

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]**

CASE NO:1669/2022

In the matter between:

MASIBULELE MKHEHLE

Applicant

And

STATION COMMANDER, CENTRAL POLICE STATION

1st Respondent

SERGEANT MADIKIZELA N. O

2nd Respondent

MINISTER OF POLICE

3rd Respondent

JUDGMENT

NQUMSE AJ:

[1] The applicant approached this court on 18 April 2022 on urgent basis seeking the return of his registration certificate or liquor license (license) and his liquor that was confiscated by the police on 16 April 2022.

[2] The order sought by the applicant is encapsulated in the Notice of Motion in the following terms: -

2.1 Dispensing with the forms and the services provided for in the Uniform Rules of the above Honourable Court and directing that this application be heard on an urgent basis in terms of Rule 6(12) (a).

2.2 The applicant's failure to issue the required 72 hours` notice prior issuing of the papers in these proceedings be and is hereby condoned.

2.3 The first and second respondent`s conduct by taking the applicant`s liquor trading license as it appears on annexures “B” and “C” be and is hereby declared unlawful, unconstitutional and or set aside.

2.4 the second respondent`s conduct of taking away the applicant`s alcohol as per the inventory list as it appears in annexure “D” be and is hereby declared unlawful, unconstitutional and or be set aside.

2.5 The first respondent be and is hereby directed to return forthwith the applicant`s alcohol as per the inventory list annexed hereto marked as exhibit “D”.

2.6 The first respondent be and is hereby directed to return forthwith to the applicant, the applicant`s original copy of the liquor trading license as per the number ECP 2066/090588/05.

2.7 An order that, the respondents whether they oppose the application or not the respondents to pay the costs of this application on a client and own attorney scale jointly and severally, the one paying the other to be absolved.

2.8 Further and / or alternative relief the Honourable Court may deem fit.

[3] Pursuant the order of 22 April 2022, granting the relief sought above, a rule nisi was issued calling the respondents to show cause why the order should not be made final. Following this development and the non-compliance with the order by the respondents, after it was served on the respondents, the matter took a number of turns and twists culminating in various interlocutory applications by one against the other and the court orders that followed thereafter.

To avoid prolixity nor to burden this judgment unduly, I have decided not to deal specifically with those interlocutory applications, except those I find it necessary to do so.

[4] A brief background of the facts which are to a large extent common cause is that on 16 April 2022 at about 22:00, whilst the police were performing their duties they found the applicant selling liquor in his house at Qweqwe Locality in Mthatha.

[5] They demanded from the applicant his license to sell liquor to the public and he presented to them his certificate of registration and a certificate of general conditions applicable to on and of consumption issued by the Eastern Cape Liquor Board.

[6] The police took pictures of the registration certificate and sent it to Ms Mayatula, an officer and a Senior Inspector at the Eastern Cape Liquor Board. This was done in the presence of the applicant. Ms Mayatula subsequently reverted to the police officer by means of a cell phone call in which she informed the police officer that the applicant was not registered with the Eastern Cape Liquor Board and that the registration certificate they had forwarded bearing the reference number ECP 2066/90588/05 was a fake document which belongs to Nceduluntu Bottle Store of Lower Didimane Village, Needs Camp at Buffalo City Metropolitan in East London.

[7] Following the response of Ms Mayatula the applicant was informed by the police that he was being arrested for selling liquor without a license and for presenting a fraudulent registration certificate. The police confiscated the applicant's liquor and registered it in the exhibit book SAP 13/243/2022, as well as his registration certificate.

[8] After successful representations which were made to the prosecution to decline to prosecute, the applicant caused a letter to be written to the legal representatives of the respondents advising them of the prosecutor's decision whilst at the same time demanded the release of his license and his liquor. In response, the respondents released the liquor but not the license. This therefore obviates the need to consider the release of the applicant's liquor. The issue that has to be determined is whether the applicant is entitled to the relief sought, more specifically the orders in terms of paragraphs 2.3; 2.4 and 2.6 of the application as referred to above.

[9] Before dealing with the issue to be determined as formulated above, it is apposite to first deal with the point *in limine* which is bought by the respondents for the failure of the applicant to comply with the State Liability Act 20 of 1957. The

respondents contend that the application was not served to the Minister of Police as required by section 2(1) of the aforesaid Act. Nor was the application served on the Head of the Department. The respondents submitted that the application ought to be dismissed on this ground alone.

