

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

Case No: 2386/2015

In the matter between:-

MAKHALA ADELINA NAZO

Applicant

and

**FREE STATE GAMBLING &
LIQUOR AUTHORITY**

1st Respondent

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

2nd Respondent

and

Case No.: 2512/2015

In the matter between:

CONRAD JACQUES TREVOR JACOBS

Applicant

and

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

1st Respondent

2nd Respondent

JUDGMENT BY:

DAFFUE, J

HEARD ON:

29 OCTOBER 2015

DELIVERED ON:

19 NOVEMBER 2015

INTRODUCTION

- [1] On 29 October 2015 two similar applications by two individuals served before me. On 5 December 2014 and thus more than eleven months ago, both applicants lodged applications for registration certificates with first respondent in terms of the Free State Gambling and Liquor Act, 6 of 2010 (herein later referred to as "the Act"). The one applicant, Me Nazo applied for a liquor store registration certificate in respect of premises situated in Kagisanong, Bloemfontein, whilst the other, Mr Jacobs applied for a tavern registration certificate in respect of premises in Heidedal, Bloemfontein. Neither application has thus far been considered by respondents. The applicants are represented by the same legal team. In fact, their attorney, Mr JM Burger of Honey Attorneys has lodged numerous applications for registration certificates on behalf of clients over the last few years and he acted as attorney of record in many court applications wherein similar relief as *in casu* was sought. I deal with this issue again *infra*.

II THE PARTIES

- [2] The applicant in application 2386/2015 is Me Makhala Adelina Nazo, a 63 year old female person residing at [.....], Phelindaba, Kagisanong, Bloemfontein. This application applies to Me Nazo's second application for a liquor store registration certificate in respect of the same premises. Her first application for a registration certificate

was lodged by herself, but it was dismissed for technical reasons.

- [3] The applicant in application 2512/2015 is Conrad Jacques Trevor Jacobs, a 46 year old businessman residing at [.....], Heidedal, Bloemfontein. This court application is in respect of his first application for a tavern registration certificate.
- [4] First respondent is the Free State Gambling and Liquor Authority, ("the Authority"), a juristic person duly established in accordance with s 4 of the Act. The Authority's powers and functions are duly set out in s 5 of the Act.
- [5] Second respondent is the chairperson of the Free State Gambling and Liquor Authority, he being appointed in accordance with s 6(3) of the Act.

III THE RELIEF SOUGHT

- [6] Me Nazo seeks an order in terms whereof first and second respondents be directed to consider her application for a liquor store registration certificate within 21 days from the date of the court order, alternatively such period regarded by the court as fair and reasonable, and furthermore that first respondent be ordered to pay the costs of the application on the scale as between attorney and client.

[7] Mr Jacobs seeks an order in terms whereof first and second respondents be directed to consider his application for a tavern registration certification within 21 days of date of the court order, alternatively within such period as regarded by the court as reasonable and fair, and furthermore that first respondent be ordered to pay the costs of the application on the scale as between attorney and client.

[8] Both applications are opposed by both respondents on similar grounds, save as mentioned *infra*.

[9] Adv L Le R Pohl SC appeared for applicants whilst Adv L Bomela appeared for respondents in both applications.

IV BACKGROUND

[10] There is no doubt that the Authority does not comply with its obligation to consider applications lodged in accordance with the Act strictly and timeously. I personally have entertained numerous similar applications by applicants on an unopposed basis in the motion court over the last four years. I am also aware, having perused the court rolls regularly, that many of my colleagues have entertained similar applications on an unopposed basis over the last few years. I am not aware of one single application that has been dismissed.

[11] It has come to my attention recently that respondents have embarked upon a strategy in terms whereof applications are opposed. One such application was adjudicated by my

brother, Lekale, J who delivered judgment in **Reynecke v Free State Gambling and Liquor Authority and Another** on 30 October 2014. The following orders were made:

"[34] The respondents are directed to determine the applicant's application for the tavern registration certificate within one month calculated from the date hereof and to advise the applicant of the outcome immediately thereafter.

[35] The first respondent is directed to pay the applicant's costs in the main application on a scale as between attorney and client."

I shall revert to this judgment and the reasons advanced by Lekale J *infra*.

[12] The following judges of this Division adjudicated similar opposed applications in the recent past, to wit Ebrahim J, Van Zyl J and Naidoo J. Ebrahim J granted the application considered by her and gave reasons at a later stage. However, I have not been presented with her reasons. Van Zyl J granted two similar applications, but indicated that her reasons would follow. These are still outstanding. Naidoo J reserved judgment in the application heard by her.

[13] I have ascertained that another opposed application was enrolled for hearing on 6 November 2015 by Mchale, AJ, the outcome of which is unknown to me at this stage.

[14] The aforesaid background and the facts to be mentioned *infra* are indicative of an arrogant, lackadaisical and irresponsible attitude by respondents. They are not prepared to honour a recent and well-reasoned judgment of this court; instead of taking Lekale J on appeal to either the full bench of this Division or the Supreme Court of Appeal, they carry on with business as usual.

