

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

Case No: 2099/2015

In the matter between

MILES OF MEAT 2 BK

Applicant

and

FREE STATE GAMBLING AND LIQUOR AUTHORITY

1st Respondent

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

2nd Respondent

CORAM: NAIDOO, J

JUDGMENT: NAIDOO, J

HEARD ON: 6 AUGUST 2015

DELIVERED ON: 26 NOVEMBER 2015

- [1] The applicant seeks an order compelling the first and second respondents to consider the applicant's application for a registration certificate in respect of a tavern, within Twenty One (21) days of the grant of the order, or such other period as the court may deem appropriate, together with a costs order against the respondents. Mr L le R Pohl appeared for the applicant and Mr Bomela for the respondents.

- [2] The applicant applied, in writing, for a tavern registration certificate in terms of section 27 read with section 31 of the Free State Gambling and Liquor Act 6 of 2010 (the Act). It lodged such application with the Free State Gambling and Liquor Authority (the Authority), the first respondent, on 6 June 2014. The first respondent was obliged in terms of Regulation 3(2) of the Regulations (the Regulations) to the Liquor Act to submit the application to its head office within seven (7) days. Regulation 3(5) required the first respondent's head office to refer the application, within seven (7) working days of receipt of the application, to the persons envisaged in section 31(3). The latter mentioned persons are obliged to submit reports to the first respondent regarding the specified information, within the time specified in the Regulations to the Act. These persons are a liquor inspector, the South African Police Service (SAPS) and the relevant municipality.
- [3] Regulation 7 prescribes that SAPS is obliged to furnish its report to the first respondent, within (10) working days of the request for a report. The first respondent must within seven (7) days of receipt of the report from SAPS refer such report to the liquor inspector, who must in turn furnish his report to the first respondent within ten (10) working days of receipt of a request for his report. Regulation 3(4) prescribes that the municipality must furnish its report to the first respondent within thirty (30) days of receipt of the application from the first respondent. The Act and Regulations, in using the word "must", make compliance with the relevant provisions of the Act and its Regulations by the liquor inspector, SAPS and the municipality peremptory, with regard to the filing of such reports.
- [4] The applicant's attorney addressed several letters to the first respondent in an attempt to obtain the necessary reports and almost five

months later, on 27 October 2014, the first respondent forwarded to the applicant's attorney, the three reports from SAPS, the liquor inspector and the municipality. The report of the municipality indicated that its designated officer who visited the applicant's premises was ostensibly advised by the person in charge of such premises that the applicant no longer wished to proceed with the application, which should be regarded as withdrawn. The applicant's attorney reacted by denying, in a letter to the first respondent, that the applicant has advised the municipal official that he did not wish to proceed with the application or that he was withdrawing it.

- [5] Numerous letters passed between the applicant's attorney and the first respondent regarding the obtaining of the report from the municipality as it became evident that the non-filing of a proper report by the municipality was the cause of the delay in the first respondent's compliance with Regulation 8(1), which required it to provide the applicant with copies of the reports of the liquor inspector, SAPS and the municipality for comments, and the applicant's inability to comply with Regulation 8(2), which required it to provide such comments to the first respondent within fourteen (14) days. Other than addressing letters to the municipality calling for the furnishing of its report, the papers do not reflect any further steps taken by the first respondent to secure such a report to enable it to perform its duties in terms of the Liquor Act.
- [6] This application was launched on 6 May 2015. Subsequent to the launch of the application, the applicant, through its own initiative obtained a "Pro-forma Inspection Report" from the municipality and handed the report to its attorney, who, in turn, hand delivered it to the first respondent. This report from the municipality indicated that on a follow up visit to the applicant's property, everything was found to be in good

order and that it would issue a "Certificate of Acceptability". At a stage after this report was received by a functionary of the first respondent, the applicant's attorney was advised that the pro forma report from the municipality has been filed. Nothing further appears to have been done by the first respondent to secure a final report from the municipality.

The Act is clear that the reports of the liquor inspector, SAPS and the municipality are to be requested by the first respondent and are to be furnished by the respective officials to the first respondent.

- [7] The respondent in its Answering Affidavit and Heads of Argument gives an exposition of the provisions of the Constitution of South Africa relating to the powers and authority of provincial and local government structures. Reference is also made to section 41(1) of the Constitution, which regulates and provides for the relationship amongst all spheres of government and Organs of State. The provisions referred to provide essentially for the ability of the different spheres of government and Organs of State to govern themselves and make decisions relevant to their respective functions and operations, without interference from other Organs of State or spheres of government. These provisions of the Constitution are not in dispute and have limited relevance to the matter at hand, as will become evident from the discussion that follows. The first respondent also raised two points *in limine*, namely the non-joinder of the municipality and the misjoinder of the second respondent. The authority of the applicant's attorney to bring this application was also challenged in the papers, as was the fact that the attorney's professional

assistant signed the attestation of the supporting affidavit attached to the founding affidavit. These latter points were not pursued in argument before court. The applicant in any event had filed a power of attorney authorising its attorney to institute legal proceedings on its behalf. The point relating to the signature of the professional assistant was abandoned by the first respondent and requires no further mention.

