

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

Case Number: 51977/11
52369/11

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES ☒ NO ☐

(2) OF INTEREST TO OTHER JUDGES: YES ☐ NO ☒

(3) REVISED. ☒

30/9/11

DATE

SIGNATURE

30/9/2011

In the matter between:

MARK JOSPH STEYN

APPLICANT

vs

THE GAUTENG PROVINCIAL LIQUOR BOARD
QEDANI MAHLANGU N.O.

1ST RESPONDENT

2ND RESPONDENT

And In the matter between:

FORTUNA TRADE 162 (PTY) LTD

APPLICANT

Vs

THE GAUTENG PROVINCIAL LIQUOR BOARD
QEDANI MAHLANGU N.O.

1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

FABRICIUS J,

1. By agreement between the parties the two applications before me in the urgent court were consolidated. The arguments on behalf of the relevant parties overlap to a large extent and I will deal with them hereunder after I have briefly set out the facts pertaining to each individual application.

2. Fortuna Trade

In this application the applicant seeks the following relief:

- 2.1 A declaratory order that the moratorium imposed by the second respondent is illegal and, accordingly, an order directing the first respondent and its staff in the normal run of the empowering provisions of the Gauteng Liquor Act, 2 of 2003, to receive and consider applications, including applications for catering permits;
- 2.2 An order authorising the applicant to trade in liquor as if the Restaurant Liquor License applied for, for the business known as Ottawa Creek Spur, situated at Shop 1, Karaglen Mall, corner Harris Avenue and Baker Road, Erf 1514, Edenglen, Edenvale, district of Germiston, was granted, until such time as the first respondent has considered and decided the said application;
- 2.3 Costs

The purpose of this order is stated to be the following:

"The applicant approaches the Honourable Court for orders directing the first respondent and its administrative staff to accept lodgement of applications tendered in terms of the provisions of the Gauteng Provincial Liquor Act and to process the same in accordance with the Act, notwithstanding the fact that the second respondent has announced a so-called moratorium on the acceptance and consideration of certain of the prescribed applications referred to in the Gauteng Liquor Act. In the alternative the applicant approaches the Honourable Court for interim court orders to offset the prejudice it is suffering resulting from the announced moratorium."

3. The applicant then makes the following allegations:

3.1 "In July 2011 the second respondent announced a moratorium on the acceptance and considerations for new liquor licences, applications of the transfer of licences and applications for occasional or catering licences.

3.2 This announcement was devoid of any principle of law in terms of which it could have been done, and it was published in the open press, not gazetted as one would have expected if it was a competent step for the second respondent to take.

3.3 From Annexure "C" it can be gleamed that the reason for the so-called moratorium for a period of 6 months from 8 August 2011, is to enable the first respondent to "get its house in

order" to catch up with the arrear work, and to sniff out corruption, incompetence, etc.

3.4 I respectfully submit, and I am advised, which advice I accept as correct, that the moratorium is illegal, alternatively unconstitutional and null and void, alternatively it should be reviewed and set aside as an *ultra vires* step on the part of the second respondent.

3.5 The practical reality, however, is that the staff of the first respondent has been instructed, on the threat of being discharged, not to accept any applications for new licenses, applications for new licences, applications for occasional or catering permits and / or applications for the transfer of existing licences.

3.6 I have personal knowledge of the staff of the first respondent refusing to issue me and other consultants with reference numbers in order to make payment of the prescribed application fees which is a prerequisite of the lodgement of applications. The practical reality is that it makes the lodgement of an application impossible."

4. The impact of the alleged legal moratorium is then stated to be that the restaurant liquor license that had been granted to the applicants for its business known as Ottawa Creek Spur had lapsed, which thus necessitated a new application. It is also alleged that the applicant can not get a "catering permit" as a bridging mechanism to continue trading

in liquor in the business and that it is difficult, if not impossible, to run a proper Spur business without being able to sell liquor. If it had not been for the illegal moratorium, the applicant would have been able to file an application for a catering permit. Under the heading of “urgency” it is stated that there had been an application before this court in respect of the validity of the moratorium. The decision that was however handed down in that matter did however not resolve the issue of the moratorium, as the judgement was based on the issue of urgency.