[15] In defending the stance of respondents Mr Bomela vigorously argued that constitutional principles have been ignored in all previous judgments of this Division on matters of similar nature and I quote the following from his heads of argument: "No Constitutional interpretation was employed in all the previous judgments by this court on matters of similar nature and in fact it is the duty of this Court in this matter to correct the otherwise wrong decision of the Court in those matters as constitutional interpretation, as I said before is not static. It remains therefore the duty of the Court to do the right thing in order to further develop the jurisprudence in this area of the law."

V THE UNDISPUTED FACTS

[16] In *casu* both applicants, Me Nazo and Mr Jacobs instructed the same attorney who filed their applications with first respondent on 5 December 2014. No objections were lodged within the time frame prescribed in s 33 of the Act, or at all. In the case of Me Nazo the report of the Mangaung

Metropolitan Municipality ("the municipality"), which had to be provided in accordance with s 31(3)(c), read with s 32(3) of the Act was still outstanding when litigation was instituted. However it is common cause that the municipality did not have any objection to the approval and issuing of a liquor store registration certificate to Me Nazo when she lodged her first application in respect of the same premises. The applicable letter of the municipality dated 27 February 2013 was indeed attached to this applicant's second application and forms part of the papers before.

[17] In any event it is now common cause that a fresh report was issued by the municipality in accordance with the aforesaid sections of the Act a few days after filing of the replying affidavit herein. Mr Pohl drew my attention to this from the Bar and although Mr Bomela did not have and could not obtain instructions from his clients during the hearing of the application notwithstanding a request from him, he conceded that his clients had received such a report and that applicant's attorney had responded thereto long before the hearing of this application.

[18] In the case of Mr Jacobs' application the report from the designated police officer ("DPO") in accordance with s 31((3)(b), read with s 32(2) of the Act, was outstanding when his court application was issued. However, the required report was in fact provided to the Authority within days after filing of applicant's replying affidavit and also in this case, as informed from the Bar, applicant's attorney had responded

thereto as well. There was thus in respect of both matters compliance with the issues raised by respondents as long ago as August 2015, but notwithstanding that, three months down the line both applications have still not been considered by the Authority.

- [19] Notwithstanding correspondence between applicants' attorney and the Authority between 12 January 2015 and 10 April 2015 in respect of both applications, including letters of demand threatening with legal action, the Authority failed to ensure compliance with the Act and/or to set down the matters for consideration of the applications, bearing in mind the provisions of the Act and its powers to which I shall return *infra*. No proof has been provided by respondents of correspondence between them and these two organs of state. Not a single letter of demand, requesting reports, is attached to any of the answering affidavits. No word has been said about a verbal demand, either by means of a telephone call or a personal visit. No explanation has been given for the alleged failure by these organs of state to comply with their duties. For all I know they have not been requested to file reports prior to the institution of these applications, but it is not necessary to regard this as an undisputed fact. Respondents failed dismally to take the court in their confidence.

VI CONSIDERATIONS OF A LIQUOR BOARD: A HISTORICAL PERSPECTIVE

[20] I refer to s 28(4) of the Act *infra*. However it is instructive to obtain a brief historical perspective of our liquor legislation. Kruger A, **Lansdown's South African Liquor Law**, 5th ed, p 119 and further discussed the considerations to be taken into account by a liquor board. I am mindful of the fact that the publication was issued in 1983 and that the author dealt with liquor legislation, the latest being the Liquor Act, 87 of 1977 including its amendments until 1983, and that all these acts have long been repealed. The three factors to be considered by a liquor board in respect of the repealed legislation were the following:

1. The public interest;
2. The suitability of the building and area;
3. The applicant.

[21] Several factors have to be considered by a liquor board in dealing with public interest. It is unnecessary to refer to the numerous authorities in this regard. One judgment will suffice. See **Bulk Deals Six CC v Chairperson, Western Cape Liquor Board and Others** 2002 (2) SA 99 (CPD) at 106G and further. The reader should bear in mind that the court dealt with s 22 of the now repealed Liquor Act, 27 of 1989, but in my view the principle has not changed.

[22] In order to consider the suitability of the building from which the applicant intended to do business and the area in which

the building was situated, it was regarded of great importance to inspect the premises in order to draw conclusions from such inspections. It was an invariable practice of board members to inspect premises, even when photographs were attached to applications. This is not necessary anymore, bearing in mind the obligation of the particular municipality to file a report.

[23] The last important factor which the boards had to consider in granting or refusing an application was the person of the applicant. Previous liquor legislation provided for police reports to be submitted as is the case in terms of the present Provincial Act as well.

[24] Dendy M, in Joubert's **The Law of South Africa**, vol 15, part 2, (2nd ed) at para [95] concisely summarised the history of our liquor legislation. Under the Liquor Act, 30 of 1928 licences were granted, annually renewed and administered in each magisterial district by a Liquor Licencing Board consisting of the chief magistrate as chairperson and two lay members. Such members of the board were acquainted with local conditions and personally inspected the premises of each and every applicant. In 1957 the provision was altered when a Liquor Board was constituted for certain defined districts or combinations of districts, consisting in each case of three senior magistrates. In 1963 a National Liquor Board for the general administration of the Liquor Act throughout the Republic of South Africa was created. The powers of local boards to grant licences were removed although they

could still renew licences. In 1977 local boards ceased to exist and all functions relating to the administration of the Liquor Act, 87 of 1977 (with the exception of the power to grant temporary licences which vested in the magistrate of the district) were vested in the national board which then became known as the Liquor Board. In 1995 the National Liquor Board was abolished and a separate Liquor Board instituted for each of the provinces in accordance with the provisions of s 5 of the Liquor Act, 27 of 1989. The Liquor Act, 27 of 1989 was repealed by the Liquor Act, 59 of 2003 with its purpose to *inter alia* establish national norms and standards in order to maintain economic unity within the legal industry, to provide for essential national standards and minimum standards required for the rendering of services and to provide measures to promote co-operative government in the area of liquor legislation. Schedule 1 of this Act provides for a transition from repealed laws to provincial legislation and as mentioned, the Free State Province now has its own act dealing with the liquor industry.

