IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: 7331/23

In the matter between:

THE INDUSTRY BAR (PTY) LTD
(Registration nr: 2014/213471/07) Applicant

and

CITY OF CAPE TOWN: GENERAL APPEALS COMMITTEE Respondent

CORAM:	**Gamble J et Dickerson AJ**
Date of hearing:	**3 November 2023**
Date of Judgment:	**12 March 2024**

JUDGMENT

DICKERSON AJ:

<u>Introduction</u>

1. The applicant holds a liquor license in terms of the Western Cape Liquor Act, 4 of 2008 ("*the Liquor Act*") for the consumption of liquor on the premises known as the Saint Champaigne Bar & Lounge situate at Gold House, 3[…] H[…] Street, Z[…], C[…] T[…] ("*the premises*").

2. The Liquor Act, as indicated in its long title, provides for the licensing *inter alia* of retail, sale and micro-manufacture of liquor in the Western Cape Province. Chapter 6 of the Act provides for liquor licensing (ss 32 to ss 48), and section 34 sets out the criteria for granting licenses, whilst section 41 provides for the consideration of license applications.

3. The standard trading hours for on-consumption premises are regulated by the City of Cape Town: Control of Undertakings That Sell Liquor to the Public By-Law of 2013, promulgated on 17 January 2014 in Provincial Gazette 6990 ("*the By-law*").

4. Section 3 of the By-law prohibits the sale of liquor to the public without a valid liquor license issued in terms of the Liquor Act, and outside the days and hours that have been determined by the City.

5. In terms of ss 4(1) of the By-law, a licensee may sell liquor for consumption on the licenced premises on any day of the week and during the hours of trade set out in the Schedule thereto. Category 3 of the Schedule provides that premises located in a general business area may trade between 11h00 and 02h00 on the following day. The applicant's premises are within a general business area for the purposes of the Schedule.

6. In terms of ss 6(1) of the By-law a licensee may submit written application to the City to extend the liquor trading days and hours of the licenced premises, and ss 6(6) allows the City to approve such an application for trading hours up to 04h00 the next day for on-consumption premises within categories 3 to 5 of the Schedule.

7. Under s 6 of the By-law, the applicant had previously been granted an extension of its trading hours on the premises for the period 14 February 2020 to 13 February 2021.

8. This historical extension had long since expired when, in July 2022, the applicant submitted an application to the City in terms of ss 6(1) of the By-law for an extension of its trading hours on the premises.

9. This extension application came before the City's Sub-Council ("*the Sub-Council*"). On 4 November 2022 it was refused on the grounds that (1) it was not in the interests of the public and (2) there had been non-adherence by the applicant to the Liquor Act.

10. The applicant then appealed to the respondent, in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000, against the Sub-Council's refusal of its application.

11. The appeal came before the respondent, the City of Cape Town's General Appeals Committee, on 10 February and again on 10 March 2023 when, the respondent dismissed the appeal, and confirmed the decision of the Sub-Committee.

12. The applicant then instituted this review application, in which it seeks the setting aside of the appeal decision, together with an order granting the extension application, alternatively for referral back to the respondent with a direction that it approves the extension application subject to appropriate conditions.

13. During the hearing Advocate Van Niekerk, who represented the applicant, declined to pursue the claim for substitutionary relief. This was prudent, given that the exceptional circumstances required by ss 8(1)(c)(ii) of the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*") had not been demonstrated.

<u>The appeal hearings</u>

14. A detailed appeal report dated 12 December 2022 ("*the appeal report*") was prepared for the respondent.

15. The appeal was first heard by the appeal authority on 10 February 2023. The applicant was represented at the hearing by both counsel and an attorney.

16. As appears from the respondent's minutes of the meeting on 10 February 2023:

    16.1. Mr G Heugh of the City's Environmental Health Department dealt with certain aspects of the appeal report and gave a brief background to the appeal. Mr K Nicol of the office of the Speaker also drew attention to written submissions presented by Councillor McMahon (the ward councillor for the area in which the premises are located) to both the Sub-council to the respondent, which the applicant complained had not had an opportunity to address.