[10] A starting point on the issue of the service of the application is at the commencement of the litigation. After the granting of the certificate of urgency with the directives therein, the applicant sought to have it served on all the respondents. On the Returns of Service appearing on pages 36, 37, and 39 of the main bundle of documents filed of record, shows that they were served on 19 April 2022 on the first and second respondent's place of business (the Police Station Mthatha). The return of service which is the subject of the complaint for non-compliance with the Act, was served on the same date as above on the Minister of Police through the Office of the State Attorney in Mthatha.

[11] In their reaction to the service, all the respondents filed their notice to oppose through the office of the State Attorney. Following their opposition, they all participated in the further litigation of the matter through the same office. This is evidenced in various interlocutory applications which were launched by the respondents against the applicant. Most notably is their application filed on 11 May 2022 for reconsideration and the setting aside of the order of 22 April 2022. This was followed by another application launched on 17 June 2022 for the variation of the order which was granted on 21 June 2022.

[12] Section 2 of the Act provides: -

“(1) In any action or other proceedings instituted against the department, the executive Authority of the Department concerned must be cited as nominal defendant or respondent.

(2) The plaintiff or Applicant, as the case may be, or his or her legal representative must after

(a) any court instituting proceedings and in which the executive authority of the department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the head of department concerned at the head office of the department.

(b)....”

[13] A helpful starting point in the interpretation of a statutory provision is section 39 (2) of the Constitution ¹ which enjoins court, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. The strict mechanical approach in the legislative provisions was jettisoned in **Maharaj and others v Rampasad**² where the test was laid as thus:

“The enquiry I suggest, is not so much whether, there has been”“exact”“adequate”or “substantial” compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question whether this object has been achieved are of importance”

In **Minister of Police and Others v Samuel Molokwane**³ the court commented as follows:

“Para [16] This approach received the imprimatur of the Constitutional Court in *African Democratic Party v Electoral Commission and Other* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) para 25. There, it was held that the adoption of the purposive approach in our law has rendered obsolete all the previous attempts to determine whether a statutory provision is directory or peremptory on the basis of

¹ Act 108 of 1996.

² 1964 (4) SA 638 (A) at 646 C-D

³ *Minister of Police and Others v Samuel Molokwane* (730/2021) [2022] ZASCA 111 (15 July 2022).

the wording and subject of the text of the provision. The question was thus “whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose”. A narrowly textual and legalistic approach is to be avoided”.

[14] It is not in dispute that the application was not served on the head of the department. Whilst that may be so, it is equally undisputed that all the respondents became aware of the application launched against them. The mere failure to serve the application on the head of department is in my view not fatal as to warrant the dismissal of the application. Taking into considerations the principles laid down in the authorities referred to above, I am satisfied that the service of the application was adequate and effective. Therefore, the point *in limine* is dismissed.

[15] That being out of the way I now turn to deal with the merits of the application. Paragraph 3 of the order of 22 April 2022 which corresponds with paragraphs 2.3 above reads:

“The first and second respondent`s conduct of taking the applicant`s liquor trading license as it appears on annexure “B” and “C” be and is hereby declared unlawful, unconstitutional and or be set aside”.

Paragraph 4 which corresponds with paragraph 2.4 above reads:

“The second respondent`s conduct of taking away the applicant`s alcohol as per the inventory list as it appears in annexure “D” be and is hereby declared unlawful, unconstitutional and or be set aside”; and paragraph 6 which corresponds with paragraph 2.6 above reads:

“The first respondent be and is hereby directed to return forthwith to the applicant, the applicant`s original copy of the liquor trading license as per the reference number ECP 2066/090588/05”.

[16] Of significance, is the information that was disclosed in the answering affidavit to which the applicant did not find it necessary to react, despite its importance and centrality to the matter. That information relates to the averments made by the

deponent, Khaya Madikizela in paragraphs 7 and 8 of the answering affidavit. For sake of completeness I will quote the two paragraphs in their entirety.

[17] Paragraph 7 reads:

“I immediately take pictures of these documents and send them to Ms Mayatula of Eastern Cape Liquor Board (sic). Ms Mayatula of the Eastern Cape Liquor Board revert to me by a call informing me that the registration certificate in which I was in possession of was a fake document in that the reference number ECP 2066/90588/05 belongs to Nceduluntu Bottle Store situated at Lower Didimane Village, Needs Camp, Buffalo City Metropolitan in East London” (sic)

[18] Paragraph 8 reads:

“I also gave the applicant my cell phone to talk to Ms Mayatula and my cell phone was on loud speaker and everybody could hear and Ms Mayatula informed him that his license has no origin at Eastern Cape Liquor Board”. (sic).

