

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

Case No.: 3402/2014

In the matter between:

JOHANNES JACOBUS FREDERIK REINECKE

Applicant

and

FREE STATE GAMBLING AND LIQUOR
AUTHORITY

1st Respondent

THE CHAIRPERSON OF THE FREE STATE
GAMBLING AND LIQUOR AUTHORITY

2nd Respondent

CORAM:

LEKALE, J

HEARD ON:

23 OCTOBER 2014

JUDGMENT BY:

LEKALE, J

DELIVERED ON:

30 OCTOBER 2014

INTRODUCTION AND BACKGROUND:

- [1] On 7 March 2014 the applicant lodged an application for tavern registration certificate with the first respondent, as the authority responsible for, *inter alia*, managing and controlling liquor in the

Free State, in terms of section 27 read with section 31 of the Free State Gambling and Liquor Act No 6 of 2010 (the Liquor Act). The second respondent is cited in the instant proceedings as the person responsible for signing such certificates.

- [2] The first respondent, thereupon, requested the South African Police Service (SAPS) and the Mangaung Metropolitan Municipality (the municipality) to provide reports on the proposed premises and the applicant as required by section 31(3) of the Liquor Act read with applicable regulations. Second requests were duly forwarded to the said instances on 15 April 2014.
- [3] On 14 May 2014 the applicant's attorney of record directed a letter to the first respondent enquiring after the relevant reports and indicating that same were overdue as it was then two months since the application was lodged. On 16 May 2014 the first respondent responded and furnished the applicant with copy of a letter from SAPS dated 2 April 2014 indicating that the proposed premises were visited on the same date, but the premises stood empty with no one in attendance to provide the required information.
- [4] The applicant, through his attorney, eventually directed two letters to the first respondent on 13 June 2014 and 10 July 2014, *inter alia*, effectively calling upon it to be firm with the

SAPS and the municipality and, further, placing it on terms with regard to the required reports.

- [5] On 25 July 2014 the applicant launched the present application in terms of which he moves:

- “1. Dat die Eerste en Tweede respondente gelas word om die Applikant se aansoek om ‘n registrasiesertifikaat vir ‘n taverne ten opsigte van ‘n perseel geleë te Erf 13017, Winkel No. 13B, Brandwag Sentrum, H/v Nelson Mandela en Melville Rylane, Brandwag, Bloemfontein, te oorweeg binne 14 (veertien) dae na verkryging van hierdie bevel, alternatiewelik binne sodanige tydperk as wat die Agbare Hof redelik en billik mag ag, en die Applikant sonder versuim van hul beslissing in kennis stel.**
- 2. Dat die Eerste Respondent die koste van hierdie aansoek betaal op die skaal soos tussen prokureur en kliënt, alternatiewelik sodanige kostebevel wat die Agbare Hof redelik en billik mag ag.”**

- [6] On 4 August 2014 the first respondent received a letter from the municipality reporting that the building plans attached to the applicant's application were not approved and the applicant's attorney was advised accordingly on 8 August 2014 by e-mail. On 12 August 2014 the applicant furnished approved building plans and expressed his views on the requirement for the same in the circumstances of his application.

- [7] The respondents, thereafter, filed their answering papers on 11 September 2014 in terms of which they, *inter alia*, accused the applicant's attorney of abusing the court process and of deliberately misleading the court. The applicant, thereupon, filed an application in terms of Rule 6(15) of the Uniform Rules of Court (the Rules) for certain paragraphs in the opposing affidavit filed for and on behalf of the respondents to be struck out.

DISPUTE

- [8] *Ante omnia* the parties are at variance on whether or not paragraphs 3.1.6, 3.7, 4.2, 4.3, 8.1, 12.1 and 20 of the opposing affidavit filed for and on behalf of the respondents amount to scandalous and/or defamatory and/or abusive and/or irrelevant matter prejudicial to the applicant and/or his attorney which, as such, falls to be struck out in terms of Rule 6(15) of the Rules.
- [9] The parties are primarily in dispute over whether or not the respondents failed to take a decision they were obliged, as of law, to take in circumstances warranting an order compelling them to make such a decision.

A APPLICATION TO STRIKE OUT

- [10] Mr Pohl, for the applicant, painstakingly points out that the relevant paragraphs are objectionable in that they are defamatory towards the applicant's attorney, who is an experienced officer of the court, insofar as they paint him as disingenuous, intellectually dishonest and deliberately misleading to the court without any factual basis therefor.
- [11] Mr Manye eloquently submits for the respondents that the cumulative effect of the conduct of applicant's attorney, as the deponent to the founding affidavit, displays a calculated and deliberate breach of the principle of full disclosure of material facts on his part. In his view, the relevant paragraphs simply describe the relevant history of the *lis* between the parties.
- [12] The parties are correctly and effectively in agreement that for a striking out application in terms of Rule 6(15) of the Rules to succeed, the impugned words should be shown to be scandalous, vexatious or irrelevant and that the applicant would be prejudiced in his case if such words are not struck out.

