IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 2851 / 2017
Date heard: 26 June 2018
Date delivered: 31 July 2018

In the matter between

SKILLFULL 1059 (PTY) LIMITED Applicant

And

EASTERN CAPE LIQUOR BOARD First Respondent

THE MEC, ECONOMIC DEVELOPMENT, TOURISM
AND ENVIRONMENTAL AFFAIRS Second
Respondent

JUDGMENT

GOOSEN, J.

[1] The applicant seeks an order declaring that s 22 (11) of the Eastern Cape Liquor Act, Act 10 of 2003 (hereinafter "the Liquor Act") does not apply to the conversion of a close corporation to a company pursuant to Schedule 2 of the Companies Act, Act 71 of 2008 (hereinafter "the Companies Act"). It also seeks an order mandating the first respondent to place a copy of the applicant's registration certificate on file and to amend its records accordingly.

[2] The application is opposed by the first respondent. The second respondent abides the decision of the court. The application raises the question of the proper interpretation of the provisions of the Liquor Act and the Companies Act. The first respondent contends that the Liquor Act makes no provision for the amendment of the applicant's certificate of registration authorising the sale of liquor, save by way of transferring said rights in terms of s 22 (11) of the Liquor Act. It therefore contends that the envisaged conduct would be *ultra vires* the provisions of the Liquor Act.

[3] It is common cause that Skillfull 1059 CC made application for conversion of the close corporation to a company on 4 November 2014 in terms of Schedule 2 of the Companies Act; and that the conversion was registered on the database of the Companies and Intellectual Property Commission (CIPC) on 24 February 2015. The Certificate of Registration in terms of Regulation 18 of the Companies Regulations, 2011 records the applicant as the converted entity.

[4] It is also common cause that prior to the conversion the first respondent issued a certificate of registration in favour of Skillfull 1059 CC authorising the retail sale of liquor for consumption off-premises by the close corporation. Said certificate has been renewed from time to time.

[5] Following the conversion, the applicant's attorneys notified the first respondent of the conversion and requested it to update its records in accordance therewith. Following an exchange of correspondence and discussions held between the parties (between July 2015 and April 2017), the first respondent adopted the stance that the applicant is required to follow the procedure set out in s 22 of the Liquor Act. This section provides for the transfer of registered rights to sell liquor from the holder of such rights to another person. The applicant contends that such transfer of rights is not required and that the first respondent must give effect to the provisions of the Companies Act.

[6] Schedule 2 of the Companies Act provides for the conversion of a close corporation to a company. Such conversion may be effected at any time and occurs by filing a notice of conversion in the prescribed manner with the CIPC. The procedure is regulated by Regulation 18 of the Companies Regulations. Item 1 (4) of Schedule 2 provides that:

> (4) Upon conversion of a close corporation in terms of this Schedule the Commission must –
> (a) cancel the registration of that close corporation in terms of the Close Corporations Act, 1984 (Act No. 69 of 1984);
> (b) give notice in the *Gazette* of the conversion of a close corporation into a company; and
> (c) enable the Registrar of Deeds to effect the necessary changes resulting from conversions and name changes.

[7] Item 2 of Schedule 2 deals with the effect of conversion upon the legal status of the entity concerned. Subsection (2) provides as follows:

> (2) On the registration of a company converted from a close corporation –

(a) the juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a company;
(b) all the assets, liabilities, rights and obligations of the close corporation vest in the company;
(c) any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the company, and any other thing done by or in respect of the close corporation, is deemed to have been done by or in respect of the company;
(d) any enforcement measures that could have been commenced with respect to the close corporation in terms of the Close Corporations Act, 1984 (Act No. 69 of 1984), for conduct occurring before the date of registration, may be brought against the company on the same basis, as if the conversion had not occurred; and
(e) any liability of a member of the corporation for the corporation's debts, that had arisen in terms of the Close Corporations Act, 1984 (Act No. 69 of 1984), and existed immediately before the date of the registration, survives the conversion and continues as a liability of that person, as if the conversion had not occurred.

