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

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

2011.12.14
DATE

SIGNATURE

CASE NUMBER: 74681/10
DATE: 14 December 2011.

YINGYING WENG	*APPLICANT*
V	
THE MINISTER OF POLICE	*1st RESPONDENT*
THE MEC FOR FINANCE AND ECONOMIC AFFAIRS, MPUMALANGA	*2nd RESPONDENT*
THE MPUMALANGA LIQUOR BOARD	*3rd RESPONDENT*

JUDGMENT

MABUSE J:

1. This matter came before me as an urgent application. I dismissed the application with costs and invited the applicant to apply for reasons for the order of dismissal. On 23 December 2010 the applicant applied for reasons in terms of Rule 49 of the Uniform Rules of Court. These are therefore the reasons for the order that the court made on 14 December 2010.

2. In this application, which was vigorously opposed by the respondents, the applicant had sought against the first respondent in particular, an order directing the first respondent, as represented by one Warrant Officer Le Roux of Bethal, to return, within 48 hours to the licensed premises of the business known as Seisho Pub and Braai Restaurant, situated at 57 Kerk Street, Erf 114 Bethal, all the items seized and removed from those premises on 2 December 2010, besides an order of costs against the respondents.

3. The applicant is Yingying Weng, an adult female who at the time the police seized and removed the articles referred to in paragraph 2 supra conducted business as Seisho Pub and Braai Restaurant at 57 Kerk Street, Erf 114 Bethal. She is of a Chinese descent and her ability to speak and understand Afrikaans and English is limited. Under those circumstances it immediately becomes patently clear that her proficiency to speak any of this country's official languages is very little. It is for that reason that in this application she relied entirely on her attorney of record, one Marius Blom ("Blom") of 835 Duncan Street, Brooklyn, Pretoria, to make depose to the founding affidavit.

4. As pointed out earlier, the applicant is a Chinese citizen having been born, according to her passport no. G32359683 issued on 8 March 2010 by the

Consulate General of the Peoples' Republic of China in Johannesburg in Fujiane, China on 16 July 1977. No evidence that she holds at the same time a South African passport was placed before court. The expiry date of her passport is 2 March 2020. Accordingly in this country the applicant was a foreigner as envisaged by the provisions of s. 1 the Immigration Act 13 of 2002 ("The Immigration Act"). Her status in this country is determined in all respects by the provisions of the Immigration Act.

5. The lawfulness of her presence in this country, this goes without saying, is dependent upon the applicant being the a holder of one of the appropriate permits issued to her by the Immigration Authorities in terms of the provisions of the said Act. As at 2 December 2010 the applicant was in this country on the strength of a Temporary Residence Permit issued to her by the Department of Home Affairs in Johannesburg on 28 April 2010. The said permit was valid up to 30 December 2010. The said permit was issued to the applicant for one purpose only and that was to take up an employment with Shui Qiang Trading. For that reason only her presence in this country was lawful and would have remained such until her permit expired or it was extended by the relevant authorities in terms of s. 10 (7) of the Act or the conditions attached to her permit were altered by the Director-General of the Department of Home Affairs in terms of s. 10 (5) of the said Act or if she applied and was granted one of the other temporary resident permits referred to in sections 11 to 23 of the Immigration Act in terms of s. 10 (6) of the said Act.

6. In view of the fact that it is common cause between the parties that, at the time of the aforementioned seizure and removal, the applicant was the holder of a Temporary Residence Permit which was valid only up to 31 December 2010 and in view furthermore of the fact that the said Temporary Residence Permit was issued to the applicant on two conditions only, the issue that the court is called upon to decide is whether the applicant's type of Temporary Residence Permit gave her any right to conduct business. The duty to prove that the said temporary residence permit allowed her to conduct business in this country lies on the applicant.