- [25] Bearing in mind the background to our liquor legislation it is fair to say that the DPO and the particular municipality employee(s) are the eyes and ears of the Authority. Unlike as earlier in our history, the members of the Authority (or liquor board as it was known in the bygone era) do not have the opportunity and time to visit premises of applicants applying for liquor licences for inspection purposes to establish whether the premises are suitable or not. The Authority now depends on the particular municipality to file a

report. The same applies to the report to be filed by the DPO, although Liquor Boards relied on reports of DPO's in the past as well. See for example the following case law: **Rosenberg and Others and Mafeking Liquor Licencing Board** 1947 (1) SA 677 (Griqualand West Local Division) at 682; **Van der Spuy v Uniondale Liquor Licencing Board** 1955 (3) SA 603 (CPD) at 606; **Rossouw v Norton NO and Other** 1950 (2) SA 1 (CPD); **Mahara j v Chairman, Liquor Board** 1997 (1) SA 273 (NPD) at 280G and further.

[26] Although in a different context, the Appeal Court found that the National Transport Commission failed to comply with the peremptory provisions of s 14(1)(a) of the Road Transportation Act, 74 of 1977 and consequently the decision of the Commission was set aside on review. See **Setsokosane Busdiens v Nasionale Vervoerkommissie** 1986 (2) 57 (AD) at 84H and 871.

VII THE FREE STATE GAMBLING AND LIQUOR ACT, 6 OF 2010

[27] The relevant objects of the Act are set out in s 2 which reads as follows:

"(1) In relation to liquor to –

(a) reduce the socio-economic and other costs of alcohol abuse by -

- (i) implementing essential nation norms and standards in the liquor industry as determined by the National Liquor Act;
- (ii)
- (iii) providing for public participation in the consideration of applications for registration; and
- (b) promote the development of a responsible and sustainable liquor industry in a manner that facilitates –
 - (i) the entry of new participants into the industry;
 - (ii) diversity of ownership in the industry;
 - (iii) an ethos of social responsibility in the industry; and
 - (iv) local tourism and economic growth, and..."

Section 3 provides that the Act applies, subject to the relevant provisions of the National Liquor Act, to all retail sale, consumption and micro-manufacturing of liquor or methylated spirits.

[28] As mentioned *supra*, the Authority is a juristic person established in accordance with s 4 of the Act. The Authority consists of the board, chief executive officer and administration.

[29] Section 5(1) stipulates as follows:

"5. Powers and functions of the Authority. – (1) The Authority manage and control the following powers and functions through the board –

- (a)
- (b) consider, grant or refuse applications in terms of this Act; ..."

[30] The member of the executive council of the province responsible for regulation of gambling and liquor appoints a member of the board as the chairperson from time to time. See s 6(3) of the Act. The chairperson has a casting vote in accordance with the provisions of s 17(4) of the Act which reads as follows:

"(4) A decision of the board must be taken by a majority of the votes of the members present at a meeting of the board and, in the event of an equality of votes on any matter, the chairperson must have a casting vote in addition to his or her deliberative vote."

The Authority may conduct any enquiry into any matter falling within the scope of its powers and functions. See s 20(1) of the Act. I quote s 20(2) to 20(6):

"(2) For the purpose of any enquiry in terms of subsection (1), the Authority may, by written notice, summon any person who is or who may be affected by or is concerned in the consideration of a particular matter by the Authority, to appear before the board-

- (a) to give evidence; or
- (b) to produce any book, document or thing which is in his or her possession or under his or her control and which, in the opinion of the Authority, relates or may relate to a matter to be considered thereat:

Provided that at any enquiry held by the Authority, the person applying for a licence or registration or the transfer or removal of a licence or registration in terms of this Act,

or any person objecting to the granting of such an application, or the person who is the subject of the enquiry, as the case may be, must, if he or she so requests, be entitled to appear before the Authority and to call witnesses.

- (3) A person who has received a notice in terms of subsection (2), must personally appear before the Authority on the date, time and place set out in the notice: Provided that if such a person is not legally competent to so appear before the Authority, any person who by law is competent to act on his or her behalf or any person authorised thereto by the Authority, may so appear on his or her behalf.
- (4) The provisions of subsection (3) apply *mutatis mutandis* to any corporate body, organisation or institution.
- (5) The Authority may call and examine any person present at the enquiry, whether or not he or she has been summoned under subsection (2) to attend the enquiry, and may inspect and retain for a reasonable period any book, document or thing, the production of which was required under that subsection: Provided that the said person affected must be entitled to make copies of such book, document or thing, if practicable, before it is so retained by the Authority.
- (6) The Authority may require from any person appearing before the Authority at an enquiry in terms of subsection (1), to give his or her evidence on oath or affirmation, and the member of the Authority presiding at the enquiry, may administer the oath or accept an affirmation from any such person."

