

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

Case number: 3578/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ENDALE ASEFA GUDDISA

Applicant

and

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

1st Respondent

**THE CHAIRMAN OF THE FREE STATE GAMBLING,
LIQUOR AND TOURISM AUTHORITY**

2nd Respondent

CORAM:

LOUBSER, J et RAMDEYAL, AJ

—

HEARD ON:

5 MAY 2023

JUDGEMENT BY:

LOUBSER, J

DELIVERED ON:

The judgment was handed down electronically by circulation to the parties' legal representatives by email

and release to SAFLII on 26 MAY 2023. The date and time for hand-down is deemed to be 26 MAY 2023 at 16:00

- [1] This is an application for the review and setting aside of the respondents' decision to refuse the granting of a liquor store licence to the applicant at the premises on the corner of King Edward and Ella Street in Willows, Bloemfontein. The application for review is brought in terms of the provisions of Section 6 of the Promotion of Administrative Justice Act (PAJA)¹ and the provisions of Rule 53 of the Uniform Court Rules.
- [2] More specifically, the applicant relies on the following provisions of Section 6 of PAJA:
- “6(2): A court or tribunal has the power to judicially review an administrative action if—
- 6(2)(d) the action was materially influenced by an error of law,
- 6(2)(e)(vi): the action was taken arbitrarily or capriciously,
- 6(2)(f) (ii): the action itself is not rationally connected to the information before the administrator.
- 6(2)(h): the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.
- 6(2)(i) the action is otherwise unconstitutional or unlawful.”

¹ Act 3 of 2000

- [3] The applicant contends that the decision of the respondents was materially influenced by an error of law, as they applied regulation 70(1) as an absolute prohibition to the granting of the licence. The relevant regulations were promulgated in terms of Section 133(1)(b) of the Free State Liquor Act (“the Act”) 6 of 2010. Regulation 70(1) provides that the premises to which the liquor licence pertains, may not be situated within a radius of 500 metres from an institution of learning or worship. The applicant further contends that the respondents acted capriciously and arbitrarily because there was no evidence that nearby schools would be negatively affected by the granting of the licence. The respondents also acted capriciously and arbitrarily by basing their decision on the fact that there are other liquor outlets situated in close proximity to the applicant’s proposed outlet, while there was no evidence that the granting of the licence would lead to excessive drinking or would cause a nuisance to the surrounding public. In this sense, the decision was not rationally connected to the information before the respondents, the applicant submits.
- [4] The respondents, on the other hand, point out that the applicant has not complied with the provisions of Regulation 70(3). Regulation 70(3) provides that where an application will be in contravention of Regulation 70(1), then the applicant must submit reasons why Regulation 70(1) should not be followed. This was not done, the respondents say. Furthermore, the respondents raised a point in *limine* in their answering affidavit, objecting to the fact that it was the applicant’s attorney who had deposed to the founding affidavit, and not the applicant himself. This amounts to a testimony on behalf of the applicant, which should not be allowed. They also dispute the authority of the deponent to institute and prosecute the application. They contend that on these grounds alone, the application should be dismissed with costs.
- [5] Firstly, in **ANC Umvoti Council Caucus and Others v Umvoti Municipality**² it was found that affidavits are not the place to challenge the authority to depose. Such challenge should be made in terms of the procedure provided

² 2010(3) SA 31 (KZP)

for in Uniform Rule 7(1). In the present application Rule 7(1) was never invoked. Secondly, Rule 6(1) 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. The applicant himself confirmed in a confirmatory affidavit the authority of the deponent to launch the review proceedings, and he furthermore confirmed the contents of the founding affidavit as far as it related to himself, as true and correct. As far as the other facts in the founding affidavit are concerned, it is clear to this court that the applicant’s attorney was the person who submitted the application for a licence on behalf of the applicant, and who communicated with the respondents throughout the process of the application and who attended to the queries of the respondents on behalf of the applicant whenever they arose. It follows that he was the person who could depose to the facts of the application in compliance with Rule 6(1), and not the applicant himself. Consequently, there is no reason to question the authority and the competency of the attorney to depose to the founding affidavit, and the point in *limine* therefore has no merit.