[8] Based on these provisions the applicant argued that, in the first instance, the legal entity created by the incorporation of Skillfull 1059 CC continued to exist through conversion, albeit in the form of a company. The conversion accordingly did not create a new or separate legal entity. It was further argued that all of the rights which vested in the close corporation immediately before the conversion, vest in the converted company. Accordingly, the rights conferred upon Skillfull 1059 CC to engage in the retail sale of liquor in terms of the registration certificate issued by the first respondent, vest in the applicant.

[9] The first respondent argued that the applicant is, on the face of it, a separate legal entity. It was submitted that there is no provision in the Liquor Act which permits the conversion of a close corporation to a company. Since the shareholding of the company may change without notice to the first respondent, "simple" registration of the new entity may contravene s 34 of the Liquor Act. In the light of the absence of any provision in the Liquor Act the first respondent would be acting *ultra vires* its powers to effect the registration in the name of the applicant. It can only do so in terms of 22 (11) of the Liquor Act.

[10] Ms *Rawjee*, on behalf of the first respondent, argued that to permit registration of the converted company as a purveyor of retail liquor in the circumstances, would defeat the purposes of the Liquor Act. The purpose of the Liquor Act as set out in s 2 thereof is to regulate, *inter-alia*, the sale of liquor by providing for registration of approved persons or entities. The registration process seeks to

manage and reduce the socio-economic and other costs of excessive alcohol consumption. The first respondent is required, to this end, to regulate the industry by facilitating new entrants thereto, take into consideration community considerations and to determine whether the entity or person seeking registration is a disqualified person. Section 19 of the Liquor Act renders registration of persons wishing to sell liquor compulsory. The procedure for such registration is set out in ss 20 and 22. Once registration is approved the first respondent is required, in terms of s 25 (1) (b) of the Liquor Act to issue a certificate of registration in the applicant's name, which certificate is valid for a prescribed period.

[11] In terms of s 22 an applicant company or close corporation is required, in its application, to provide details of its full name, registration number and address, and must provide the names and identity numbers of its shareholders or members. Its application must state that none of these shareholders or members is disqualified from registration in terms of s 21. Notice of the application must be given to the ward committee in whose area the premises are situated and the governing body of every educational institution with in a prescribed radius. An opportunity is given for public comment and the lodging of objections. Upon consideration of the application and any objections thereto the Board is required to give notice of its decision and to provide reasons therefore.

[12] Section 22 (11) makes provision for the holder of a registration certificate to apply for the transfer thereof to another person or entity. In terms of s 22 (14) (a) the procedure and consultation process set out in s 22 is applicable to an application for the transfer of a certificate of registration. Sections 28 and 29 of the Act deal with non-compliance with the terms of registration and the effect thereof.

[13] Ms *Rawjee* argued that there is no provision in the Liquor Act which deals with the position of a close corporation converted to a company. She pointed out that the applicant is a "regulated person or entity" i.e. an entity which has been granted authority to conduct business by a "regulatory authority". A "regulatory authority" is an entity "established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry". The first respondent is such an

authority. Public regulation is defined to include authorisation in terms of national, provincial or local government legislation and includes the issuing of a licence. [1]

[14] The first respondent's argument proceeded along the lines that since the applicant's authority to conduct business as a retailer of liquor is to be determined by the first respondent, the provisions of the Liquor Act are determinative. The applicant can only obtain such authority in the manner prescribed. It is accordingly required to apply for a transfer of rights in terms of s 22 (11). In support of the submission that the applicant is, for purposes of the Liquor Act, to be treated as a separate legal entity, Ms *Rawjee* relied on s 2 (2) of the Close Corporations Act 69 of 1984, as it has been amended. That section provides as follows:

> (2) A corporation formed in accordance with the provisions of this Act is on registration in terms of these provisions a juristic person and continues, subject to the provisions of this Act, to exist as a juristic person, notwithstanding changes in its membership, or its conversion to a company in terms of Schedule 2 of the Companies Act, until it is deregistered or dissolved –
> (a) in terms of this Act; or
> (b) in terms of the Companies Act, in the case of a juristic person that has been converted to a company.