5. In this context I was referred to the decision of ***S B Dunn and Others v The Gauteng Provincial Liquor Board and Others*** under case number 43475/20011. In that case similar relief was sought. Matojane J delivered a judgment on 29 August 2011 in which he dismissed the application on the basis that it was not urgent, and after referring to what that applicant had stated in his Founding Affidavit mainly “as far as I know from personal knowledge, there is a fair amount of chaos at the office of the second respondent because of many pending matters which should have been finalised, many *mandamus* orders issued against the second respondent; a lack of efficient administrative system etc ...”, held that the urgent relief sought by applicants in that case would just exacerbate an already dysfunctional system of liquor licensing, without giving applicants any immediate meaningful relief. Applicants would still suffer the same loss or damage were the relief sought granted, as they would if they were to rely solely or substantially

on the normal procedure provided for in the rules of court. The application was therefore dismissed on that ground alone.

6. I will return to the Fortuna Trade application. In the answering affidavit the chairperson of the Gauteng Liquor Board raised a number of issues including three points *in limine* relating to abuse of process, urgency and *locus standi*. He also dealt with the respondent's case on the merits, ie the statutory basis for the moratorium, the process leading to the moratorium and the justification therefor.
7. As far as the abuse of process was concerned, he alleged that the individual applicant was represented by a firm of attorneys, the responsible attorney being Mr Marius Blom. This same firm of attorneys and Mr Blom specifically also acted for the applicants in the matter of Dunn to which I have referred. It was pointed out that materially the relief sought therein was on the same terms as in the present application. As I have said, the judgment in the Dunn matter was delivered on 29 August 2011. Thereafter, on 31 August 2011, the said Mr Blom addressed a letter to him, which he annexed, which amongst others stated the following: " You are aware of the fact that Judge Matojane for some or other strange reason did not make a decision on the unlawfulness of the moratorium imposed by the MEC and adhered to by the Board. This matter will be going back to court on 20 September 2011". The following also appears therein: " We request the Board immediately to instruct its administrative staff to issue

reference numbers and to accept lodgement of new applications on the second of September 2011, failing which we hold instructions on behalf of a great number of prospective applicants to institute action as a group action against the Gauteng Provincial Liquor Board for damages in respect of damages so suffered.

8. On the same day the same attorney addressed a letter to various members of the liquor industry, also referred to the judgment of **Matojane J** and then in paragraph 4 thereof said the following: "The only way of dealing with this unlawful impasse is to go back to court and to get a Judge who is willing to make a decision on the crisp issue of the legality of the moratorium. On the 20 September 2011 Judge "X", a senior and highly rated and appreciated Judge will be sitting in the urgent court. This Judge has in the past made strong and brave decisions based on law and nothing but law. He will not take a political position!". Members of the industry are then requested to provide assistance and to "join In" by contributing towards the costs of further applications.
9. The chairperson of the Liquor Board then stated that he found these comments regarding the Judge who allegedly does not make political decisions and the implied attack on Judge Matojane both unfortunate and unworthy of an officer of the court. It was then contended that these letters indicate that the present applicants' attorneys have engaged in forum-shopping and attempted to select a judge most

likely, in their view, to grant the application. It was pointed out that the same attorneys have instituted a second application, namely that of Steyn, with which I shall deal hereunder. It was also pointed out that the present applicant, in the same way as in the Dunn application, has not disputed the need for reforms that were being implemented during the moratorium. Accordingly, he states the applicants are attempting to re-litigate the same issue that Matojane J had already dismissed for lack of urgency. Instead of enrolling the matter on the normal motion court roll and seeking the appropriate relief relating to the so-called merits of the application, the application has yet again been brought on an urgent basis. He states that it is impermissible to re-enrol on the urgent roll, before the same court but a different judge, an issue that has been dismissed for lack of urgency. This constitutes an abuse of process, which was aggravated by enrolling as a separate application the virtually identical application in the Steyn matter that I have mentioned and that has been consolidated as stated.

10. In addition points relating to lack of urgency and locus standi were raised. As far as urgency is concerned it was contended that this application was not urgent for the following reasons:

10.1 The applicant, in fact, submitted a liquor licence on 5 August 2011 prior to the commencement of the moratorium. That application is accordingly not subject to the moratorium and is being considered in the ordinary course, entirely unaffected by the moratorium. This was

admitted by the applicant in the replying affidavit, who however stated that it begged the question that the applicant was not in a position to apply for catering permits to continue trading. It was also contended that the applicant did not and could not reasonably have complained that there had been an unreasonable delay in processing his application for a liquor license. His complaint is that it is prevented by the moratorium from applying for a catering permit to act as a "bridging mechanism to continue trading in liquor", until the application for a liquor licence is processed. It was also stated that the respondents have made significant progress implementing the reforms that informed the decision to put the moratorium in place, and have determined that it will be possible to uplift the moratorium in respect of section 31 occasional or catering permits by 31 October 2011. It was then and in that context submitted that the applicant was not eligible for a catering permit in any event having regard to the provisions of section 31 of the Gauteng Liquor Act. Section 31 (2), which reads as follows: "The local committee shall not grant a catering or occasional permit under subsection(1) unless the applicant can show exceptional circumstances that warrant the granting of the catering or occasional permit for a period not longer than seven consecutive

days." Section 31(4) is also apposite: "The local committee shall be satisfied that the distribution or sale of liquor is not the principal business of the applicant, but incidental to the occasion held by the applicant. In that context it was contended that catering or occasional permits were not intended to operate as a "bridging mechanism for applicants for liquor licenses to operate while their applications were pending as if they have already been granted liquor licenses. These permits were intended, as is apparent from section 31, to be available for persons involved in "once-off events" who require a short term permit not exceeding seven days. In any event, section 31(2) requires "exceptional circumstances" and section 31(4) is clear in the present context. On applicant's own version the sale of liquor is indeed part of the principal business of the applicant. On his own version it is certainly not incidental thereto. In the premises it was argued that the application was an abuse of the process of court, that it was not urgent and that prayer 3 in any event was not competent according to law. The applicant had no potential to secure a catering or occasional permit in terms of Section 31 as it had no standing to institute this application at all. The applicant's application for a liquor license in terms of Section 23 of the said Act was submitted before the moratorium

commenced and, accordingly that application was unaffected. Accordingly, the applicant had no legal right implicated by the moratorium and no *locus standi* to institute this action.

11. A lengthy summary of the respondents' case on the merits was then given relating to the justification of the imposition of the moratorium. I have considered those reasons and the rationality thereof and am *prima facie* of the view that such reasoning was sound. It is however not necessary for me in this application to express a final view thereon and apart from saying that on a *prima facie* basis at the very least the arguments seem rational, I do not deem it necessary to finally arrive at a decision thereon for purposes of these proceedings.

12. The Steyn application:

In this application the same relief relating to the unlawfulness of the moratorium was sought and in prayer 3 the following relief was sought:

"An order authorising me, the applicant, to trade in liquor in a business to be known as John Dory's and to be situated at Shop 4, Heritage Square, corner Cecile Knight and Viljoen Streets, Krugersdorp, as if a restaurant liquor license has been granted to me, until such time as an application for such a license could have been lodged and processed by the first respondent, on condition that the same must be lodged in

accordance with the provisions of the Gauteng Liquor Act on the first available Friday for lodgement, the requirements for advertising taken into account, after the order of the honourable Court declaring the moratorium illegal or unconstitutional, or if not, after the expiry date of the moratorium."

In that founding affidavit the applicant submitted that the moratorium was unconstitutional, unlawful, and invalid, in that it was contrary to the provisions of section 22 of the Constitution read with section 33 thereof. It was also contended that the moratorium of the Liquor Board was not legislation and was in fact not regulating or limiting any of his rights, but was in fact simply barring his right to apply for and/or obtain a license.

13. In the answering affidavit the chairperson of the Liquor Board again referred to the already mentioned *in limine* points that I dealt with in the Fortuna case, namely relating to abuse of process and lack of urgency. As far as the aspect of lack of urgency was concerned it was stated that in summary the relevant facts were that the applicant had previously held a liquor license which had lapsed and accordingly could not be transferred. He now required a new license in respect of different premises from which he wished to operate. On that basis the applicant in fact sought interim relief by way of prayer 3, effectively allowing him to operate as if he had a liquor licence. Also, the moratorium was announced approximately one month before it took

effect on 8 August 2011. The applicant provided no explanation for why he failed to make use of this mentioned window period. Also, in the ordinary course liquor licence applications were in any event subject to a lengthy and rigorous process, and were not there for the asking on a urgent basis. The Gauteng Liquor Act imposed a number of stages and processes before a final decision could be taken by the Board, including an initial recommendation by a local committee, the process of inspection and substantive consideration by the Board.

