



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **3611/2022**

In the matter between:

ELIAS GEBRESILASSIE TEKLEHIMANOTE

Applicant

and

**THE FREE STATE GAMBLING, LIQUOR &
TOURISM AUTHORITY**

First Respondent

**THE CHAIRPERSON OF THE FREE STATE
GAMBLING, LIQUOR & TOURISM AUTHORITY**

Second Respondent

CORAM: DANISO, J *et* CRONJÉ, AJ

HEARD ON: 17 April 2023

JUDGMENT BY: CRONJÉ, AJ

DELIVERED ON: 22 May 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15h50 on 22 May 2023.

I BACKGROUND

- [1] The Applicant applied for a restaurant liquor licence in terms of the Free State Gambling and Liquor Act, 6 of 2016 (the Act).
- [2] The First Respondent rejected the application on 13 June 2022 on the basis that: *"The proposed premises is situated in a traffic-congested area, with a taxi rank in close proximity, [and] parking as a major issue and will therefore be insufficient"*.
- [3] Dissatisfied with the outcome, the Applicant brought an application in terms of Rule 53 of the Uniform Rules of Court to review and set aside the decision not to issue a license. The Applicant seeks an order that the First Respondent be directed to issue a license, or as an alternative, that the matter be referred back to the First Respondent, and it be directed to consider the matter afresh.

II POINT IN LIMINE – LACK OF AUTHORITY

- [4] The Respondents raise as a point in *limine* the lack of authority of Mr Burger, the attorney for the Applicant, to depose to the affidavits in the review application. at hearing of the application, Mr Bomela who appeared for the Respondents, withdrew the objection and sought to rely on Rule 6 instead of Rule 7 of the Uniform Rules of Court.
- [5] For clarity, it may be opportune to distinguish between the two Rules.

- [6] The remedy of a Respondent who disputes authority is not to challenge the authority in the answering affidavit, but to use Rule 7(1) of the Uniform Rules of Court.¹ The Rule states:

“Subject to the provisions of sub-rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

- [7] Rule 6(1) of the Uniform Rules of Court that provides that:

“Every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.”

- [8] The Respondents contend that the Applicant himself should depose to the affidavit as he is the witness. According to them, Mr Burger is “*testifying*” and an attorney should only “*advise and guide*” litigation. The fact that the Applicant deposed to a confirmatory affidavit does not, according to them, address the deficiency. They request that the application be dismissed with costs, for lack of authority.

III THE LAW ON AUTHORITY IN TERMS OF RULE 6

- [9] A deponent to an affidavit in motion proceedings need not be authorised by the Applicant. The Applicant, however, has to authorise the institution and prosecution of the proceedings.
- [10] Attorneys often depose to affidavits on their client’s behalf. The test is whether they have personal knowledge of the facts relevant to the application. In *Masako v Masako and another*² the Supreme Court of Appeal held:

¹ Harms, Civil Procedure in the Superior Courts, LexisNexis, Issue 66, p. B-37

² [2021] JOL 51783 (SCA)

[10] Turning to the issue of authority to depose to an affidavit, the judgment of this Court in *Ganes and another v Telecom Namibia Ltd*³ provides a complete answer to this question. It held that:

"... it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. ..."

[11] Ms Moduka alleged that her reason for deposing to the founding affidavit was that the facts that gave rise to the need for a rescission application lay squarely within her knowledge as the attorney who was dealing with the matter. It stands to reason that a deponent to an affidavit is a witness who states under oath facts that lie within her personal knowledge. She swears or affirms to the truthfulness of such statements. She is no different from a witness who testifies orally, on oath or affirmation, regarding events within her knowledge. Thus, when Ms Moduka deposed to the founding affidavit, she needed no authorisation from her client."

[11] On this basis, the point in limine is dismissed.

IV MERITS

[12] Mr Burger drew an Annexure "B" to the application for the licence. No mention is made therein of parking space at the restaurant.