[6] The applicant, on the other hand, contended that the answering affidavit was not properly commissioned by a commissioner of oaths and should therefore be ignored in the adjudication of the application. The attorney representing the applicant mentions in the replying affidavit that he found a copy of the answering affidavit on the court file before the hearing. On this copy, the signature of the deponent was not the original signature, while the commissioning of the affidavit was original. The attorney contend that, as a result, it is clear that the affidavit was not signed in front of a commissioner of oaths. Meanwhile, the original answering affidavit has found its way into the papers before the court, and there can be no doubt that the signatures on this original affidavit correspond in every respect with the signatures that appear on the non-original affidavit. I am therefore not persuaded that this affidavit was not signed in the presence of a commissioner of oaths.

[7] In any event, the requirement of a signature in the presence of a commissioner of oaths was held to be not peremptory in a number of

decisions.³ If it appears that the affidavit was not signed in the presence of a commissioner of oaths, the court has a discretion to either regard the affidavit of no value, or to acknowledge the affidavit as a sworn affidavit. In the circumstances of the present answering affidavit, I have no hesitation in accepting it as duly signed and commissioned. The objection raised in this regard is rejected.

[8] I now turn to the merits and the facts of the matter as they transpire from the affidavits and the record of the decision making process filed by the respondents in terms of Rule 53(1). As already mentioned, the applicant applied for a liquor store licence at premises where liquor would only be purchased and not consumed. The applicant presently has a restaurant liquor licence for on-site consumption. The restaurant is situated right next door to the proposed premises of the liquor store for which he now seeks a licence. There are two other outlets for the sale of liquor (off-site consumption) in the area, and both are owned by the same person. None of the existing liquor outlets in the area objected to the granting of a liquor store licence to the applicant.

[9] The two other off-site liquor outlets are respectively 498 and 420 metres away from the premises where the applicant wants to open his liquor store. The local municipality did not bother to provide the respondents with a report to assist them in considering the application. The inspector of the 1st respondent mentioned in his report that the building plan of the outlet has not been approved. The police did submit a report, in which the granting of the licence to the applicant was recommended. It is mentioned in the report that the building plan does not correspond with the premises in question. It appears that the issue of the building plan did not play any role in the decision of the respondents not to grant the licence.

[10] There are three schools situated within a distance of 500 metres from the proposed outlet. The schools are not in the same block as the proposed

³ See for instance *Cape Sheet Metal Works (Pty) Ltd v JJ Calitz Builder (Pty) Ltd* 1981(1) SA 697 (O) at 699 B and the decisions referred to.

outlet, and are respectively 415, 450 and 460 metres from the proposed outlet. None of these schools have objected to the granting of the licence. The community members interviewed by the respondents all supported the application for a licence.

[11] After considering the application, the respondents invited the applicant's attorney to address them on the following issues: The building does not correspond with the submitted building plans, the proposed premises are in close proximity to institutions of learning, there are two similar outlets in the area, and Ella Street has more than four liquor outlets and the granting of another liquor licence might lead to proliferation. Further, section 28(4) of the Act read together with Regulation 70(1) and (3) indicates that, when considering an application for registration, the Authority must also take due regard to issues of proximity of the proposed premises to institutions of learning, places of worship and existing outlets. This invitation was contained in a letter from the respondents dated 11 March 2022.

[12] These issues were then addressed by the applicant's attorney in an open meeting with the respondents on 18 May 2022. On 31 May 2022, however, the respondents informed the attorney by way of a letter that the application is refused on the following grounds:

- "1. The proposed premises are situated in close proximity to places of amenity, namely, institutions of learning, Doctor Viljoen Primary School (450 metres), Louis Botha Technical High School (415 metres) and Roseview Primary School (460 metres).
2. There are similar and existing outlets, Music Kitchen (Sandis/ AB2 Restaurant (same erf), Tech Café Tavern (30.7 metres), Café La Scala Restaurant (64.5 metres), Club House Tavern (63.1 metres), Blue Rooms Tavern (79.2 metres) and Platinum Lounge (410 metres), Overland Liquor (498) and HO2 Liquor Store (420 metres).

3. you failed to persuade the Board to deviate from Regulation 70(1) and allow your application notwithstanding non-compliance with the said sections as well as regulation.”