14. In argument Mr Rip SC on behalf of the applicants stated that what was actually before me was a review of the decision of the relevant member of the executive committee in terms of section 6 of the Administrative Justice Act 3 of 2000. He submitted that the relevant recommendation and decision was a unilateral suspension of legislation, and in that context the decision maker had "crossed into the field of the legislator". He did not associate himself with the mentioned letters of 29 July of 2011, and submitted, correctly, that the letters and the sentiments expressed therein were not appropriate. He challenged the basis for the moratorium on a number of grounds but, as I have already stated, I am not deciding these applications on the basis of the invalidity or otherwise of the said moratorium.

15. Mr Marcus SC on behalf of the respondents pointed out that in the Steyn matter there had been no application. In the Fortuna matter the said application on 5 August 2011 was defective in a number of

material respects. In both cases, therefore, no application had been or could been considered by the respondents. The Court, whether on the basis of common law, or relevant legislation including the Promotion of Administrative Justice Act, does not lightly substitute its decision for that of an authority that has been given responsibility for such in terms of relevant legislation. The provisions of section 8(1)(c)(ii) were clear, and no exceptional case was before me, nor indeed exceptional circumstances referred to in the Gauteng Liquor Act. Also, the same reasoning that found favour with *Matojane J* applied and in that context also both of these applications amounted to an abuse of the process of Court, and further amounted to unacceptable "forum shopping". I also did not lose sight of the fact that the moratorium was put in place for reasons that I found *prima facie* to be rational and I also considered that it only applied for a limited six months period, that only three categories of applications were involved, namely those that imposed the greatest administrative and operational burdens, and that the moratorium in any event only applied to new applications in these categories, so as not to prejudice existing applicants.

16. Mr Marcus also submitted that if I had to find that the moratorium was unlawful, *ultra vires* or unconstitutional, I would have to consider the provisions of section 172(1)(b)(ii) as, it was required to me to make an order that was just and equitable. In the present context I would not hold the restructuring of the Board and all efforts made in that regard simply be set aside, and that the present chaos simply continue. I

would, in that context then order that the nullity of that decision be suspended for a certain period. In that case, therefore, as a matter of logic the applicant herein would in any event not be entitled to urgent relief, having regard to the state of affairs of the Liquor Board which was not in dispute. In any event, it was pointed out that it was not disputed on the affidavits before me in the Steyn application that had the moratorium not been implemented, and if Steyn had lodged an application for a liquor license mid September 2011, in the ordinary course, the application would not have been decided before the moratorium ended. Applications normally take several months to process and after the moratorium was lifted, Steyn, like all other applicants, will have the benefit of a faster process with greater efficiency and integrity.

17. In both the mentioned cases it is my view that the reasoning of Matojane J in the mentioned judgment was sound. I intend following it. There are also clear indications of a disturbing nature that the relevant attorneys intend persisting in applications of the same nature based largely on the same reasoning before different judges in different courts. In fact I was informed that another similar application had been set down before the urgent court, commencing on 4 October 2011. I am therefore of the following view:

- 17.1 The relevant moratorium is lawful and rational on a *prima facie* basis, although I have not finally decided this as it is unnecessary for present purposes;
- 17.2 Neither of the applications is urgent;
- 17.3 Both applications amount to an abuse of the process of this court and especially in the context of the Rule and Practice Directions relating to urgent applications;
- 17.4 No exceptional circumstances have been shown to exist which would allow me, either in terms of the Gauteng Liquor Act, or the Administrative Justice Act, to grant "temporary liquor licenses" , if I may use that phrase in the present context.

18. As far as the questions of costs were concerned, Mr Marcus argued that, having regard to all the facts seen cumulatively, I ought to order that the applicants' attorney, Mr Blom, pay the cost *de bonis propriis* on an attorney and client scale. I have considered this argument and, as I have said, the relevant correspondence referred to is not only highly inappropriate but borders on contempt of court, apart from putting undue pressure on me to make a decision on me that is "not political". On careful consideration however I do not deem it appropriate to accede to Mr Marcus's request for the following reasons:

- 18.1 I cannot find on the present papers that Mr Blom intended to act contemptuously;

18.2 He ought to have been granted sufficient opportunity to confront this request for a special cost order, and to make submissions to me in regard thereto;

18.3 The present applications seen in the proper context of the Dunn application and the application that is to be heard by the urgent court next week, however, point to a disturbing trend which I ought to discourage by making an order that the costs be paid on an attorney and own client scale.

19. Accordingly both applications are dismissed with costs on an attorney and own client scale including the cost of two counsel.