



**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 number: 3440/2022

In the matter between:

MOKHATHALE JONAS MASHIYA

Applicant

And

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

1st Respondent

**THE CHAIRPERSON OF THE FREE STATE GAMBLING,
LIQUOR AND TOURISM**

2nd Respondent

CORAM:

DANISO, J *et* CRONJE, AJ

JUDGMENT BY:

DANISO, J

HEARD ON:

17 APRIL 2023

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 20 July 2023 at 11h00.

- [1] This is an application for the review and setting aside of the decision of the first respondent a statutory body responsible for the consideration, granting or refusal of applications for the liquor licenses including registration of taverns in terms of the Free State Gambling Liquor and Tourism Act¹ (The Act). The decision was rendered on 09 June 2022 declining the applicant's application for the registration of his business premises, Kilowatt situated at stand number 5780 Monyakeng Extension in Wesselbron (the proposed outlet) as a tavern based on the following reason:

“1) Proposed outlet is situated in close proximity to an institution of learning namely Iphathele to convince the Board to deviate from regulation 70 (1) of the liquor regulations of the Free State Gambling Liquor and Tourism Act 6 of 2010 as amended.”

- [2] The application is directed at the first respondent only and it opposed.
- [3] The grounds for review are set out in the affidavit deposed to by the applicant's attorney Mr Jacobus Michiel Burger and they essentially based on the provisions of section 2(c), (d), (e)(vi), (f)(ii)(cc), (h) and (i) of the Promotion of Administrative Justice Act² (PAJA). The premise is that: the application was declined despite the fact that no objections were filed against the application, the decision was taken arbitrarily and in contravention of the *audi alteram partem* rule in that, the applicant was not granted an opportunity to be heard before the decision was taken. It is also procedurally unfair, unreasonable, unconstitutional and was influenced by an error in law as the fact that the proposed outlet is situated in close proximity to a learning institution is not an absolute prohibition to the granting of a tavern registration application. Based on all these reasons, the applicant submits that the first respondent's decision must be reviewed, set aside and substituted with an order granting the application alternatively, the application must be remitted back to the first respondent for re-consideration.

¹ Act No, 60 of 2010 (section 4 and 5).

² Act No, 3 of 2002.

- [4] It is common cause that in refusing the applicant's application the first respondent relied on the provisions of regulation 70 (1) under the Act. Regulation 70 provides the guidelines regarding proximity and ratio of population of the proposed outlet in relation to institutions of learning and other outlets.
- [5] The relevant provision in this matter is subregulation (1). It prohibits the granting of a tavern license where the proposed outlet is situated within a radius of 500 meters from institutions of learning while subregulation (3) makes provision for a deviation from the provisions of subregulation (1) having regard to the applicant's representations indicating the reasons why the application should be allowed notwithstanding non-compliance with subregulation (1).
- [6] The first respondent seeks the dismissal of the application on the grounds that founding affidavit is defective for want of compliance with rule 6 (1) of the Uniform Rules of Court in that it was not deposed to by the applicant 'who can lawfully be a witness' and it is the applicant who chose not to reply to the inspection reports of the local municipality, the designated police officer and the liquor inspector when called upon to do so.
- [7] The import of rule 6(1) is that the founding affidavit must be deposed by a person who has knowledge of the facts relied upon for the relief sought to minimise the risk of a deponent deposing to inadmissible hearsay evidence.
- [8] Mr. Burger's version that the facts contained in the founding affidavit fall within his personal knowledge³ is uncontested and having regard to the record of the proceedings relating to the subject of this review, it is clear that Mr Burger lodged the application on behalf of the applicant⁴ therefore, he has first-hand knowledge

³ Para 1.2 of the founding affidavit.

⁴ Pages 1 to 103 of the record of the proceedings.

of every fact including the records relied upon by the applicant in these proceedings accordingly, I am inclined to determine the objection in favour of the applicant and dismiss the objection.

- [9] It is tested law that the two basic requirements of natural justice founded upon the *audi alteram partem* rule are that before any administrative action is taken the person who may be prejudicially affected thereby must be given notice of such intended action and the opportunity to be heard.⁵ The examination of the record of the proceedings reveals that at no stage was the applicant given an opportunity to make representations for deviation as contemplated in subregulation (3). The first respondent merely sought the applicants' response to the inspection reports which raised no objection to the granting of the application despite the fact that the proposed outlet is situated within a radius of 500 meters from the school.
- [10] On the facts germane to this matter, the first respondent was fully aware that the applicant was entitled to be granted an opportunity to be heard before a decision was made because, on 24 March 2022 the first respondent transmitted a letter to Mr Burger calling upon the applicant to appear before the Liquor Board in order to state reasons why the application should be granted considering the fact that the proposed outlet was situated in a residential area which was not zoned for liquor business.⁶
- [11] I have thus come to a conclusion that the first respondent's failure to grant the applicant the opportunity to make representations before the decision was made is an affront to the tenets of the *audi alteram partem* rule which renders the decision procedurally unfair and a subversion of the applicant's constitutional rights.⁷ The decision ought to be set aside.

⁵ Section 3(1) and 3 (2)(b)(i) supra at fn1 above.

⁶ Page 58 of the court bundle.

⁷ In terms of section 33(1) of the Constitution, Act No, 108 of 1996: Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

[12] There is no reason why the costs should not follow the result.

[13] Resultantly, the following order is granted:

1. The first respondent's decision dated 09 June 2022 dismissing the applicant's application for the registration of his business premises, Kilowatt situated at stand number 5780 Monyakeng Extension in Wesselbron as a tavern is reviewed and set aside.
2. The matter is remitted back to the first respondent to consider the matter afresh having regard to the record of the proceedings and the representations to be made by the applicant in terms of subregulation (3) of the Regulations under Act, 60 of 2010.
3. The first respondent shall pay the costs.

N.S. DANISO, J

I concur,

P.R. CRONJE, AJ

APPEARANCES:

Counsel on behalf of the applicant:

Adv. R. van der Merwe

Instructed by:

Kobus Burger Attorneys
BLOEMFONTEIN

Counsel on behalf of the first respondent:

Adv. L. Bomela

Instructed by:

Mohobo Attorneys

BLOEMFONTEIN