    16.2. The applicant's counsel then worked through his heads of argument (which had been given to the respondent the previous day) and made further oral submissions in support of the application.

    16.3. The chairperson of the Sub-Council, Alderman M Kempthorne, addressed the respondent in support of the Sub-Council's refusal of the s 6(1) application.

    16.4. The applicant's counsel and members of the respondent then debated matters such as the renewal of the applicant's liquor licence, parking issues in the area, noise levels and the mixed-use zoning of the area.

    16.5. The respondent resolved to postpone the further consideration of the appeal to its next meeting on 10 March 2023, to allow a site visit to the premises and to afford the applicant an opportunity to respond in writing to Councillor McMahon's submissions. The appeal report was also to be resubmitted to the respondent with any additional written comments/responses. The applicant's attorneys were advised of this.

17. The appeal was again considered by the respondent at its meeting on 10 March 2023, at which the applicant was again legally represented. By this time the appeal report had been supplemented with: Councillor McMahon's submissions to the appeal authority on 9 February 2023; the heads of argument by the applicant's counsel dealt with at the 10 February meeting;

and his supplementary heads of argument dated 28 February 2023 and which had been prepared for the 10 March 2023 hearing.

18. As appears from the minutes of the meeting of 10 March 2023, the members of respondent confirmed that they had carried out a site visit to the premises and proceeded to consider the appeal on the basis of the supplemented appeal report and the supplementary heads of argument, and matters proceeded as set out below.

19. Councillor McMahon's submissions to the Sub-Council referred to an email by Mr E Stimela, a Senior Inspector: Compliance and Enforcement at the Western Cape Liquor Authority ("*WCLA*") dated 22 October 2022. This observed that the premises were the subject of a licence renewal process in terms of s 64 of the Liquor Act, and that a negative report had been submitted by WCLA objecting to the automatic renewal of the liquor licence due to a history of non-adherence to the Liquor Act, and also referred to Mr Stimela's report dated 20 September 2022 prepared by him in terms of s 64(2) of the Liquor Act ("*the Stimela report*").

20. The Stimela report:

    20.1. listed compliance notices issued to the applicant after routine inspections conducted by the WCLA's Compliance and Enforcement Officials, as well as certain fines issued by WCLA, and other fines issued by the City of Cape Town: Law Enforcement ("*Law Enforcement*") and by the South African Police Service ("*SAPS*");

    20.2. referred to hearings in terms of s 20 of the Liquor Act held as a result of complaints, investigations and fines issued by the Liquor Licencing Tribunal ("*LLT*") in respect of the applicant. The complaints related to contravention of trading hours, and noise;

    20.3. noted that the applicant had failed to present measures to address its non-compliance, and that WCLA had objected to the renewal of the applicant's liquor licence as it "*has shown no willingness to trade in a more responsible manner which would be in the public interest"*;

20.4. observed that in an extract from a complaints register maintained by WCLA, further noise complaints between 2018 and 2021 were logged;

20.5. recorded actions taken by various officials visiting the premises between February 2021 and August 2021, with fines imposed for infringements of trading hours and Covid-19 regulations; and

20.6. referred to a report by the SAPS Designated Liquor Officer, Cape Town dated 12 July 2022, which included affidavit evidence of after-hours activity on the premises as late as 05h00 on 11 July 2022, with patrons drinking on the premises, music playing, and the barman cashing up.

21. In relation to the Stimela report, the supplementary heads of argument avoided addressing the substance of the complaint and merely stated that: a number of the transgressions fell outside the 12 months preceding the extension application; the LLT had granted the applicant's s 64(1) application for licence renewal; whilst it was evidently accepted that the compliance notices had been issued, the dates of these notices were not specified; and, in respect of the s 20 hearings referred to in the report, "*that no section 20 hearings were held after May 2017"*.

22. Councillor McMahon's submissions to the respondent again referred to the Stimela report, but also included an affidavit by Mr Baron, a WCLA inspector, made on 23 January 2023 ("*the Baron affidavit"*) in which he stated that:

22.1. On 31 December 2022 he had been in a joint operation with Cape Town Central SAPS members in the Cape Town central business district carrying out compliance inspections.