[15] It was submitted, therefore, that the applicant is either deregistered or dissolved as a close corporation.

[16] The first respondent's argument is founded upon two fundamental assertions. The first is that the applicant as a converted company is, for the purposes of the Liquor Act, a separate legal entity. The second is that there is no provision in the Liquor Act to cater for a converted company. The only procedure available to the converted company is that provided for in s 22 (11), i.e. a transfer of registration. The two assertions are inter-related on the basis that any conflict between the provisions of the Liquor Act and any other law, apart from the Constitution, is to be resolved on the basis of the Liquor Act.[2]

[17] The nature and legal status of an entity incorporated in terms of the Companies Act is determined by that Act. The definition of a "company", as set out in s1 of the Act, extends to a converted company i.e. a close corporation converted in terms of Schedule 2. Schedule 2 provides in clear and

[1] See the definitions set out in s 1 of the Liquor Act
[2] See s 3(2) of the Liquor Act

unambiguous language that the legal entity created by registration in terms of the Close Corporations Act continues to exist as a legal entity upon its conversion to a company. The converted company is, upon an ordinary construction of Item 2 (2) of Schedule 2, the same legal entity as that which existed in the form of a close corporation prior to its conversion.

[18] The "conversion" of the entity relates to its form. It addresses the internal relations of participants in the company, i.e. shareholders and directors. It also addresses regulatory aspects of the company and its governance. Schedule 2 specifically provides for the external legal effect of conversion. Section 2 (2) of the Close Corporations Act, referred to above, is consistent with the provisions of Items 1 (4) and 2 (2) of Schedule 2. Item 1 (4) requires the cancellation of the registration of the close corporation upon its conversion. This gives expression to the requirement in s 2 (2) (b) of the Close Corporations Act. However, both s 2 (2) of the Close Corporations Act and Item 2 (2) of Schedule 2 of the Companies Act provides for the continued existence of the juristic person.

[19] Section 1 of the Interpretation Act, Act 33 of 1957 (which is rendered applicable to the definition of "person" in the Liquor Act), defines a "person" to include any company incorporated or registered as such under any law.

[20] The ordinary meaning of Items 1 and 2 of Schedule 2 of the Companies Act, as read with s 2 (2) of the Close Corporations Act is that the converted company is <u>the same juristic person</u> or entity as existed prior to conversion in the form of a close corporation. Item 2 (2) of the Schedule, furthermore, makes it plain that all of the rights and obligations which vested in that juristic person in the form of a close corporation continue to invest in the juristic person in the form of a company. There is accordingly a continuity of, *inter-alia*, rights and obligations.

[21] Section 22 of the Liquor Act deals with three types of application, i.e. <u>registration</u> by a person, company or close corporation as a retailer of liquor within certain categories; <u>transfer</u> of an existing registration; and <u>removal</u> of a registration certificate from one premises to another. Section 22 (11) provides that:

> The holder of a registration certificate may at any time make application to the board for the transfer thereof to another person.

[22] As indicated earlier, a "person" is defined in the Liquor Act to include a trust and a company incorporated or registered in terms of any law. Once a certificate of registration is issued to a person such person is entitled to sell liquor, subject to such conditions as may be imposed and in accordance with the category of registration approved by the first respondent. [3] The rights conferred by a certificate of registration vest for so long as the holder is in possession of a valid registration for the period approved, and subject to the registration being varied, suspended or cancelled in terms of s 29 of the Act.[4] In this instance there is no dispute that immediately prior to conversion the holder (Skillfull 1059 CC) was in possession of a valid certificate conferring upon it the right to sell liquor. In terms of the Companies Act, those vested rights now vest in the applicant

[23] Section 22 (11) deals with the transfer of rights from one person to another person. It is for this reason, no doubt, that the requirements for disclosure of information; for public notice and objection; and the related registration procedures are made applicable to the process of transfer. As Ms *Rawjee* quite correctly submitted, these procedures serve to meet the objects and purposes of proper regulation of the industry.