(See: **Vaatz v Law Society of Namibia** 1991 (3) SA 563 (NM).)

- [13] The impugned paragraphs in the instant matter contain the following assertions:

13.1 Paragraph 3.1.6:

“I aver that the applicant’s attorney is deliberately misleading the court by implying that he was not well informed about the first respondent’s endeavours to solicit the prerequisite reports. (See annexure “C”).”

13.2 Paragraph 3.7:

“In the premises of the above I humbly ask the Honourable Court to have a deem (*sic*) view of the applicant’s attorney’s conduct and apply punitive costs order *de bonis propriis* for abuse of court process.”

13.3 Paragraph 4.2:

“I aver that applicant’s attorney has made a conscious decision not to disclose fully his dealings with the first respondent to the above Honourable Court.”

13.4 Paragraph 4.3:

“The only probable assumption I can make is that applicant’s attorney’s conduct was deliberate in withholding these facts to the court with the view only of achieving an unfair advantage from the court.”

13.5 Paragraph 8.1:

“It appears to me that the deponent’s understanding of the section displays some intellectual dishonesty if he is not outright disingenuous. He seems to suggest that the

respondents' decision be set aside while knowing full well that there has not been full compliance with the provisions of section 31(3) and 32(3)."

13.6 Paragraph 12.1:

"I aver that the applicant's attorney is being disingenuous with the court as he knows full well that the respondents' authority does not extend to the police service and the local municipality."

13.7 Paragraph 20:

"I urge the above Honourable Court to take a closer look at the applicant's legal representative's cumulative conduct in this matter."

- [14] A reading of the first six paragraphs identified by the applicant as offending conveys the message that the applicant's attorney is disingenuous, dishonest and misleading to the court. In the absence of any factual basis for such conclusions on the part of the respondents, such paragraphs are *prima facie* objectionable as being defamatory and/or abusive towards the said attorney. There exists no basis for such conclusions on the papers before the court and Mr Manye, on the court's invitation, went in vain through the papers with a fine comb in an attempt to dig out at least an iota of evidence showing that the attorney in question withheld information from the court and, further, misled it. The papers show that the founding affidavit, in fact, contains

all of the relevant information repeated in the opposing affidavit and alleged by the respondents not to have been disclosed by the applicant's attorney. I am satisfied that the impugned averments are scandalous and potentially prejudicial towards the said attorney.

- [15] The averments in paragraph 20, when looked at in isolation, create a *prima facie* impression that the deponent simply invites the court to scrutinise the cumulative conduct of the applicant's attorney without necessarily insinuating, *inter alia*, anything negative or abusive about the attorney in question. In the absence of the objectionable averments referred to above, the averments in this paragraph remain, in my view, unobjectionable but irrelevant to the primary issue raised by the applicant. The plea to the court contained in this paragraph is, in my judgment, potentially prejudicial to the attorney in question who has 24 years' experience in his profession because it suggests that there is something in his cumulative conduct which deserves the attention of the court. The fact that such an invitation to the court comes from the opposition can, in my opinion, only suggest that that which is in his conduct is negative or bad.

- [16] In my view all the impugned paragraphs fall to be struck out for being scandalous and/or irrelevant.

B APPLICATION FOR MANDAMUS

[17] Mr Pohl submits that it is clear from the papers that the respondents failed to do the necessary in order to consider the applicant's application within a reasonable time regard being had to the fact that the applicant needs to participate in the economy so as to, *inter alia*, create jobs. The SAPS and the municipality were required to submit the relevant reports within the period prescribed by the Liquor Act and the relevant regulations. Had the two instances complied, the respondents would have been in a position to consider the application long before July 2014 when the instant application was launched. The two institutions were, according to case law, the eyes and ears of the respondents and it was not for the applicant to join them in the proceedings. The respondents could have joined the SAPS and the municipality in the present application as they had warned them in second requests directed to them that they would be joined in the event of the applicant proceeding to court. The delay does not advance just administrative action as contemplated by the Constitution of the Republic of South Africa (the Constitution) according to Mr Pohl.

[18] On behalf of the respondents Mr Manye points out that the respondents did everything in their power to secure the relevant reports from the SAPS and the municipality. According to him the respondents could not have litigated against the two institutions in line with the Constitution which discourages such a move. In his view the application was not ripe for consideration until and unless the relevant reports were

available. The applicant was also to blame for the delay in that when he was made aware of the fact that the SAPS visited the proposed premises on 2 April 2014, but could not access the same, he did nothing to expedite the matter. He, further, reminds the court that the applicant had not submitted approved building plans and, as such, the application was further not competent for determination.