7. According to the founding affidavit, the applicant purchased the liquor licensed business known as Seisho Pub and Bar Restaurant, licensed under Restaurant Liquor Licence with reference number MPU/024498. A copy of the purchase agreement was not attached to the application. The applicant does not indicate whether the said purchase agreement was in writing or verbal nor did she indicate the date on which the said business was purchased. The salient details of the said agreement have, for one or other reasons, not been disclosed in the application. It is nonetheless not in dispute that the applicant was conducting business and further that she had purchased a liquor licence. The applicant has admitted that she had purchased the said business and furthermore that as at 2 December 2010 she was indeed conducting business in the aforesaid name of the business.

8. Following the said sale, Blom was instructed by the lessee and the applicant to give effect to the sale which involved, among others, having to apply, on behalf of the applicant, for the transfer of the liquor licence in terms of s. 113

of the Liquor Act 27 of 1989 ("Liquor Act") and having furthermore to apply in terms of s. 39 of the said Liquor Act for the appointment of a responsible person to manage the business. The lessor of the business premises was one Himie Norman Hirschowitz and the applicant was the lessee. Accordingly the applicant had leased the premises in which the business had been located for the sole purpose of conducting business on terms of the Liquor Act. S. 113 of the Liquor Act provides as follows:

"The holder of a licence (excluding a temporary liquor licence and occasional licence) may at any time make application for the transfer thereof to another person (hereinafter called the prospective holder)."

Sec. 39 of the said Act provides as follows:

"(1) A person other than a natural person shall not conduct any business under a licence unless a natural person who is not disqualified in terms of section 25 to hold a licence, is appointed by it in the prescribed manner to manage and be responsible for its business."

2. A natural person who is the holder of a licence may in the prescribed manner appoint another person who is not disqualified in terms of section 25 to hold a licence, to manage and be responsible for the business to which the first-mentioned licence relates".

Sec. 25 of the said Act provides as follows:

"(1) A licence shall not be granted to any person who –

(a) *has in the Republic or elsewhere in the preceding 10 years been sentenced for any offence to imprisonment without the option of a fine, unless the competent authority considering the application concerned is of the opinion that the offence was of such a nature that it does not imply that such a person is unsuitable to hold the licence or unless the sentence has been set aside by a competent court or such a person has received a grant of amnesty or a free pardon;*

(b) *has in the preceding 10 years been convicted of an offence in terms of this Act or the Liquor Act, 1977 (Act No. 87 of 1977), irrespective of the sentence imposed, and was within five years after the conviction again convicted of an offence in terms of this Act or the Liquor Act, 1977, and was then sentenced therefore to a fine of not less than R200 or to imprisonment without the option of a fine, unless the competent authority considering the application concerned is of the opinion that the last-mentioned offence was of such a nature that it does not imply that such a person is unsuitable to hold the licence or unless any one of the sentences has been set aside by a competent court or such a person has received a grant of amnesty or a free pardon in respect of any one of the sentences or the fine has been remitted;*

(c) *is not domiciled in the Republic;*

(d) *is an unrehabilitated insolvent;*

(e) *is a minor on the date of the consideration of the application concerned;*

(f) is the spouse of a person contemplated in paragraph (a), (b) or (d).

(2) If a person who is in terms of subsection (1) disqualified to hold a licence –

(a) has a controlling interest in a company, close corporation or trust;

(b) is a partner in a partnership; or

(c) is the main beneficiary under a trust,

a licence shall also not be granted to that company, corporation, partnership or trust.

(3) In the application of subsection (1)(a) and (b), "preceding" means preceding the date of the application concerned."

9. On 9 September 2010 Blom dispatched to the magistrate at Bethal the prescribed application form for the transfer of the said liquor licence into the names of the applicant. A copy of the relevant application has been attached to this application. According to the said application, which was essentially an application by the licence holder to transfer the liquor licence, the licence holder was one James Seloko Seisho ("James"), who conducted his licensed business under the names of Seisho Pub and Braai Restaurant. His licence was a Restaurant Liquor Licence. The applicant was the prospective holder of the said Restaurant Liquor Licence. The purpose of the said application clearly was to make the applicant the holder of the liquor licence. The said liquor licence, if granted, would have entitled the applicant, who at that stage had only a temporary residence permit and did not have any permission from the Director-General to conduct business, as she already was doing,

without a business permit having been issued to her by the Director-General in terms of s. 15 of the Act. Now Sec. 10(2) of the Act provides as follows:

"Subject to this act, upon application in the prescribed manner and on the prescribed form, one of the temporary residence permits contemplated in sections 11 to 23 may be issued to the foreigner."