[13] Section 28(2) and 28(4) of the Act set out the criteria to be considered in an application for a liquor licence. Section 28(2) provides as follows:

“(2) If the application complies with the provisions of the Act, the Authority must further consider the application, relating to the following criteria:

(a) The applicant's proposed contribution to combating alcohol abuse, including whether the applicant has subscribed to any industry code of conduct approved by the National Minister as contemplated in section 13(1)(b) of the National Liquor Act; and

(b) The extent to which the proposed registration may materially restrict or promote –

(i) new entrants to the liquor industry

(ii) job creation within the liquor industry

(iii) diversity of ownership within the liquor industry

(iv) efficiency of operation of the liquor industry, or

(v) competition within the liquor industry.”

[14] Section 28(4) provides that the Authority must also take due regard of issues of –

“(a) public interest

(b) proximity of the proposed premises to –

(i) institutions of learning, or

(ii) places of worship

(iii) existing outlets

(c) the ratio of population *vis-à-vis* the number of outlets in the relevant ward,

(d) the report of the relevant municipality received in terms of section 31, and

(e) the reports, views, comments and objections contemplated in sections 31(4)."

[15] Regulation 70(1) provides that the premises may not be situated within a radius of 500 meters from an institution of learning or worship. Regulation 70(3) provides that an applicant whose application will be in contravention of Regulation 70(1), must submit representations which specifically indicate the reasons why such non-compliance should be allowed.

[16] In his answering affidavit the 2nd respondent exposed the real gravamen of the decision not to grant the licence in question, by stating the following: "I am advised that the law as it currently stands is as set out in Regulation 70. This is what the respondents considered." In this respect the respondents were clearly wrong in that they were materially influenced by an error of law. Firstly, they treated Regulation 70(1) as an absolute prohibition to the granting of a licence to an outlet that is located less than 500 metres from an institution of learning. Such an approach could only lead to absurdities, such as the granting of a licence to an outlet that is 503 metres away from a school, but refusing a licence to an outlet that is 498 metres away from a school.

- [17] Secondly, the regulations fall within the category of subordinate legislation. It is trite that subordinate legislation must be created and enforced within the limits of the empowering statute, in this case the Act. This means that any regulations promulgate in terms of the Act, must be applied consistent with the provisions and the purpose of the Act.⁴ In terms of the Act, the Authority must take due regard to, *inter alia*, the public interest and the proximity to institutions of learning when an application is considered. The Act does not refer to a distance of 500 metres, and such distance contained in the regulations must therefore only be regarded as a guideline. It can never be regarded as creating an absolute prohibition.
- [18] Section 2 of the Act clearly stipulates the purpose of the Act, namely to reduce the socio-economic and other costs of alcohol abuse, and to promote the development of a responsible and sustainable liquor industry. Consequently, the regulation must be read in such a way that these objectives are achieved.
- [19] The finding is therefore inevitable that the respondents have made an error of law in their interpretation of Regulation 70(1). The decision was also made capriciously and arbitrarily on this basis, since there was no evidence before the 1st respondent that the relevant schools would be negatively affected by the granting of a licence.
- [20] As far as the reason that there are similar outlets in the same area, there was no evidence before the respondents that the granting of another licence would encourage excessive drinking. The decision in this regard must therefore be considered as speculative only. There was also no evidence that the granting of the licence would not lead to healthy competition in an open market. Certainly, healthy competition serves the public interest and results in a better distribution of liquor in the whole area.

⁴ *Singapi v Maku* 1982(2) SA 515 (SE) at 517 D

[21] In the circumstances, the basis for the decision falls within the confines of PAJA, and it stands to be reviewed and set aside. I am of the view that the respondents should be directed to grant the licence in question, and that they should be ordered to pay the applicant's costs of this review application.

[22] The following order is made:

1. The decision of the first respondent to refuse the applicant's application for a bottle store liquor licence, is hereby reviewed and set aside.
2. The respondents are directed to grant the licence in question on such conditions as they deem appropriate.
3. The respondents are ordered to pay the applicant's costs of this application for review.

P. J. LOUBSER, J

I agree:

T. RAMDEYAL, AJ

For the applicant:

Instructed by:

Adv. R. van der Merwe
Kobus Burger Attorneys
Bloemfontein

For the respondents:

Instructed by:

Adv. L. Bomela
Mohobo Attorneys Inc.
Bloemfontein

/roosthuizen