[31] When considering an application for registration, s 28(4) of the Act provides that the Authority must "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-a-vis* the number of outlets in the relevant ward; (d) the report of the relevant municipality received in terms of s 31 and (e) the reports, views and objections contemplated in s 31(4) to 35".

[32] Certain requirements have to be met by an applicant for a new registration and on receipt of the application the Authority must comply with certain obligations. Sub-section 31(2) of the Act specifies what every application for a new registration must contain and the documentation to be attached. It is unnecessary to quote these requirements, save to state that there is no obligation on an applicant to provide reports from the particular municipality or the DPO or any other police officer.

[33] Sub-sections 31(3) and (4) stipulate as follows:

- "(3) On receipt of the application by the Authority, said Authority must request-
 - (a) a report by a liquor inspector regarding the application which includes the information contemplated in section 32(1);
 - (b) a report from the South African Police Service regarding the application, which must include information regarding the suitability of the applicant and the information contemplated in section 32(2);

- (c) a report from the relevant municipality, which must include the information contemplated in section 32(3).
- (4) The municipality, liquor inspector and designated police officer contemplated in subsection (3) must compile and submit the relevant reports within the prescribed period." (emphasis added)

[34] Subsection 32(2) stipulates as follows:

"(2) A report by a designated police officer must provide details of those matters prescribed and matters which ought, in the opinion of the designated police officer, to be taken into consideration in respect of the application concerned."

[35] Subsection 32(3) stipulates as follows:

- (3) A report from the relevant municipality must provide information on-
 - (a) the zoning of the relevant premises;
 - (b) the impact on surrounding traffic patterns, traffic congestion, entrances and exits to and from the premises and parking requirements;
 - (c) environmental health; or
 - (d) any other matter which, in the opinion of the municipality, ought to be taken into consideration in respect of the application for registration."

[36] If the legislature intended to burden an applicant with the obligation to obtain the reports from the SAPS and the municipality it would have provided so. On no reading of the

Act can it ever be suggested that an applicant has to take any steps against these two organs of state to obtain reports from their employees and to submit these reports before his/her application for a registration certificate can be considered by the Authority. The wording of the Act is clear and unambiguous. Sub-section 31(3) is peremptory. It is the Authority that must request the reports and in terms of sub-section 31(4), the municipality, liquor inspector and designated police officer must compile and submit the relevant reports. These aspects will be considered again when the arguments of the legal representatives are entertained *infra*. The regulations issued in terms of the Act provide for time frames within which the reports have to be requested and supplied in order to ensure compliance with sections 31 and 32 of the Act. Nothing turns on this and it is not respondents' case that these time frames are unreasonable.

VIII MANDAMUS OR REVIEW

[37] Although applicants rely on judicial review of administrative action in accordance with s 6 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), and in particular sub-section 6(2)(g) read with the definition of "decision", the application may just as well be considered on the basis that a mandamus is sought. A simple refusal by a state functionary or organ of state to exercise a function may be met by an application for a mandamus. On the other hand, the failure to take a decision is regarded as an

administrative action. Section 1 of PAJA defines administrative action to be "...any decision taken, or any failure to take a decision which adversely affects the rights of any person and which has a direct external legal effect. ..." Decision is defined as "... any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be under an empowering provision, including a decision relating to(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly."

[38] Mr Bolema did not argue that the applicants' applications do not fit within the purview of a mandamus or review in terms of PAJA, but concentrated on the fact that the onus was on applicants to join, in the case of Me Nazo the municipality, and in the case of Mr Jacobs the Minister of Police. He submitted that there was indeed a non-joinder and that these two organs of state should have been joined and orders based on PAJA should have been sought against them and not against respondents. He relied on the judgment of the Constitutional Court in **Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd** 2011 (1) SA 327 (CC) at para [37], but in developing his argument he emphasised that the SAPS and the municipality are separate organs of state running their own affairs and their failure to act constituted administrative action. This aspect will be considered later.

[39] PAJA has created an explicit ground of review in so far as the failure to take a decision within a reasonable time is now

recognised as reviewable as shown *supra*. However it was always possible to apply for review at common law in this regard, although parties did not often resort thereto. It was more common to obtain a mandamus forcing a reluctant functionary to take a decision. See Hoexter C, **Administrative Law in South Africa**, 2nd ed, p.314.

IX **MISJOINDER OF SECOND RESPONDENT**

[40] It was submitted on behalf of respondents that second respondent as chairperson is neither responsible for the hearing of applications for liquor licences, nor their registration and that he should not have been joined. This submission is ill-conceived and apparently made as a result of an incorrect reading of the founding affidavits. No authority was quoted to me by Mr Bomela in support of his submission. A perusal of law reports for the period 1947 to the date hereof clearly shows numerous cases where bodies such as the Authority and their chairpersons have been cited, either as applicants or respondents. This point *in limine* is dismissed.