[24] Section 22 (11) however, cannot, in its ordinary grammatical meaning, apply to a converted company since there is no other person to whom rights are to be transferred. It is difficult to conceive on what basis rights, which invest in an incorporated juristic person, can be "transferred" to that same incorporated juristic person.

[25] The procedure provided for conversion of the form of the juristic person, seeks to ensure that the conversion in form is consistent with the requirements for incorporation of a company in the ordinary course. Thus Item 1 (3) of the Schedule makes s 14 of the Companies Act applicable to the conversion. Section 14 deals with the registration of a company upon acceptance of a Notice of Incorporation together with a Memorandum of Incorporation. In the case of a conversion, the Notice of Conversion is deemed to be a Notice of Incorporation. The registration certificate issued in terms

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[3] Sections 19, 20 and 27 of the Liquor Act

[4] Section 29 provides that a registration i.e. the rights to sell liquor conferred by the Board upon a holder of a registration certificate, may be 'varied' in the event that the holder does not comply with a notice of non-compliance issued by the Board in terms of s 28. It also provides for the suspension or cancellation of the registration in certain circumstances.

of Regulation 18 of the Companies Regulations serves, in terms of s 14 (9), as conclusive proof that the requirements of incorporation have been met.

[26] The argument that the s 22 registration procedure is necessary to ensure that the "new entity" meets the requirements of the Liquor Act does not take into consideration that rights have already been conferred in accordance with the prescribed application procedure. Furthermore, s 34 of the Liquor Act, places an obligation upon a registered person to obtain prior approval of the chairperson of the first respondent for certain changes to the business to which the registration relates. The section provides that:

> (1) A registered person must not permit any other person to procure a controlling interest in the business to which the registration relates, unless the chairperson of the board has, on application by the registered person, granted consent that the other person may procure that interest in the business.
> (2) The chairperson must not grant consent under subsection (1) where the person who is the subject of the application, is disqualified or incompetent in terms of this Act to be registered.

[27] The first respondent's contention that it is possible that the shareholding of the company may change in conversion and that, for this reason, adherence to the s 22 (11) transfer would serve to ensure that disqualified persons are not granted registration, cannot be upheld. There is no provision in the Liquor Act which requires a company or close corporation holder of a registration certificate to disclose shareholding or membership changes during the currency of a valid registration. The disclosure obligation applies at registration and in relation to the acquisition of a controlling interest in terms of s 34. In any event, the registration is valid for a specified period, subject to renewal and payment of annual fees.

[28] The process of conversion of a close corporation to a company involves the conversion, *inter alia*, of a membership interest into shareholding. Item 2 (1) of Schedule 2 provides that:

> Every member of a close corporation converted under this Schedule is entitled to become a shareholder of the company, resulting from that conversion, but the shares to be held in the company by the shareholders individually need not necessarily be in proportion to the member's interests as stated in the founding statement of the close corporation concerned.

[29] The notice of conversion which must be filed serves as a notice of incorporation as is required in terms of ss 13 and 14 of the Companies Act. It deals with the shareholding of the erstwhile members of the close corporation. All members become shareholders.

[30] Ms *Bands*, on behalf of the applicant, submitted that a s 22 (11) transfer is neither possible nor competent. It is not strictly possible, since s 22 (11) requires the holder of a registration certificate to apply. Since the holder, Skillfull 1059 CC, has been de-registered as a close corporation pursuant to the conversion, "it" cannot apply. It is also not competent for a legal entity to apply to transfer rights to itself. I have already dealt with the latter argument. As to the former, Ms *Bands* correctly points out that, on the first respondent's construction of the provisions of Companies Act, the "separate entity" has in fact ceased to exist.

