



**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

CASE NUMBER: 47571/12

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

DATE

SIGNATURE

In the matter between:

PICK N PAY RETAILERS (PTY) LTD

Applicant

And

THE GAUTENG PROVINCIAL LIQUOR BOARD

1st Respondent

**THE CHAIRPERSON OF THE GAUTENG
PROVINCIAL LIQUOR BOARD**

2nd Respondent

MAPILELA BEER DISTRIBUTORS

3rd Respondent

JUDGMENT

RATSHIBVUMO AJ:

1. The applicant brought an application to have the decision by the first respondent reviewed and set aside. An order is further sought for the court to grant the applicant the

liquor store licence, authorising it to deal in liquor pending the issue of the licence by the respondent, and ordering the respondent to issue the said licence. The application is brought in terms of sec 5, 6 and 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Only the first and the second respondents oppose the application.

2. The relevant background facts are that the applicant, a well-established chain store in South Africa, applied for a liquor store licence (the licence) for a business to be known as Pick n Pay Liquor store, Westgate, to be situated at Westgate Regional Shopping Centre, Roodepoort, on 1 October 2010. The said application was refused by the first respondent, a statutory body established in terms of section 2 of Gauteng Provincial Liquor Act 2 of 2003 (the Act). This decision was set aside following a court order granted on 2 June 2011 after a settlement between the applicant and the first respondent. In terms of the order, the respondent was to convene another meeting wherein the applicant would be afforded an opportunity to argue its case before the first respondent for the application to be considered afresh. This was done on 28 September 2011 and a decision to refuse the application again was communicated to the applicant in a letter dated 3 July 2012. It is this decision that the application seeks to have reviewed since the earlier decision was set aside.

3. It is necessary to observe the statutory provisions before unpacking the reasons advanced in refusing the licence. It was submitted that the decision of the first respondent is reviewable in terms of sections 6 (2) (d), (e) (iii), (e) (vi), (f) (ii) (cc) (f) (ii) (dd) and (h) of PAJA, which provide,

6 (2) A court or tribunal has the power to judicially review an administrative action if—
 ...
 (d) the action was materially influenced by an error of law;
 (e) the action was taken (iii) because irrelevant considerations were taken into account or relevant considerations were not considered; (vi) arbitrarily or capriciously;
 (f) the action itself—
 ...
 (ii) is not rationally connected to—
 ...
 (cc) the information before the administrator; or
 (dd) the reasons given for it by the administrator;

While the above statute authorises the court to intervene and set aside an administrative decision, the responsibility of the court is not to determine if the decision by the statutory body is right or wrong or whether it is the decision the court would have granted had the matter been before it; but rather to determine if the decision was capriciously arrived at.¹ Unlike an appeal where the appeal body determines if the decision is right or wrong, in review, the courts determine the process of arriving at such a decision.²

4. Although reference was made to the reasons given by the first respondent in refusing the first application, I do not deem it necessary to refer to such a ruling since the first respondent conceded that those proceedings be set aside which was done on 2 June 2011.
5. The reasons advanced by the first respondent are that the granting of a licence to the applicant would not be in the public interests since the possibility exist that it could cause harmful monopolistic condition to arise. Central to the decision to refuse the licence was the passage quoted by the respondent from the affidavit presented by the applicant before the first respondent in the application for the said licence where it said, “[t]he applicant encloses in the papers, a copy of a tenant list of all the tenants in the shopping centre which gives a good idea of the nature of the shopping centre. The existing liquor store in the shopping centre will be granted to the applicant. Accordingly there will not be two liquor stores in the centre, but only one.” This passage had been quoted by the third respondent in its objection against the granting of the licence; and was re-quoted in the ruling of the first respondent.
6. In its ruling, the first respondent referred to the two objections raised by the third respondent. The only objection that the first respondent gave some weight and considered in making its decision refers to the passage I quoted above made by the applicant. In summarising the objection, the first respondent wrote,

“the Objector contends that it had been operating from the same premises and to allow the Applicant’s application to succeed will effectively lead to him closing the doors... He relies on this view by virtue of the letter from the Landlord and the evidence placed before the Board

¹ See *Shidiack v Union Government (Minister of Interior)* 1912 CPD 656 and *South African Railways v Swanepoel* 1933 AD 370

² *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2006] 11 BLLR 1021 (SCA) at para 30.

to the effect that once the Applicant's application is approved, the Objector's lease will come to an end. As a matter of fact as common cause between the Applicant and the Objector, the owners of the Shopping Centres are merely awaiting the Board's decision whether the applicant will receive the licence, subsequent to which the Objector 's lease will come to an end." The following quote is from the letter sent to the applicant referred to above, "It is absolutely clear that if the Board approves the Applicant's application, the Applicant will enjoy total liquor share market within the Westgate Shopping Centre. In considering the above, cognizance must be given to the fact that the applicant has already been licenced by the Board to sell Grocers' Wine in the same Shopping Centre." In conclusion, the respondent said "[f]urthermore, bearing in mind that the Applicant, if its application were to be granted will inevitably be the only liquor outlet in the Shopping Centre, the monopolistic situation is likely to arise as barriers to entry would be too high."