X **FREEDOM OF TRADE, OCCUPATION AND PROFESSION**

[41] In **S v Lawrence; S v Negal; S v Solberg** 1997 (4) SA 1176 (CC) the Constitutional Court dealt with the predecessor of s

22 of the Constitution and stated in para [34] as follows per Chaskalson P:

"Implicit in this is that the participation should be in accordance with law. Thus nobody can claim that s 26 gives him or her the right to deal in stolen property or in harmful drugs or to break the law in any other way. Nor can anyone claim that the right entitles him or her to ignore laws having a rational basis which deal town-planning, zoning, licencing and other regulation of business, trades or professions. These are the constraints of the economic system applicable to all persons and those who wish to engage in it must do so subject to such constraints."

In para [36] Chaskalson P commented as follows:

"Liquor is a potentially harmful substance. It is part of the normal environment in which the liquor trade is conducted in South Africa, and other countries, for selling to be regulated by licences which control not only the right to sell liquor but also where, when and what liquor may be sold."

In para [54] it was put on record that the "excessive consumption of liquor is universally regarded as a social evil" and that "...it is linked to crime, disturbance of the public order, impairment of road safety, damage to health and has other deleterious social and economic consequences." Chaskalson P went on to state at para [65] that "(t)he scheme of the legislation is to effect controls through licences".

[42] When the 5th edition of Lansdown's South African Liquor Law was published in 1983, neither the interim nor the final Constitution was applicable. In my view and bearing in mind the Bill of Rights contained in our Constitution, it may be argued that a fourth element has to be borne in mind by the Authority considering an application for a registration certificate in terms of the Act, to wit the right to freedom of trade. It is conceivable that this aspect might be considered under public interest, but in my opinion will be more prudent to consider the right to freedom of trade as a fourth factor.

[43] Section 22 of our Constitution reads as follows:

"Freedom of trade, occupation and profession.

[22] Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[44] Section 22 is a "substantially more limited right" than s 26 of the interim Constitution. See D Davis, Freedom of trade, occupation and profession in Woolman *et al* Constitutional Law of South Africa, 2nd ed, vol 4, p. 54-1 and Currie and De Waal, The Bill of Rights Handbook, 5th e, p. 487. However and although the practice of a trade, occupation or profession may be regulated by law, in my view the constitutional right of freedom of trade should not be undermined by restrictions, unless necessary in order to protect the rights of the public in general.

[45] It is understandable that the right to engage in economic activity is limited, but in my view no citizen should effectively be prevented from being heard by the particular body that is obliged to consider his or her application for a licence: *in casu* a registration certificate. It is apparent from the papers that both applicants are members of the previously disadvantaged groups in this country and therefore the words of Jones J are worth quoting:

"We have a history of repression in the choice of trade, occupation or profession. This resulted in disadvantage to a large number of South Africans in earning their daily bread. In the pre-Constitution era the implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions upon where and for how long they could reside in particular areas, the practice of making available structures to develop skills and training in the employment sphere to select sections of the population only, and the statutory reservation of jobs for members of particular races are examples of past unfairness which caused hardship. The result was that all citizens of the country did not have a free choice of trade, occupation or profession. Section 22 is designed to prevent a perpetuation of this state of affairs.

See **JR1013 Investments CC and Others v Minister of Safety and Security and Others** 1997 (7) BCLR 925 (E) at 9308-E.

[46] The purpose of the Constitution as expressed in s 22 will be undermined if bureaucrats keep on putting unnecessary obstacles in the way of applicants for registration certificates in terms of the Act or any other similar legislation. The delay in considering an application for any licence to enable a citizen of this country to conduct a business in order to participate in the economy is *prima facie* one such obstacle. In **Offit Enterprises (Pty) Ltd v Coega Development Corporation** 2010 (4) SA 242 (SCA) para 43 Wallis AJA (as he then was) dealt with unreasonable delay relating to a decision that a functionary is under some obligation to take in the following words: "It is directed at dilatoriness in taking decisions that the administrator is supposed to take and aims at protecting the citizen against **bureaucratic stonewalling.** As such its focus is the person who applies for an identity document, government grant, licence, permit or passport and does not receive it within an appropriate period of time, and whose attempts to chivvy officialdom along are met with: 'Come back next week.'" (emphasis added). See also De Ville JR, **Judicial Review of Administrative Action in South Africa**, revised 1⁵¹ ed, p. 184 – 186. Hoexter C, *foe cit* deals with unreasonable delay and states that this ground of review "... is a statutory addition that will be welcomed by anyone who has experienced the frustration of waiting for a government department to act. Because it has been made explicit and thus more accessible, the ground is likely to be relied on more often than its common-law forbears."

[47] In the same vein it is deemed necessary to consider the following judgment. The Constitutional Court dealt with the constitutional right to freedom of trade, occupation and

[48] Respondents are of the view that the Authority's hands are tied in so far as it is dependent on other organs of state, in

the one instance the municipality, and in the other the SAPS, to provide the required reports and the failure by these two organs of state makes it impossible for the Authority to consider the applications at all. It was submitted that the Authority had requested these two organs of state to present the reports but in the event of their failure, there was nothing that the Authority could do, bearing in mind the provisions of the Constitution and in particular sections 40 and 41 thereof.

[49] In terms of s 40(1) of the Constitution our government "is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated." Furthermore "(A)ll spheres of government must observe and adhere to the principles (in chapter 3 of the Constitution) and must conduct their activities within the parameters that the Chapter provides." See s 40(2) of the Constitution.