[13] In the SAPS.21 form of the South African Police Service, Lt. Col. MH Modise stated that the Applicant did not answer his cell phone when called. In a Pre-

³ (608/2002) [2003] ZASCA 123; [2004] 2 All SA 609 (SCA) (25 November 2003)

inspection Report completed by the Inspector, Area Leader and the Manager of the First Respondent, it is stated: "*Road accessible Tar and parking sufficient*".

- [14] Section 28(4) of the Act lists public interest and a report of the municipality in whose area the premises falls as factors that need to be considered in applications for licenses.
- [15] Section 32(2) of the Act stipulates that a report from the municipality must provide information on *inter alia* the impact on surrounding traffic patterns, traffic congestion, entrances and exits to and from the premises, and parking requirements.
- [16] The First Respondent requested from Mr Burger to comment on the reports and to submit any outstanding documents within fourteen (14) days, failing which the application would be forwarded to the First Respondent as "*defective*". Mr Burger referred to the liquor inspector and designated police officer's reports, stating that both the reports were favourable and that the Applicant has no intention to reply.
- [17] A number of black and white photographs, apparently emanating from the investigations of the First Respondent. They depict a large number of vehicles in the street. The photos attached to the Applicant application to the First Respondent, show few vehicles parked outside the premises. The difference between the respective sets of photos is obvious.
- [18] On 7 June 2022, Mr Mashinini, the Acting Legal Manager of the First Respondent, stated that he and one Mr Magashule went to verify the facts regarding parking in the vicinity of the premises. He stated that there is a taxi rank near the proposed outlet, that the First Respondent has no competency to do a traffic impact study, nor does it have funds to do so, but that it is clear from the photos that there is not enough parking. The Applicant was given an opportunity to address the issue by way of oral submission and to state reasons why the Board should grant the application.

[19] The Applicant did not appear in person but was represented by Mr Burger at the hearing on 8 June 2022. Large portions of the transcript are intelligible. It was *inter alia* recorded that the liquor inspector and the report states that there is insufficient parking. That was followed by a statement in the transcript that states that there are no objections against the application.⁴ Later on it is recorded: *"Parking is not irrelevant, but it is not that important. Someone says it doesn't [sic] there is no provision for it in the Act."*⁵

[20] In a debate on the traffic issue, and after a question that was put to Mr Burger, whether he attended the premises during the day and night, Mr Burger stated:

"I do not know exactly. A week, two or three ago. I was not there at night. But I, the evidence, or I can't give evidence. I present my client's case on instructions. I have asked him; he says to me the [sic] sufficient parking at night. So I cannot give evidence. And I do not want to do that."⁶

[21] The proceedings, which were apparently conducted virtually, came to a point where the chairperson stated that the application of the Applicant stands down and will be heard at some other stage.⁷

[22] The record does not reflect that the deliberations continued in respect of the Applicant's application. The First Respondent informed the Applicant that it took a decision to refuse the application on the following singular ground:

"1. The proposed premises is situated in a traffic congested area, with a taxi rank in close proximity, parking is a major issue and will therefore be insufficient."

[23] In their opposing affidavit⁸, the Respondents ask this Court to order the municipality to provide a report to the First Respondent for reconsideration of the matter within 90 days of this Order. The Applicant denies that this Court has the power to make such a directive.