[19] Undoubtedly, the allegations in the two paragraphs quoted above are quite serious and should have invited a reply from the applicant. However, for a strange reason, this the applicant did not do. Furthermore, Ms Mayatula in her confirmatory affidavit supports the allegations made by the police official in the aforementioned paragraphs.

[20] In its reply to paragraph 7 the applicant steered clear from making reference by either confirming or denying the allegations contained therein. Instead his reply focused on the different liquor license numbers which are not reconcilable as they belong to different entities. In paragraph 43 of the replying affidavit under the subheading Ad Paragraph 7 the following is stated:

“With a due amount of respect, it is still escaping my logic how license number appears on “KM3”, reconcilable with annexure “B” which is my trading liquor license”. In paragraph 44 he stated “That brings me the conclusion if the second respondent saw the annexure “KM3” and my liquor trading license which has a total different

trading license number, why was my alcohol taken by the second respondent on the 16th April 2022 and the second respondent was aware of this information right on the 16th April 2022, clearly took my license and my alcohol when facts never justified so".
(sic)

In paragraph 45 he stated "with respect this case ends here and the respondent must pay costs on an attorney and client scale".

[21] It is worth noting that the applicant has clearly avoided to deal with the allegation that pictures of his trading license were taken and sent to Ms Mayatula. He is mum about the averment that Ms Mayatula informed the police official that the license that was sent to her was a fake document. Of serious concern is the silence of the applicant on the allegations at paragraph 8 of the answering affidavit. In fact, no attempt is made to reply on the allegations in paragraph 8 of the answering affidavit. From Ad Paragraph 7 of the replying affidavit, the next paragraph on the reply is Ad Paragraph 9 which simply means the applicant has avoided deliberately to reply to the allegations that Ms Mayatula spoke on the cell phone which was on loudspeaker in the hearing of the applicant and confirmed that the license of the applicant was a fake document which was cancelled by the Liquor Board. Nowhere in the replying affidavit does the applicant refute the allegations made in paragraph 8 of the answering affidavit more particularly, that the police officer had given the applicant the cell phone in order for Ms Mayatula to speak to the applicant who was insisting that the applicant's license had no origin at the Eastern Cape Liquor Board.

[22] Mr Genu for the applicant was invited to offer an explanation, if any, for the apparent lack of a reply to the respondent's allegations. He was hard pressed to offer any, except to cast doubt whether the police forwarded the correct picture of the license to Ms Mayatula. Whatever the reason may be which has not been made clear to the court why the applicant chose not to reply to the respondent's allegations, does not redound to the applicant's credit and can hardly assist in his quest for the relief sought. It follows therefore that the applicant's failure activates the well-known

Plascon – Evans rule test, in terms of which the version of the respondent which has not been denied has to be accepted ⁴.

[23] If regard is had to what transpired between the police, the applicant and Ms Mayatula, it is not difficult to understand why the police confiscated the liquor and removed the applicant's license from him. However, the question that remains is whether the police were acting lawfully and within the law when they did so.

[24] In their heads of argument, the respondent referred me to section 20 of the Criminal Procedure Act 51 of 1977 (the CPA) to justify their conduct for confiscating both the liquor and the license of the applicant. Section 20 of the CPA provides:

“The State may, in accordance with the provisions of this Chapter seize anything (in this Chapter referred to as an article) –

- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;
- (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence”.

In amplification the respondents rely on **Ndabeni v Minister of Law and Order and Another** ⁵ where the court held:

“Whether the suspicion or belief was reasonable is an objective question and will be answered objectively on all the facts before the court”.

⁴ *Plascon – Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623.

⁵ *Ndabeni v Minister of Law and Order and Another* 1984(3) SA 500 (D).

It was therefore contended by the respondent that the criminal court will be the appropriate forum to pronounce on the disposal of the exhibits after consideration of the facts and the evidence in the matter. It was further argued by the respondent that if the exhibits more particularly, the licence were to be released to the applicant, the evidence needed for a charge of fraud will be destroyed. As was stated earlier, following representations made to the prosecution on behalf of the applicant, the prosecution declined to prosecute the charges levelled against the applicant under CAS 297/04/2022 which included the fraud allegations. It is on this basis that the liquor was released to the applicant. It should also follow that there is no longer a fraud case pending against the applicant.