[31] Ms *Bands* further argued that no purpose would be served by a transfer application since the first respondent is possessed of all of the information regarding the applicant and its shareholders as would be required in the application for transfer, since that information was provided at the stage that registration was sought. I agree.

[32] It should be mentioned that the applicant relied on the fact that the first respondent has apparently, on previous occasions, made such amendments to registration certificates without requiring a transfer of rights in terms of s 22 (11). The first respondent contended that these were administrative errors. In my view the prior conduct of the first respondent is not relevant in addressing the legal question raised in these proceedings.

[33] I turn now to the second leg of the first respondent's argument, namely that the Liquor Act does not provide for the amendment of the registration certificate in the case of a converted company and that it would be acting *ultra vires* were it to issue such certificate.

[34] It is so that the Liquor Act is silent in relation to a converted company. What the applicant requires, in addition to the declaratory relief, is that the first respondent place a copy of its certificate of registration issued by the CIPC in terms of Regulation 18 of the Companies Regulations on file, and to amend its records in accordance therewith. It requires also that the first respondent issue an

amended certificate of registration in terms of s 25 (1) (b) of the Liquor Act. The 'amendment' is effectively in relation to the name of the holder, since all the information set out in the certificate of registration would be the same as that previously issued.

[35] The first respondent submits that its powers are defined by the Liquor Act and that there is no provision for the issuing of an amended certificate of registration in the name of the applicant. The first respondent's powers to vary any registration is confined, so it was submitted, to variation required consequent upon failure to comply with a notice of non-compliance.[5] The first respondent therefore does not have the power to amend a certificate of registration by changing the name of the registered person. The applicant does not however, seek a variation of the registration. It seeks merely that a certificate be issued reflecting that the holder of the rights is the applicant i.e. the juristic person which has been converted from a close corporation to a company.

[36] The first respondent however placed reliance upon s 3 (2) which provides that:

> Subject to sections 23 (a), 32 (1) and (2), 47 (1), 48 (2), 50 (2) (a) and 51, if any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, save the Constitution or an Act amending this Act, the provisions of this Act must prevail.

[37] It was submitted that there is a conflict between the Companies Act, which makes provision for conversion, and the Liquor Act which does not deal with the position of a converted company. A conflict however arises between legislative provisions when two legislative instruments make different provisions for the same or a similar matter. In this instance the Companies Act deals with the conversion of a close Corporation to a company and provides for the legal status of the juristic person so converted. The Liquor Act does not deal with this matter. The Liquor Act deals with registration, transfer and removal of registrations. There is accordingly no conflict between the two Acts. At best for the first respondent the Liquor Act is silent as to the procedure to give effect to the provisions of Schedule 2 of the Companies Act.

[38] The first respondent's powers are defined by the Liquor Act. Its authority, to consider applications for registration, transfer or removal, is as it is set out in the Act. These are adjudicative functions performed by the first respondent to give effect to the legislation. The first respondent also performs

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[5] See fn 4 above.

certain regulatory functions in enforcing the provisions of the Liquor Act. It is, in this regard, clothed with authority to vary a registration upon non-compliance with its directives or to suspend or cancel a registration. It is entitled to grant a registration subject to certain conditions and to determine the period for which a registration is valid.