7. The first respondent derives its authority from the Act as pointed out above, and the applicant submitted that the decision by the respondent was materially influenced by an error of law. Where a relevant legislation provides the grounds upon which the grant of a licence may be refused, it cannot be refused on any other ground.³ For that reason, the aspects that the Board should look at in considering applications for liquor licences are hereby revisited. Section 30 of the Act provides as follows,
 - (1) An application for a licence shall be considered by the local committee and referred to the Board with recommendations whereafter the Board shall consider the application, and it may -
 - (a) refuse the application; or
 - (b) grant the application.
 - (2) The Board shall grant an application for any licence if -
 - (a) the premises are or will, on completion, be suitable for the purposes for which they will be used under the licence;
 - (b) the applicant concerned is of good character and is otherwise fit to be the holder of the licence;
 - (c) *the granting of the licence is in the public interest;*
 - (d) *the possibility does not exist that the granting of the application may cause a harmful monopolistic condition to arise or be aggravated;* or

³ *Foxcroft v Bloemfontein Licence Certificate Board* 1921 OPD 149

(e) the premises, accommodation, equipment and facilities in respect of which the licence is to be issued are, or will be, if the applicant is licenced, in compliance with this Act and regulations.

(3) The Board shall grant an application in the case of premises not situated

- *Own emphasis.*

8. What is clear is that the Act empowers the Board to grant the licence if it is in the public interests and a possibility does not exist that the granting of a licence may not cause a harmful monopolistic condition to arise or be aggravated, a reason raised by the first respondent in refusing the application. In refusing the application the applicant relied heavily in the affidavit presented by the applicant in ruling that the granting of a licence could give rise to a monopolistic condition. What is interesting is the turnabout by the applicant's counsel in the heads of argument when she alleges that her client is clearly mistaken in making the allegation to the effect that his store would be the only one trading in liquor in the shopping centre.
9. The concern I raised with both counsel was whether the first respondent was informed by the applicant before making a decision that such allegations were not true and were made out by mistake. The reason I raised this is it would be undesirable for the courts to review decisions taken based on affidavits which are only retracted during a review, without even a confirmatory affidavit by the applicant to that effect. The applicant's counsel could not respond because she was not involved in the application before the second respondent. The defence's counsel was able to clarify the position saying the position alleged in the affidavit by the complainant remained unchanged until the ruling was made.
10. The first respondent did not know that the applicant distances himself with what he alleged in the affidavit either because of a mistake or any other reason. In answering this query the first respondent went further to hand in heads of argument prepared for the applicant at a hearing before the first respondent.⁴ The last page (Exhibit A4) is a letter wherein the Westgate Regional Shopping Centre Leasing Manager confirms in writing that the applicant has entered into a 15 year Lease Agreement with Westgate Regional Shopping Centre commencing 1 March 2011 which is conditional upon the applicant obtaining a liquor licence for the centre and that they will replace the current liquor store trading under Westgate

⁴ See Exhibit A1-4.

Hyper Liquor. The letter goes on to stipulate that upon approval of the applicant's licence, the Westgate Regional Shopping Centre will provide Westgate Hyper Liquor with one calendar month notice to vacate.

11. The importance of the letter is not to prove the agreement entered into between the applicant and Westgate Regional Shopping Centre; that could only be necessary if the court was sitting as an appeal body. The importance thereof is to show that the information provided before the court is different from that presented before the first respondent. What now emanates is how it can now be argued that the applicant was mistaken while its affidavit and the letter from Westgate Regional Shopping Centre confirm the contrary.
12. The first respondent was given evidence under oath in a form of an affidavit, but the applicant's counsel wants the court to discard that evidence irrespective of the fact that there is no other affidavit by the application wherein he rectifies the allegations contained in the affidavit. If a review is to be successful it should easily deviate from what was presented before the administrative body, especially on allegations of this magnitude which gave rise to a decision by the first respondent to refuse the application for the licence. When a party is allowed to present that which was not present before the administrative body, a satisfactory explanation may have to be given as to why the same was not presented for consideration before the said body. No explanation was given in this case.
13. In an attempt to remedy the situation the applicant's counsel argues that the first respondent was in any event aware of the true factual situation since the third respondent clarified it. But I am of a view that the first respondent was given two conflicting views, being that of the applicant and the other one from the third respondent based. The letter by Karin Burton, the Westgate Regional Shopping Centre Leasing Manager may have served as guidance on what the true version could be. It was the first respondent's discretion on whose version to believe.
14. It follows therefore that I am not persuaded that the first respondent acted outside of the authority conferred by the Act. There is no basis to hold that the decision to refuse the application for liquor store licence was taken because irrelevant considerations were taken into account or relevant considerations were not considered; that it was taken arbitrarily or

capriciously; or that the action itself is not rationally connected to the information before the first respondent; or the reasons given by it.

15. I therefore make the following order:

The application is dismissed with costs.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Date Heard: 08 May 2013

Judgment Delivered: 31 May 2013

For the Applicant: Adv. ML Pretorius
Instructed by: Couzyn, Hertzog & Horak
Pretoria

For the Respondents: Adv. D Mtsweni
Instructed by: The Sate Attorney
Pretoria