[50] It is clear that all spheres of government and organs of state within each sphere must *inter alia* exercise their powers and perform their functions in a manner that does not encroach on geographical, functional or institutional integrity of government in another sphere and co-operate with one another in mutual trust and good faith by fostering friendly relations and assisting in supporting one another, adhering to agreed procedures and avoiding legal proceedings against one another. See s 41(1)(g) and (h).

[51] Organs of state involved in inter-governmental disputes must make every reasonable effort to settle their disputes and if a court is not satisfied that all the requirements of s 41(3) have been met, it may refer the dispute back to the organs of state involved. See s 41(4). The granting of liquor licences is a competence of the provincial legislatures: see Part A of Schedule 5 of the Constitution. Contrary thereto, the control of undertakings that sell liquor to the public is a local government matter: see Part B of Schedule 5 of the Constitution. It is also clear that a municipality has executive authority in respect of and has the right to administer the local government matters listed in Part B of Schedule 5. See s 156(1) of the Constitution. On the other hand, the Premier of a province *inter alia* exercises executive authority together with the other Members of the Executive Council by implementing provincial legislation in the province and implementing all national legislation within the functional areas listed in Schedules 4 and 5 except where the Constitution or an Act of Parliament provides otherwise. See s 125(2).

[52] In **Uthukela District Municipality and Others v President**

of the Republic of SA and Others 2003 (1) SA 678 (CC) at para [14] the Constitutional Court held that a court will rarely decide an inter-governmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level. Such organs of state have a two-fold obligation, i.e. to make every reasonable effort to settle the dispute with the mechanisms provided and

to exhaust all other remedies before they approach the courts. See para [19] and also **National Gambling Board v Premier KwaZulu Natal and Others** 2002 (2) SA 715 (CC) at paras [30] to [39].

[53] In my view it is clear that there is or was no dispute at all between the applicable organs of state. It is or was not a matter where the municipality concerned or the SAPS refused for the one of other reason to submit the applicable reports. They merely failed to file reports and first respondent failed to use the mechanisms available to it to obtain the reports. Mr Bomela conceded that the particular organs of state were not involved in disputes. I deal with this aspect later again.

[54] Mr Bomela argued that the SAPS and the municipality as separate organs of state, running their own affairs, cannot be dictated to and/or "forced" by the Authority to comply with the Act based on the principle of autonomy of spheres of government. Their failure to supply reports constituted administrative action according to counsel and it was for applicants to utilise PAJA against these organ of state. As this was not done the applications are premature: the Authority could not be directed to consider the applications for registration certificates.

[55] Another issue raised by counsel for respondents was the principle of legality. He relied on authorities such as **Pharmaceutical Manufacturers Association of SA** &

another: in re President of the Republic of South Africa

& others 2000 (2) SA 674 (CC) and **Lester v Ndlarnbe Municipality** (Case number 514/12) [2013] ZASCA 95 (22 August 2013) at paras [20] and [26]. There is no doubt that the exercise of all public power must comply with the Constitution, the supreme law of our land, and the doctrine of legality which is part of the law. Organs of state are thus constrained by this doctrine to exercise only those powers bestowed upon them by the law.

[56] In **Reynecke** *foe cit* Lekale J not only found that the SAPS and the municipality were the "eyes and ears" of the respondents, but that "(t)heir cooperation was necessary in the services that the respondents render and was, as such, of utmost importance to service delivery." See also the judgments in **One Turn Trading 226 (Pty) Ltd v The North West Liquor Board and another**, case number 1121/2012, a judgment by Matlapeng AJ delivered on 30 August 2012, and in particular paras [15] to [17] and **Rio Grande Beverage Industries (Pty) Ltd and others v The Minister of Trade and Industry N.O. and others**, case number 5303/2013, a judgment by Ebersohn AJ delivered in the North Gauteng High Court on 29 July 2014. The learned judge in the last mentioned judgment referred to the numerous similar applications in Gauteng and stated that "(t)he way the respondents operated and delayed these and numerous other similar applications was a travesty of justice and scandalous."

XII EVALUATION OF THE EVIDENCE, LEGISLATION, AUTHORITIES AND SUBMISSIONS BY COUNSEL

[57] Respondents presented no proof whatsoever that they had instructed the municipality in the case of Me Nazo to file the required report. Applicant attached to the founding affidavit certain emails from a Mr Johan de Bruyn, Acting Manager, Business Regulation of the Authority, to applicant's attorney confirming that a second instruction letter had been served on the municipality on 13 February 2015 and that a third instruction letter would be forwarded to the municipality shortly. This email is dated 4 March 2015. However it has not been proven that the municipality had in fact been instructed to file a report. However and bearing in mind the fact that the municipality did not have any objection to the issuing of a liquor store registration certificate when Me Nazo filed her first application, I would have expected the Authority to accept such report for purposes of the second application. It is clear that Me Nazo filed an application for the same type of registration certificate in respect of the same premises within months after her first application was rejected for technical reasons. Alternatively, a simple telephone call to the author of the municipal report dated 27 February 2013 could have cured the alleged problem of non-reporting.