22.2. He inspected the premises at about 19h05 and obtained confirmation from the manager that he was aware that the premises should only remain open until 02h00.

22.3. At 03h30 on 1 January 2023 he observed four SAPS vehicles leaving the premises, along with patrons exiting.

22.4. He was advised by a SAPS member that SAPS had established that the premises had remained open and traded after 02h00.

22.5. On 19 January 2023 he had received reports in terms of s 73(7)(c) of the Liquor Act, which were attached to his affidavit, and which he summarised as follows:

22.5.1. On 18 December 2022 at 03h19 the premises were found open and trading, with patrons consuming alcohol and dancing.

22.5.2. On 24 December 2022 at 02h50 the premises were operating, but the doors were closed/locked upon arrival of SAPS members. Entrance was refused despite instructions to open the doors. Mr Stimela had earlier warned the manager of the premises at 00h50 that the premises were to close at 02h00.

22.5.3. On 30 December 2022 at 04h20 the premises were still operating and the doors were closed/locked upon arrival of SAPS members. Entrance was refused, despite instructions to open the doors.

22.5.4. On 1 January 2023 at 02h30 the premises were still operating and the doors were closed/locked upon arrival of SAPS members. Entrance was refused, despite instructions to open the doors. Loud music could be heard coming from the premises, as well as patrons screaming to get out. All fire escapes had been locked. The fire department was contacted to assist with the opening of the doors because of safety concerns for patrons inside the premises. Entrance was finally gained at 03h15, with the doors being opened from the inside.

22.5.5. On 6 January 2023 at 03h15 the premises were still operating and the doors were closed/locked with loud music playing, when SAPS members arrived. Entrance was refused, despite instructions to open the doors.

23. In relation to the Baron affidavit, the supplementary heads of argument merely submitted that the complaints were yet to be investigated and confirmed, and as such should be disregarded entirely. No attempt was made to refute or address the merits of the complaints, other than to advance a denial that patrons had been locked in the premises. If anything, the tenor of the submissions made to the respondent was a confirmation, by omission, of the transgressions. Notably, the supplementary heads of argument also stated that "*if regard is had to the alleged transgressions, it appears that most of the alleged transgressions occurred between the hours of 02h00 and 04h00, which do* (sic) *show a need for extended trading hours",* which seems to acknowledge that they occurred.

24. In considering the merits of the appeal, members of the respondent expressed concern regarding the applicant's non-compliance with its permitted trading hours, the impact of extended trading hours on residential properties in the area, the level of complaints generated by the operation of the venue, and various aspects of the applicant's apparent non-compliance with its licence and operating conditions. In this context the chairperson observed that it was incidents during the past 12 months which should be taken into account. Her affidavit in these proceedings explained that she was attempting to emphasise her understanding of the enhanced relevance of recent, as opposed to more dated, incidents.

25. Another issue raised by members of the respondent was the purpose of extended trading hours, which was understood to have been aimed at creating an all-night tourist destination, in which context concern was expressed about the affected residential component in the vicinity of the premises.

26. In reaching its decision, the respondent had regard to the validity of the applicant's liquor and business licences, but the proximity of the venue to surrounding residential properties was also taken into account and was of

concern its members. It also considered the views of the WCLA, the reports from SAPS members, and the submissions of Councillor McMahon (the relevant ward councillor) as required by s 6(9)(f) of the By-law. It was noted that the application was not supported by the relevant ward committee, by the Central City Improvement District, by the GPCID (Green Point City Improvement District), by the GRRA (Green Point Ratepayers Association), by the District Six Forum, or by the Haven and Garden Watch.

27. The respondent noted that the contraventions of regulation 37 of the Liquor Act regulations (the failure to display the liquor licence), s 52 of the Liquor Act (the failure to appoint a nominated natural person as a manager) and s 53 of the Liquor Act (the alteration of licence premises or the nature of the business without the required permission) were not fully detailed, but it should be borne in mind that the applicant in its supplementary heads of argument avoided dealing with these, other than to point out that the Stimela report did not say when they were issued. The applicant's failure to refute these complaints or advance any mitigating or corrective measures suggests that it was unable to do so.

