a tertiary institution, Boston College, which is 400 meters from the proposed premises.

[6] On 26 November 2009 the Board considered the application and refused it. That decision was communicated to the applicant in letter dated 23 February 2010, wherein it is stated further that the reasons for the refusal would be provided on request. On 6 July 2010 the applicant, through its attorneys, sent a letter to the Board requesting reasons for the decision. The letter was not responded to. That resulted in the present application.

[7] In its replying affidavit, the applicant's deponent states that he doubts the correctness of the report of the Liquor Trade Inspector insofar as it mentions the institutions within the 500 meters radius. It is stated that the Inspector did not specify the addresses of such institutions, making it difficult to verify the correctness thereof. There is no merit in this contention. There are either such institutions or not. There is nothing that prevented the applicant, if it so desired, to place the contrary information before court. It chose not to. This information should be within the applicant's knowledge. It is certainly not sufficient to simply express 'doubt' about the correctness of the Inspector's report. In the absence of any contrary information, the Inspector's report should be accepted as correct.

[8] The Board's reason for the refusal of the application is contained in a *pro forma* document, which is annexure "V2" to its answering affidavit. It is cryptically stated: "500m radius school and place of worship". Mention of the "500m radius" in "V2" is clearly reference to section 30(2) of the Act, which sets out the circumstances under which the Board shall grant an application for a liquor licence. Section 30(3) provides that:

"The Board shall 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, (or) educational institution"

[9] How this so-called "500 meters radius" principle is to be approached and applied, is central to this application. In this regard, counsel for the applicant, Ms. Pretorius, referred me to a judgment of this court delivered on 7 July 2010 by Du Plessis J in *Caroline Street Liquor Store CC v the Gauteng Provincial Liquor Board*, (case no 67725/09, unreported). The learned Judge placed an interpretation on the sub-section and concluded that it does not mean the Board must refuse an application if the proposed premises are within 500 meters from any of the places mentioned in sub-section. The Board still has to exercise a discretion, weighing up all the evidence before it and decide whether the granting of the licence, even though it is within the radius, will have a negative impact on the surrounding area and whether it will be in the public interest or not.

[10] To my mind, the nature of the residual discretion which Du Plessis J correctly, with respect, concluded that the Board retains, is this: where there are places mentioned in section 30(3) within the 500 meters radius of the proposed premises, an assumption readily exists that such institutions would be negatively impacted by the granting of a liquor licence, and *a fortiori*, that it would not be in the public interest to grant such an application. Put differently, if the proposed premises are situated within the 500 meters radius of one or more of those institutions, the Board would be more readily inclined to refuse the application for a liquor licence than to grant it, unless it is established that despite the proximity of the proposed premises to such institutions, the granting of a liquor licence would not impact negatively on those institutions. The duty to establish that, in my view, rests upon the applicant, which obviously, is a factual enquiry.

[11] In the present matter, the proposed premises are situated within 500 meters of two churches and an educational institution. One church is a mere 50 meters away. The other church is 350 meters away, while the institution of higher learning is situated 400 meters away. That the decision of the Board has not been articulated in so many words is, in my view, not a basis to infer that the Board did not exercise its discretion properly. It is clear that the very close proximity of the proposed premises to these institutions, especially the church within 50 meters radius, must have weighed heavily on the Board to refuse the application.

[12] It is also contended that the Board's decision falls to be reviewed because the so-called *audi alteram partem* rule has not been observed. There is no merit in this contention. The applicant made substantive written representations with its application. It is common cause that no hearing was convened in terms of section 27 as there was no need for such hearing. The Board decided the matter on the applicant's written application and the report of the Liquor Trade Inspector. The Board is not obliged to convene a hearing and may determine the application after it had read and considered the application.

[13] To sum up, I am not persuaded that the Board failed to exercise its discretion, properly or at all. The application therefore fails to fail and it is dismissed with costs.



TM MAKGOKA
JUDGE OF THE HIGH COURT

MATTER HEARD	: 28 FEBRUARY 2011
JUDGMENT DELIVERED	: 11 MARCH 2011
FOR THE APPLICANT	: ADV L PRETORIUS
INSTRUCTED BY	: MARIUS BLOM & G C, GERMISHUIZEN INC, : PRETORIA.
FOR THE DEFENDANT	: ADV C H MSIYA (ADV DT SKOSANA HAVING DRAFTED HEADS OF ARGUMENT)
INSTRUCTED BY	: STATE ATTORNEY, PRETORIA