[58] Save for the fact that the court has not been presented with any proof that the Authority had made every effort to obtain a report from the municipality, it needs to be emphasised that even if such a report was filed with the Authority by the

municipality timeously, applicant and/or her attorney would not have any knowledge thereof unless they were provided with a copy as required by the Act.

[59] Me Nazo has no business with the municipality and had no right to launch an application for review of the municipality's failure to file a report to the Authority. Mr Bolema conceded this to an extent in so far as he argued that applicant should have cited the Authority in her application for review brought against the municipality. This argument is without any merit and is rejected. If applicant had a right as against the municipality to issue a review application based on its failure to file a report, it would not be necessary to join the Authority as a party to those proceedings.

[60] The fact of the matter is that respondents try to shift their responsibilities to applicant. As mentioned *supra* when I dealt with the Act, the obligation to request the reports and to obtain those rests squarely on the shoulders of the Authority. If one considers the structure of the Act, the intention of the legislature and the history of our liquor legislation referred to *supra*, the Authority must be satisfied with the suitability of the building from which the applicant wants to trade and the area concerned. In the past, and as stated, liquor board members did personal inspections, but the legislature has considered it to be impracticable nowadays and therefore that task has been awarded to the applicable municipality.

[61] The same criticism levelled at respondents in respect of the failure to obtain a report from the municipality applies to the failure to obtain a police report from the DPO in the Jacobs application. In the Jacobs matter there is no indication whatsoever that the same Mr De Bruyn referred to *supra* requested a report from the DPO at all. The only reference to such a report is the email of 20 April 2015 to applicant's attorney which reads as follows:

"Please be advised that we have received the municipal report on the 17 April 2015. We are now waiting for the DPO report."

[62] Mr LO Motaung, the legal manager of first respondent stated the following in the answering affidavit on behalf of respondents in the Jacobs matter:

"4.12.2 Annexure E (the email of 20 April 2015) to the founding affidavit is proof that the applicant was at all times kept abreast of the developments in the liquor licence application.

4.12.3 The Police report is still outstanding."

This affidavit is dated 10 July 2015. These allegations are made in response to averments by applicant's attorney in respect of problems experienced in obtaining reports, substantiated by his letters of 28 January 2015, 10 April 2015 and 15 May 2015 addressed to first respondent for attention Mr De Bruyn. In the letter of 15 May 2015 first respondent is requested to provide the necessary reports urgently and within the next seven days, failing which the

attorney would proceed with a court application as instructed. No response whatsoever was received *ex facie* the papers. It is not even certain whether the Authority did in fact request the report from the DPO at all. As in the case of Me Nazo, Mr Motaung apparently did not deal with the matters personally and relied on unsubstantiated hearsay evidence.

[63] Again, as in the case of the municipality, and notwithstanding the submissions of counsel, it was not required of applicant to file a review application against the Minister of Police. Any action to be taken to obtain the report from the DPO had to be taken by the Authority and by nobody else. There is no proof of a dispute between two organs of state and there is not even proof that there was no co-operation between the Authority and the SAPD. If it was really the case of the Authority that the DPO deliberately refused to file a report and/or otherwise to assist the Authority by failing to file the report notwithstanding written request, I would have expected respondents to place that on record and to provide the court with the necessary proof. This it failed to do and it cannot now rely on the Constitution or the principles of co-operative government and/or sections 40 and 41 of the Constitution or any other section thereof.

[64] It is apparent that, during this whole process which started eleven months ago, respondents did not show any respect whatsoever for the rights of the two applicants. The two applicants do not want the court to direct the respondents to issue registration certificates to them; they merely want the

opportunity to be heard and/or that their applications be considered. An import aspect to be considered is the fact that no objections have been lodged against any of the two applications. Consequently, and without usurping the functions of respondents and/or attempting to venture into the liquor licencing arena, the only obstacle to be overcome by applicants at this stage is the bureaucratic stonewall with which they are confronted.

[65] Before, but particularly after receipt of final letters of demand the Authority failed to communicate its challenges to applicant's attorney so as to provide them an opportunity to make suggestions, if any, to expedite matters. In the words of Lekale J in **Reynecke** *foe cit*:

"In my view, if the absence of personnel at the proposed premises was the cause of or contributed toward the delay on the part of the SAPS, one would have expected the respondent to have, at least, pointed that out to the applicant's attorney in response to those letters. The delay was, thus, undue in so far it is not explained."

As indicated no responses whatsoever were forthcoming and the applicants were left in the dark as to any obstacles that might have prevented the relevant parties to file reports.

[66] I reiterate therefore that respondents were expected to present explanations as to why the reports were not forthcoming and exactly what they had done in obtaining these reports, but their explanations are in the words of

Lekale J, In Reynecke "..... wanting, unsatisfactory and unacceptable m so far as it is simply to the effect that the first respondent was helplessly waiting for reports from the SAPS and the municipality. It is not apparent *ex facie* the opposing papers that the respondents escalated the problem regarding such reports to senior personnel within the institutions concerned in an attempt to expedite the matter, ..."

[67] Lekale J dealt with a submission that the Constitution discourages interdepartmental litigation and stated that "... the Constitution in fact does not *per se* bar interdepartmental litigation and only discourages it in the sense that it should be avoided in favour of other less drastic measures and mutually harmonious steps." I fully endorse his remarks, but wish to reiterate that *ex facie* the application papers there was not the faintest suggestion of a dispute between organs of state *in casu*.