28. The respondent accepted that incidents of alleged non-compliance which had occurred some time ago, particularly when such incidents were presented in broad and undetailed form, should carry relatively less weight compared to incidents of non-compliance which occurred in the 12 months preceding the hearing of the application. However, the applicant's failure to address the substance of the reported non-compliance was unhelpful.

29. The respondent recognised that the Stimela report, referred to certain fines imposed by WCLA, but that these had been imposed some years back, and described complaints of non-compliance, being trading hours and noise, for which s 20 hearings were held were only in general terms. The respondent was justified in rejecting the contention in the supplementary heads of argument that because Mr Stimela did not supply the dates of the s 20 hearings and the amounts of the fines imposed, *'the only conclusion that can be reached, in the absence of any reference, is that no such hearings took*

place nor that any of the fines were imposed'. That conclusion did not follow, given the applicant's conspicuous failure to refute the allegations.

30. The report under ss 64(2) of the Liquor Act, which featured in the appeal deliberations, was not a report prepared for, or in the context of, the application for extension of trading hours: it pertained to a separate application for renewal of the liquor license under the Liquor Act, which was ultimately successful. As Mr Rosenberg SC (who appeared for the respondent) correctly observed: an application for renewal of a liquor license under the Liquor Act involves an entirely different and discrete procedure and enquiry from that which pertains to an application for extension of trading hours under ss 6(1) of the By-law. Consequently, the fact that the liquor licencing authority may have approved the renewal of a liquor licence, notwithstanding certain complaints, does not mean that those same complaints are not relevant, or should not be taken into account, in an application for extending trading hours.

31. In the event, the respondent dismissed the appeal. Its reasons for doing so were summarised as follows:

- *the premises' history of non-adherence and non-compliance to the Liquor Act, in terms of the (sic) section 64 of the Western Cape Liquor Act, Act 4 of 2008.*

- *Having regard to the applicants, the premises, the operation of the outlet, potential harm to the local public, the granting of extended trading hours is not in the public interest, and therefore not desirable.*

- *The liquor licence holder has shown no willingness to trade in a more responsible manner which would be in the public interest.*

The grounds of review

32. The applicant relies for its review on the provisions of ss 6(2)(e), (h) and (i) of PAJA.

33. The applicant's principal challenge to the appeal decision rests on the contention that sub-section 6(9)(d) of the By-law requires that no complaints regarding the conduct or contraventions by an applicant's business may be taken into account unless these (1) have been investigated and confirmed in the sense that "*there must at least be a <u>finding</u> of wrongdoing either by an appropriate tribunal, in this case the Western Cape Liquor Licensing Tribunal… or a court of law";* and (2) occurred within a 12-month period calculated from the date on which the appeal authority made its decision (i.e. 10 March 2023).

34. Consequently - according to the applicant - the respondent, by having regard to complaints of misconduct, took into account irrelevant considerations, was arbitrary, and acted in bad faith and was capricious.

35. These grounds of review are therefore ultimately predicated on an interpretation of sub-section 6(9) of the By-law as performing a <u>limiting</u> role, by confining the factors which the decision maker <u>may</u> take into account to any those listed in ss 6(9)(a) to (i) therein. If this interpretation is incorrect, then – as Mr Van Niekerk similarly acknowledged – the attacks upon the respondent's decision effectively fall away.

36. Sub-section 6(9) of the By-law reads as follows:

"*6(9) The City <u>must</u>, before approving on application for extension of trading days and hours, reasonably and fairly consider <u>further factors</u> which <u>include, inter alia</u> –*

(a) the validity of the liquor licence;

(b) where applicable, the validity of a business licence issued in terms of the Business Act of 1991 (Act No. 712 of 1991);

(c) location category as per the Schedule;

(d) previous suspension, amendment or revocation of extended trading days and hours including previous records of complaints investigated and confirmed <u>in respect of the last twelve months preceding a current application for extension</u>;

(e) the proximity of the licenced premises to surrounding residential zoned area, cultural, religious and educational facilities;

(f) outcome of community consultation and the recommendation of the relevant ward;

(g) the potential impact on the surrounding environment;

(h) whether it is in the public interest to approve and grant an extension of trading days or hours; or

(i) a motivation from the applicant dealing with the impact of –

(i) the risks to and nuisances on the surrounding community;

(ii) mitigation measures to assist the control risks and nuisances; and

(iii) possible benefits of extended liquor trading hours and days on the surrounding community."