⁴ Transcribed record, p. 38, line 20 - 22

⁵ Ibid, p. 44

⁶ Ibid, p. 52, line 16 - 23

⁷ Ibid, p. 61, line 6

⁸ Para 35

V THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

- [24] The Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”), *inter alia* provides that an administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. An administrator must give a person a reasonable opportunity to make representations.⁹ Non-compliance with this requirement normally leads to invalidity of the process. Procedural unfairness is listed as a ground for review in section 6(2)(c) of PAJA and setting the decision aside remains the default for non-compliance.¹⁰
- [25] A Court may either set the decision aside or correct it. Courts are reluctant to usurp the decision-making powers of administrators as the legislature delegated decision-making to an administrator¹¹ and generally refer matters back to the original decision-maker rather than attempt to correct the decision themselves. This affirms the distinction between reviews and appeals.
- [26] These principles are summed up in *Gauteng Gambling Board v Silverstar Development Ltd and Others*¹² as follows:

”[28] *The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is ‘exceptional’: ... Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. ...*

⁹ Section 3

¹⁰ Hoexter, C, *Administrative Law in Southern Africa*, Second Edition, Juta, p. 386

¹¹ Hoexter *supra*, p. 552, para (b)

¹² (80/2004) [2005] ZASCA 19 (29 March 2005)

[29] *An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognize its own limitations. See Minister of Environmental Affairs & Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) at paras [47] to [50], and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at paras [46] to [49]. That is why remittal is almost always the prudent and proper course.”*

[27] In *Johannesburg City Council v Administrator, Transvaal*¹³ it was held:

“In Livestock and Meat Industries Control Board v. Garda, 1961 (1) S.A. 342 (A.D.), HOLMES, A.J.A., stated the “basic principle” as follows at p. 349G:

“From a survey of the foregoing decisions it seems to me possible to state the basic principle as follows, namely that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that, although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.”

The whole position was again reviewed by MULLER, J., in Vries v. du Plessis, N.O., 1967 (4) S.A. 469 (S.W.A.) at p. 482, and from the numerous cases referred to there (which include four not yet mentioned by me above) it seems clear that the Courts have consistently followed this pattern:

1. *The ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.*
2. *The Court will depart from the ordinary course in these circumstances:*
 - (i) *Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.*

¹³ 1969 (2 SA 72 (T) at 76D-E

(ii) *Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.*"

[28] On the question whether a Court should substitute the decision on its own accord, I refer to the decision in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another*¹⁴ where the Constitutional Court held:

"[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. ...

[49] Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and 'it would merely be a waste of time to order the [administrator] to reconsider the matter'... in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion."
[my emphasis]

VI CONCLUSION

¹⁴ 2015 (5) SA 245 (CC)

- [29] This Court cannot accede to the Respondents' request that direct the municipality to render a report. The municipality was not joined to these proceedings and a Court will only under exceptional circumstances order a party not joined to perform a function. No such circumstances are present. The principle of separation of powers applies.
- [30] The transcript of the proceedings does not assist this Court in determining whether due process was followed. This is unfortunate. The Board should address the quality of the recording and transcription of the proceedings. The relevant portion in the record where the case of the Applicant was discussed was difficult to find and difficult to read.
- [31] The level of antagonism during the hearing of the Applicant's application, which appears in the transcript, is disconcerting. A lack of constructive dialogue would on probabilities not lead to a fair result.
- [32] This matter should be referred back to the First Respondent for reconsideration.

VI COSTS

- [33] The Applicant did not give his cooperation to the Police and the transcribed record indicates that the First Respondent did not obtain all the information from the municipality. The record does not show how and when the conclusion to reject the application was arrived at. Both parties carry the responsibility for the deficiencies and it would be fair that each party carries its own costs.

VII ORDERS:

- [34] I grant the following orders:

1. The decision of the Respondents, dated 22 June 2022, rejecting the Applicant's application for a license is reviewed and set aside.
2. The Respondents are directed to reconsider the Applicant's application for a liquor license within 21 days from date of this order.
3. Each party to pay its own costs.

P R CRONJÉ, AJ

I agree:

N S DANISO, J

On behalf of the Applicants: Adv R Van der Merwe
Instructed by:
Kobus Burger Attorneys
BLOEMFONTEIN

On behalf of the Respondents: Adv. L Bomela
Instructed by:
Mohobo Attorneys Inc.
BLOEMFONTEIN