[68] In *casu* nearly a year has lapsed and the applications have not yet been enrolled for consideration. This is preposterous and a mockery is made of applicants' constitutional rights. In my view and bearing in mind the applicable time frames and the obvious workload of the Authority which I accept, although this was not tendered as an excuse at any stage, there is no reason why applications for registration certificates cannot be considered by the Authority within four months from the date of lodging of the applications. respectfully disagree with the view of Lekale J in this regard in the aforesaid judgment to the effect that an application can be ripe for determination two months after lodging thereof. This might be so in exceptional cases only. Save for this

comment I respectfully agree with the reasons and orders of Lekale J. I am in any event bound to follow his judgment in accordance with the time-honoured *stare decisis*-principle, unless I am convinced that he was wrong, which is not the case. Unfortunately respondents, represented by an in-house legal adviser, the Office of the State Attorney and counsel regarded them not bound by a reasoned judgment of this division.

[69] The facts reported in the **Rio Grande** judgment are mirror images of the situation in the Free State Province. Here, Mr Burger, an experienced attorney who specialises in the field of Liquor Licencing and Registration, like Mr Blom in Pretoria, has to approach the court on a regular basis to obtain orders against respondents, every time at the expense of the taxpayer. The respondents are oblivious of applicants' constitutional rights and in particular their rights to obtain fair, just, transparent and expeditious administrative decisions.

[70] If respondents acted professionally and without dragging their feet they could have considered these applications long ago. They had the means and the authority to obtain reports from the DPO and the municipality, even if they had to act in terms of s 20 of the Act which allows for enquiries to be conducted by the Authority and the summoning of any person to appear before the board. I reject Mr Bomela's argument that the Authority was required to interfere with the powers and/or functions of other organs of state. The

reporting functions mentioned in sections 31 and 32 of the Act have nothing to do with the affairs of the SAPS and the municipality. It should be noted that the function of a municipality in particular is the control of undertakings that sell liquor to the public within its area. Refer again to Schedule 5, Part B of the Constitution, read with s 156 thereof. The SAPS must ensure that law and order prevail. I have referred to the structure of the Act, the clear and unambiguous language of the relevant sections and sections 20, 31 and 32 in particular, as well as the background to the present Act with reference to past liquor legislation, the purpose of such legislation and the present Act and the surrounding circumstances. The reliance on the principles of co-operative government for the argument that applicants' applications are premature and that they had to rush to court to obtain relief against the SAPS and/or the municipality is without merit.

[71] The reliance on the principle of legality for the argument that respondents do not have any means to obtain reports from these organs of state is misplaced for the reasons advanced herein. It is unnecessary to repeat what I have stated above. There is in my mind no doubt that applicants have made out a proper case for the relief sought.

XIII COSTS

- [72] Both applicants seek costs on the scale as between attorney and client. Such orders have been made, to the best of my knowledge, in all the unopposed applications referred to *supra* as well as by Lekale J in **Reynecke** *foe cit.* Notwithstanding this and the history of litigation between various applicants and respondents over the years, respondents still do not adhere to court orders in this regard and specifically the judgment of Lekale J. Their attitude cannot be defended, smells of arrogance and must be penalised with a punitive costs order.
- [73] I have seriously considered to call upon the chairperson of the Authority, cited as second respondent herein, and/or the deponent of the answering affidavits, Mr LD Motaung, a legally qualified person to advance reasons why costs *de bonis propriis* on an attorney and client scale should not be granted against either or both of them. In this regard I wish to refer to the unanimous judgment of the Constitutional Court, the scribe being O'Regan J in **SA Liquor Traders' Association v Gauteng Liquor Board** 2009 (1) SA 565 (CC) at paras [50] – [54]. In my view the employees and/or functionaries of the Authority deliberately failed to adhere to the judgment of Lekale J and Mr Motaung's version as to the steps taken (or reasons for the failure to take steps to obtain the required reports) is in the words of O'Regan J indicative of a "lamentable want of professional responsibility". It also reflects on the members of the Authority and its chairman in particular who over the years caused numerous court orders to be made against them in similar circumstances. There is

no reason why the taxpayer should be burdened with legal costs unnecessary incurred. Applicants did not ask for such a punitive costs order to be made and bearing in mind the further costs to be incurred in postponing the matter for adjudication of such order, I decided to exercise my discretion on the basis as set out *infra*.

XIV ORDERS

[74] Therefore I grant the following orders:

In application 2386/2015:

1. First and second respondents are directed to consider applicant's application for a liquor store registration certificate in respect of the premises situated at [.....], Phelindaba, Kagisanong, Bloemfontein within 21 days from the date of this order;
2. First respondent is ordered to pay the costs of this application on the scale as between attorney and client.

In application 2512/2015:

1. First and second respondents are directed to consider applicant's application for a tavern registration certificate in respect of the premises situated at Erf 1580, 30 Joe Solomon Street, Opkoms, Heidedal, Bloemfontein within 21 days from the date of this order;
2. First respondent is ordered to pay the costs of this application on the scale as between attorney and client.



J. P. DAFFUE, J

On behalf of applicants: Adv. L. Le R. Pohl SC
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of respondents: Adv. L. Bomela
Instructed by:
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