[39] The Act does not however, define the first respondent's authority in relation to functions which do not involve the exercise of its adjudicative functions by which it gives effect to the legislation but which are incidental to the performance of those functions. What the applicant seeks is an amendment of the certificate of registration to give effect to the conversion to a company pursuant to the Companies Act. This does not engage the first respondent's adjudicative administrative decision-making authority. The first respondent is not required to exercise any of its statutorily conferred powers by which it decides to grant a registration, or a transfer of registration. It has already exercised those powers and, by its original decision to grant a registration certificate to Skillfull 1059 CC, conferred rights to sell liquor upon certain conditions. What the applicant now seeks is that effect be given to a lawful process of conversion pursuant to legislation which governs such process and which determines the legal effect of such conversion process. The first respondent is obliged, in accordance with the principle of legality, to give effect to the lawfully executed conversion. There is no impediment to such conduct, and in effecting the amendment to its records the first respondent will not, in my view, be acting *ultra vires* its powers.

[40] The point may be illustrated by analogy with reference to s 21 of the Close Corporations Act. That section deals with the effect of the change of name of a close corporation. Subsection (2) provides that:

> (2) Upon the production by a corporation of a certified copy of a founding statement reflecting a change of name of that corporation to any registrar or other officer charged with the maintenance of a register under any law, and on compliance with all the requirements pursuant to any such law as to the form of application (if any) and the payment of any required fee, such registrar or other officer shall make in his or her register all such alterations as are necessary, by reason of the change of name in respect of the corporation.

[41] This section clearly authorises a regulatory authority to effect amendments to its records and to give effect to the name change. The fact that the Liquor Act does not make provision for such an amendment to be made, would not preclude the amendment of a registration certificate pursuant to s 21(2) of the Close Corporations Act. Were that to be so it would give rise to absurdity.

[42] In just the same way the first respondent, as a regulatory authority, is obliged to give effect to the provisions of Schedule 2 of the Companies Act. The fact that the Schedule does not in terms direct a regulatory authority to amend its records, does not alter the essential obligation imposed upon a regulatory authority to act in accordance with the principle of legality.

[43] Legislative provisions must be interpreted sensibly and in manner which does not undermine the purpose of the legislation.[6] In this instance, effect must be given to the purpose of both the Companies Act and the Liquor Act. To hold that the first respondent is precluded from giving effect to a provision of the Companies Act because the Liquor Act, enacted prior thereto, does not refer to the amendment of the certificate of registration in circumstances such as the present, would lead to an insensible and un-businesslike interpretation of the legislation. To hold, on the contrary, that the first respondent is entitled in the exercise of its administrative functions which do not engage its adjudicative or regulatory powers, to amend the certificate of registration by issuing a certificate in the name of the converted entity would give effect to the purposes of both the Companies Act and the Liquor Act.

[44] It follows from what is set out above that the applicant is entitled to the declaratory order and the further order it seeks. There is no reason why the costs of the application should not follow the result. I was informed that the parties were in agreement that in respect of the costs reserved by Eksteen J on 29 March 2018 regarding a postponement of the matter, that there should be no order as to costs.

[45] In the result the following orders will issue:

1. It is declared that the requirements of section 22 (11) of the Eastern Cape Liquor Act, Act 10 of 2003 do not apply to the amendment of the Certificate of Registration issued in terms of the said Act to a close corporation which is converted to a company, pursuant to Schedule 2 of the Companies Act, Act 71 of 2008.

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[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA)

2. The first respondent is ordered to place a copy of the applicant's Certificate of Registration issued by the Companies and Intellectual Properties Commission on 24 February 2015 on file and to amend its records, within a period of 21 days from the date of this order, in respect of the applicant in accordance therewith.

3. The first respondent is ordered to issue the applicant with an amended Certificate of Registration in accordance with section 25 (1) (b) of the Eastern Cape Liquor Act, Act 10 of 2003, within 21 days from the date of this Order.

4. The first respondent is ordered to pay the costs of the application, save that in respect of the reserved costs of 29 March 2018, there shall be no order as to costs.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Applicant
Adv. I. Bands
Instructed by BLC Attorneys

For the First Respondent
Adv. A. Rawjee, assisted by Adv. Gagiano
Instructed by the State Attorney, Port Elizabeth