- [19] The parties are correctly *ad idem* that the first respondent, as the liquor authority, was obliged to request the relevant reports as the *sine qua non* for the determination of the relevant application. It is, further, not disputed by the respondents that the relevant institutions were obliged, as of law, to compile and submit the relevant reports within the periods prescribed by the Act and the applicable regulations. (See sections 31(3) and (4) of the Liquor Act.)
- [20] It is, further, correct, as deposed to for the applicant and submitted by Mr Pohl, that the Regulations prescribe that the relevant municipality should compile and submit its report within 30 (thirty) days of the request, while the SAPS is obliged to compile and submit the same within 10 (ten) working days from the date on which the application was received by them. On his part the liquor inspector has to submit his report to the first respondent within 10 (ten) working days calculated from the date on which such a report was requested. All the reports have to be submitted to the applicant for comments and the

latter, in turn, has 14 (fourteen) working days within which to reply to the same. (See Regulations 7(1) (2) (3) and Regulation 8 of the Free State Liquor Regulations.)

[21] Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), as correctly deposed for the applicant, means

“Any decision taken, or any failure to take a decision... which adversely affect the rights of any person and which has a direct, external legal effect...”

[22] As Mr Manye correctly and effectively reminds the court, spheres of Government and organs of State within each sphere are required to, *inter alia*, co-operate with one another in mutual trust and good faith by, *inter alia*, assisting and supporting one another and avoiding legal proceedings against one another. (See section 41(1)(h) of the Constitution.)

[23] A party who has direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned must, as a matter of necessity, as opposed to convenience, be joined in such proceedings.

(See: **Bowring NO v Vrededorp Properties CC and Another** 2007 (5) SA 391 (SCA) par [21].)

[24] Neither the Liquor Act nor the relevant Regulations prescribes time limits within which an application of the nature involved in

the instant matter should be determined. Such an application should, as such, be considered within a reasonable time in accordance with the common law.

[25] In my judgment the question in the present matter is whether or not, as at the date of the instant application, there was unreasonable delay on the part of the respondents in determining the relevant application regard being had to the prescribed time limits within which reports should have been furnished. Had the relevant timeframes been observed, the application would, in my view, have been ripe for determination two months, at the very most, after it was lodged on 7 March 2014. The fact that the applicant had not submitted approved building plans is, in my opinion, not relevant to the issue because it came to light after the fact of the launch of the present application as Mr Pohl correctly points out and, had the municipality kept to prescribed timeframes, it would have discovered the defect within 30 (thirty) days after it received the request from the first respondent.

[26] There was a delay on the part of the respondents in determining the application regard being had to the timeframes within which the reports should have been furnished. The onus was therefore on the respondents to explain the same. The explanation furnished by the respondents for such a delay is, with respect, wanting, unsatisfactory and unacceptable insofar 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, as Mr Pohl correctly points out.

[27] The submission by Mr Manye to the effect that the Constitution discourages interdepartmental litigation is, with respect, not relied upon by the respondents in the answering affidavit insofar as it is not their case that first respondent was helpless as it could not litigate against the institutions in question after doing everything in the first respondent's power to secure the reports. Even if that was their case in the opposing papers, 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. In my considered view litigation remains available as a measure of last resort in an appropriate case. In the instant matter the respondents did not take any steps to ensure compliance other than sending second requests to the relevant institutions.

[28] It is not even apparent from the opposing papers that after receipt of the letters of 13 June 2014 and 10 July 2014, the first respondent communicated its challenges to the applicant so as to enlighten and afford him an opportunity to make suggestions,

if any, aimed at expediting the matter. In my view, if the absence of personnel at the proposed premises was the cause of or contributed towards the delay on the part of the SAPS, one would have expected the first respondent to have, at least, pointed that out to the applicant's attorney in response to those letters. The delay was, thus, undue insofar as it is not explained.

[29] It is true, as Mr Pohl points out, 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. It is correctly not the respondents' case that the application suffers from non-joinder of the relevant instances.

[30] I am, further, convinced that the relief sought is appropriate regard being had to Mr Pohl's undisputed submissions to the effect that on 3 October 2014 the relevant reports were furnished to the applicant by the respondents and the applicant, on his part, duly replied to the same on 9 October 2014.

COSTS

[31] The applicant prays for costs on a scale as between attorney and client in both the application for striking out and the main

application. I am satisfied that the offending assertions warrant an expression of the court's displeasure by way of costs regard being had to the fact that the allegations in question were directed at an officer of the court without any justification whatsoever. Instead of explaining the delay involved, the respondents, through the deponent to the opposing affidavit, who happens to be an officer of the court himself, elected to assail the credibility of applicant's attorney.

[32] I am, further, persuaded that such an order is indicated in the main application insofar as the first respondent failed to respond to letters from the applicant's attorney placing it on terms.

ORDER

[33] Paragraphs 3.1.6, 3.7, 4.2, 4.3, 8.1, 12.1 and 20 of the opposing affidavit deposed to by Duncan Lejone Motaung are hereby struck out in terms of the provisions of Rule 6(15) of the Uniform Rules of Court with costs on the scale as between attorney and client.

[34] The respondents are directed to determine the applicant's application for a 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.

L. J. LEKALE, J

On behalf of applicant:

Adv L. Le R. Pohl
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of respondent:

Adv T.L. Manye
Instructed by:
c/o State Attorney
BLOEMFONTEIN

/spieterse