- [8] I deal now with the two points *in limine* raised by the first respondent. With regard to the misjoinder of the second respondent, the starting point is to note that section 4(1) of the Liquor Act establishes the first respondent (the Authority) as a juristic person. Section 4(2) of the Act provides that the "Authority consists of the board, chief executive officer and administration". Section 5 of the Act provides that the powers and functions of the Authority are managed and controlled through the board. It is clear therefore, that the Authority requires natural persons to implement and control its business and affairs in terms of the Act. Section 6(3) of the Act provides that

"The responsible Member appoints a member of the board as the chairperson, and another member as the deputy chairperson, of the board"

Section 17 of the Act provides for the chairperson of the board to determine the time and place of the first meeting of the board, and that the time and place of subsequent meetings is to be determined by the board (presumably acting on the direction of the chairperson). The fact that the chairperson is a member of the board, indicates his responsibility for and interest in the running of the affairs of the first respondent. This responsibility includes the power conferred upon the Authority (acting through the board) in section 5(1)(b) to "consider, grant or

refuse applications in terms of this Act". The Chairperson is also responsible for signing licenses and certificates that have been approved. The reference in the first respondent's Heads of Argument to section 14(4) of the Act as the provision dealing with delegation of authority appears to be erroneous, as section 14 of the Act deals with the position of trust of board members vis-à-vis the Authority. Furthermore section 14 does not appear to have a subsection (4). In my view, the second respondent is the person who gives direction to the board in the conduct of the affairs of the first respondent, has a direct interest in these proceedings and was correctly joined in this application.

- [9] Turning to the non-joinder of the municipality, I have set out the provisions of the Act relating to the obligations of the municipality to furnish to the first respondent the required report in terms of section 31(3) of the Act read with Regulation 3(4). The municipality bears a statutory duty to furnish a report to enable another organ of state (the first respondent) to perform its duties. The municipality is not required to make a decision about its own functions and duties or has acted in a way that entitles the applicant to seek relief against the municipality in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Its failure to furnish the required report to the first respondent does not, in my view, give rise to any cause of action against it by the applicant. More importantly, the Act makes no provision for any relationship between the applicant and the municipality with regard to an application for a tavern registration certificate, and does not at all make provision for the applicant to take steps to compel the municipality to comply with the provisions of the Act.

[10] As I alluded to earlier in this judgment, the Act and Regulations thereto requires the first respondent to request the report from the municipality and makes the furnishing of such report by the municipality compulsory. The first respondent bears the onus to ensure that the time frames prescribed in the Act are adhered to, and in violation thereof to take the necessary steps to obtain the required reports. In this regard, Mr Pohl for the applicant, refers in his Heads of Argument, to the powers conferred by the Act on the first respondent to ensure the proper conduct of its business. In particular, he referred to sections 5(f), 12(4)(d) and 12 (5). Section 12(4)(d) of the Act deals with the responsibilities of the Chief Executive Officer and empowers him/her to appoint the necessary staff to enable the board to exercise its powers and perform its duties under the Act. Section 12(5) empowers the board to seek the assistance of, *inter alia*, the Provincial Government, SAPS and other Government Departments to designate or second officers of the relevant entity to assist the board in the exercise of its powers and the performance of its duties. Section 5(f) specifically empowers the board to exercise any power necessary to conduct its business, which includes attending to litigation. It is clear, therefore, that the first respondent is the entity empowered to take steps to secure the delivery of the report by the municipality. Whilst embarking on litigation to compel the municipality to furnish the required report should be the last resort, it is not prohibited. In this regard, section 41(3) of the Constitution provides that an organ of state must exhaust all other remedies before approaching a court to resolve an inter-governmental dispute. There is no indication that the first respondent exhausted such remedies or that it acted in terms of section 41(1) of the Constitution to foster harmonious interactions with and enlist the support and cooperation of senior functionaries within the municipality, for example the Municipal or Legal Manager, to secure the delivery of the report. It simply sent letters to a functionary within the

municipality the report, and then adopted a supine approach when such report was not forthcoming.