(emphasis supplied)

Findings

37. The applicant's construction of ss 6(9) of the By-law, which is the cornerstone of its case, is untenable.

38. Firstly: as a matter of linguistic construction, the plain language of the section indicates that it does not confine the factors which may be taken into account by the decision-maker to the *numerus clausus* listed in ss 6(9)(a) to (i). This is clear from the opening words of ss 6(9), that the "*City must… consider further factors which must **include, inter alia**…".* This language allows for no interpretation other than that the ensuing list is of mandatory factors which must be considered, amongst other (unspecified) factors may also be considered. These other factors may, for example, encompass records of complaints other than those described in ss 6(9)(d). The context of the section fortifies the interpretation.

39. Secondly: the appellant's construction that ss 6(9)(d) requires investigations and confirmation by a tribunal or court would lead to impractical and irrational results. Whatever the gravity or frequency of complaints and infractions

brought to the attention of the decision-maker, these (on the applicant's interpretation) cannot be taken into account until the conclusion of proceedings in either the tribunal or a court of law.

40. This could never have been the intention of the Legislature: the nature of the type of complaints and infractions under the Liquor Act which are likely to occur, and play a role in a decision regarding the extension (or not) of trading hours, are in their very nature unlikely to warrant protracted legal or other proceedings. Investigation and confirmation by City officials will suffice.

41. It should be added, for the sake of completeness, that the applicant's history of infractions and trading outside of the permissible trading hours was effectively investigated by SAPS and City officials and confirmed: both by various officials, on affidavit, and by the applicant itself. Although the applicant had every opportunity – both before the sub-committee and the respondent – to address these facts and refute the complaints, it declined to do so. On the contrary, before the respondent it explicitly argued that its trading outside the permissible hours in the past was a factor which weighed in favour of granting the application to extend its hours. In short: the applicant, by failing to refute the complaint and investigations by SAPS and City officials, effectively confirmed them.

42. Thirdly: the argument that the 12-month referred to in ss 6(9) (which – as explained above – merely indicates the factors which must be taken into account, and does not exclude the consideration of complaints outside of this period) should be reckoned from the date of the appeal decision is specious. Carried to its logical conclusion, it would mean that any complaints made within 12-months of the date on which the application was made could – despite the peremptory language of the section – nonetheless be ignored by the decision maker, if the decision maker delayed making the decision until the 12-months had elapsed. The plain language of ss 6(9)(d) refers to the 12-months preceding an application, not the date on which it is decided.

43. Given the concession by the applicant's counsel that its review was dependent upon this court upholding its interpretation of ss 6(9) of the By-law,

it is strictly speaking unnecessary to traverse the probity of the approach adopted by the respondent in weighing the various considerations before it. Nevertheless, given the attacks which have been made upon the *bona fides*, and supposed caprice of its decision, it is appropriate to say that the manner in which the respondent approached the appeal, the careful consideration, evaluation, and weight it gave to the various complaints and factors cannot be faulted. These have been traversed above, and demonstrate a *bona fide,* careful and nuanced evaluation of factors which were plainly relevant.

44. It follows that the application for the review and setting aside of the respondent's decision on appeal falls to be dismissed.

45. In the event, I would propose the following order:

1. The application is dismissed.

2. The applicant shall pay the respondent's costs of suit, including the costs of counsel, on the scale as between party-and-party.

DICKERSON AJ

I AGREE AND IT IS SO ORDERED

GAMBLE J

For applicant:	Adv J van Niekerk
Instructed by:	Maurice Philips Wisenberg
For Respondents:	Adv S Rosenberg SC
Instructed by:	Cluver Markotter