[25] That being the case, the submissions that the exhibits including the license should await a pronouncement by the criminal court can no longer apply, it has been overtaken by events. During argument Mr Genu submitted that one of the things the applicant has to prove is that he was in possession of a valid trading license. The license referred to by the applicant is referred to in the bundle of documents as “KM1” which bears the reference no: ECP 2066/90588/05. This is the same license which was sent to Ms Mayatula and was disowned by the liquor board.

[26] Mr Notshe for the respondents argued correctly in my view, that as soon as the license was disputed by Ms Mayatula, the applicant ought to have contacted the liquor board to protest its denial of the existence of his license. Better still, the applicant was expected to demand from the liquor board a copy of his file and his license that is supposed to be in their custody. Mr Notshe invited the court to draw an adverse inference in the non-activity of the applicant. No reasonable steps have been taken by the applicant to verify the pronouncements of Ms Mayatula. nor did he challenge her claim in any manner. No reasons were advanced why this could not be done by the applicant. Instead the applicant chose to launch an urgent application for the return of his license which has a questionable status.

The applicant chose this route notwithstanding the trite legal position which was expressed in **Tshwaedi v Greater Louis Trichardt Transitional Council** ⁶ as follows:

⁶ [2002] 4 BLLR 469 (LC) paragraph 11.

“... An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief...”

[27] In *casu* the applicant has sought to rely on the decision of the prosecutor to decline to prosecute as the basis to insist that it bears a valid license. I do not agree for the following reason. No evidence was presented to show any steps taken by the prosecution to verify or authenticate the applicant`s license with the liquor board. All that appears to have happened is for the applicant to direct a letter through his attorneys to the prosecution in which they related the circumstances under which the applicant`s liquor and license were taken by the police and the arrest of the applicant, for which they requested the prosecution to decline to prosecute. Attached to their correspondence was a number of documents including the disputed license of the applicant and that of Nceduluntu Bottle Store.

[28] The subsequent correspondence is that which is dated 19 May 2022 directed to the Office of the State Attorney in which they are informed by the applicant that pursuant their representations made to the prosecutor on 05 May 2022, the prosecutor has declined to prosecute and were therefore demanding the release of the applicant`s alcohol. There is no allegation made that the prosecutor investigated the veracity of the applicant`s submissions with the liquor board and as a result thereof was satisfied that the license is valid contrary to the undisputed claim of Ms Mayatula. As there may be many reasons including that of the status of the license that caused the prosecutor to decline to prosecute, the court without any reasons advanced therefore, is left but guessing as to the actual reason for the prosecutor to decline to prosecute. What we are left with is still the question on the validity of the applicant`s license.

[29] As alluded above, the applicant has set itself the onus to prove that it has a valid license. I am not convinced that it has succeeded in discharging that onus.. There is no effort whatsoever that establishes the applicant`s attempt to show the authenticity of his license. Not even the basic attempt to obtain a copy of his license from the liquor board as proof that he has a recognised license in the offices of the liquor board. I find therefore that the applicant has failed to prove that it is entitled to the order sought. Therefore, the application ought to fail.

[30] I now turn to deal with the question of costs. It is trite that the issue of costs is within the discretion of the court ⁷. It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs. The general rule is that costs follow the event which is a starting point⁸. I am of the view that the respondents are entitled to their costs. Mr Notshe had submitted that the award for costs must include the employment of two counsel. This is absent any motivation that the matter was so complex as to warrant the employment of two counsel one of which is a senior counsel. In exercising my discretion and having regard to the issues that were argued before me, I am not persuaded that the employment of two counsel was necessary.

[31] In the result, the following order will issue: -

1. The interim relief is not confirmed.
2. The application is dismissed with costs, such costs to include the costs of senior counsel.

M.V NQUMSE
JUDGE OF THE HIGH COURT (ACTING)

Appearances

Counsel for the applicant	:	<i>Adv Genu</i>
Instructed by	:	AYANDA ZOZI ATTORNEYS. NO. 70 CUMBERLAND STREET MTHATHA
Counsel for the respondents	:	<i>Adv Notshe SC</i>
Instructed by	:	STATE ATTORNEY MTHATHA

⁷ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA); *Swaartbooi v Brink* 2006 (1) 203 (CC) paragraph 27.

⁸ *Thusi v Minister of Home Affairs and 71 Other Cases* (2011) (2) SA 561 (KZP) 605-611.

DATE HEARD	: 06 OCTOBER 2022
DATE DELIVERED	: 01 DECEMBER 2022