- [11] In the unreported judgment by Lekhale J in the matter of **Reinecke v The Free State Gambling and Liquor Authority and Another, case number 3402/ 2014**, emanating from this Division, and referred to by Mr Pohl, the court said at paragraph 29 that

“...the SAPS and the municipality served as the eyes and ears of the respondents. Such institutions had no direct and substantial interest in the matter necessitating their joinder in the proceedings. Their co-operation was necessary in the services that the respondents render and was, as such, of utmost importance to service delivery.” I agree. The Reinecke matter was very similar to the present application and Lekale J granted that application. It is instructive that this view was expressed by Lekale J in his well-reasoned judgment which was delivered on 30 October 2014 and dealt with the exact same points which the first respondent perseveres in taking in the current matter. The unavoidable impression is that the first respondent conducts itself in arrogant disregard for the pronouncements of this court. Two almost identical matters served before Daffue J, also of the Free State Division of the High Court on 29 October 2015. In an extensive, comprehensive and well- reasoned judgment, delivered on 19 November 2015, Daffue J holds similar views to Lekale J and myself, and is scathingly critical of the first respondent’s disregard for the rights of applicants such as the present applicant, and the high-handed and arrogant manner in which it deals with applications that are lodged with it. Daffue J granted both applications. (**Makhala Adelina Nazo v Free State Gambling and Liquor Authority +1 case number 2386/2015 and Conrad Jacques Trevor Jacobs v Free State Gambling and Liquor Authority +1 , case number 2512/2015**)

- [12] Crucial to the relief sought by the applicant is whether the delay by the respondents in considering its application was unreasonable. Given the timeframes provided for in the Act, and which I have set out above, for the furnishing of the reports envisaged by section 31(3) read with the relevant Regulations, the first respondent ought to have responded to the applicant, at least, within three months of the date on which the application was lodged with it. This was not done and the first respondent took no adequate steps to deal with this matter in accordance with the Act. There is no explanation on the papers for this delay, other than that the first respondent was awaiting the report from the municipality. As I indicated, the first respondent took none of the steps it was empowered to, in terms of the Act, to expedite this matter. In my view, the delay on the part of the first respondent in dealing with this matter is unreasonable.
- [13] As correctly indicated by the applicant, this matter falls within the ambit of PAJA, which provides that everyone has the right to just administrative action. The first respondent's failure to deal with this matter constitutes an administrative action as defined in PAJA. In another unreported decision referred to by Mr Pohl, which emanates from the North Gauteng High Court, the court (Ebersohn AJ), dealing with a similar delay in making a decision on the part of the Minister of Trade and Industry and the National Liquor Authority, found that the respondents are administrative bodies defined in PAJA and that delay fell to be dealt with in terms of PAJA. **(Rio Grande Beverage Industries (Pty) Ltd and 3 Others v The Minister of Trade and Industry NO and The National Liquor Authority case number 5303/13)**. I align myself with this view.

Section 1 of PAJA defines “administrative action” as 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 in section 1 of PAJA to mean

“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 –

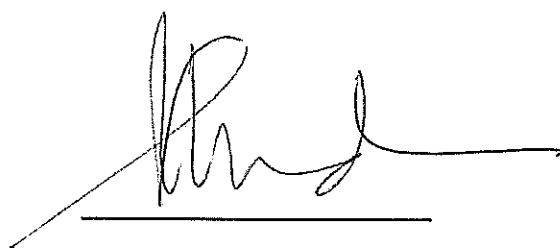
- (a)...
- (b)...
- (c)...
- (d)...
- (e)...
- (f)...
- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly”

[14] I am, therefore persuaded that the applicant has correctly brought this application in its current form and that it has made out a case for the relief it seeks. As regards costs, the manner in which the first respondent has dealt with the application filed by the applicant and the delays it has caused in the consideration of this matter, coupled with its disregard for the rights of the applicant warrant, in my view, the punitive costs order that the applicant seeks.

ORDER

[15] In the circumstances, I make the following order :

- 15.1 The first and second respondents are ordered to consider, within Twenty One (21) Days of the date of this order, the applicant's application for a registration certificate for a tavern in respect of the premises situated at Erf 16600, Heidedal (Extension 24), shop numbers 1, 4, 5 and 6, Twin City Shopping Centre, 55 Heatherdale Road, Heidedal, Bloemfontein, Free State Province, and to inform the applicant, without delay, of their decision;
- 15.2 The first respondent is ordered to pay the applicant's costs on the scale as between attorney and client.

A handwritten signature in black ink, appearing to be 'J. Naidoo', written over a horizontal line. The signature is stylized with a large initial 'J' and a long horizontal stroke extending to the right.

NAIDOO, J

On behalf of the Applicant:

Instructed by:

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Honey Attorneys

Honey Chambers

Kenneth Kaunda Road

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(Mr JM Burger)

On behalf of 1st & 2nd Respondent:

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