According to s. 10(2) one of such temporary residence permits is a business permit issued in terms of s. 15 of the said Act. Again the duty lies on the applicant to satisfy the court that she had been issued with a business permit in terms of s. 15 of the Act. The said s. 15 provides as follows:

"15(1) A business permit may be issued by the Director General to a foreigner intending to establish or invest in, or who has established or invested in a business in the Republic in which he or she may be employed, and an appropriate permit for the duration of the business permit to the members of such foreigner's immediate family: provided that –

(a) such foreigner invest the prescribed financial or capital contribution in such business;

(b) the contribution referred to in paragraph (a) forms part of the intended book value of such business; and

(c) such foreigner had undertaken to comply with any relevant registration requirement set out in any law administered by the South African Revenue Service.

> (2) *The holder of the business permit may not conduct work other than work related to the business in respect of which the permit has been issued.*
>
> (3) *The Director General may reduce or wave the capitalisation requirements referred to in subsection 1(a) for business which are prescribed to be in the national interest, or when so requested by the Department of Trade and Industry.*
>
> (4) *The holder of the business permit shall proof to the satisfaction of the Director General that he or she has filled the requirement contemplated in subsection 1(a) within 24 months of the issuers of the permit, and within every two years thereafter.*
>
> (5) *A business permit may be issued to a foreigner for more than one entry if multiple entries into the Republic by that foreigner over a period time are necessary for that foreigner to conduct the business in question effectively."*

10. No argument was advanced on behalf of the applicant that she was the holder of a business permit issued to her in terms of s. 15 of the Act or that she had applied for one or that the Temporary Residence Permit that had been issued to her entitled her to conduct any form of business or that she had been granted permission by the Director-General to conduct liquor business or that the conditions of her Temporary Residence Permit had been altered by the relevant authorities.

11. There is a part of the application in which a prospective licence holder has to complete a number of questions. One of the questions required the applicant to indicate whether he or she was a person who was not domiciled in the Republic. The answer to this question would have been "yes" if the applicant was not domiciled in the Republic and "no", if she was domiciled in the Republic. The applicant was, at the time she applied for the transfer of the liquor licence to her, not domiciled in the Republic.

12. Under the Subheading, Financial Interest, the applicant was required to state the name, identity number and address of each person who, including the holder of the licence, had any financial interest, if the application was granted and who, including the applicant, would have such interest, if the application was granted and in each case the nature and extent of such interest. It is stated in the application that the only person with financial interest in the business, was the current licensee, in other words, James Seloko Seisho. This is misleading for should the application for transfer be approved of, Ms Yinying Weng, whose full details have been set out in part "B" of the questionnaire, would be the sole owner of the business, entitled to all the profits and liable for any losses.

13. The application was accompanied by written representations. The said written representations stated quite clearly that that was an application for the transfer of the existing Restaurant Liquor Licence. The reasons for the application was said to be the result of a normal financial transaction in terms of which the business as a going concern, including the right, title and interest in respect of the liquor licence, was sold to the applicant or

transferee. It states furthermore that Ms Weng is a temporary resident with a work permit and is currently working at Shui Qiang Trading. A work permit is normally issued in terms of the provisions of s. 19 of the Act. According to the aforementioned representation the applicant was not disqualified by the provisions of s. 25 or s. 31 of the Liquor Act 27 of 1989 from being the holder of a liquor licence. Her attorney also applied to the relevant authorities that she be appointed as a responsible person under the said licence in terms of s 39 of the said Liquor Act.

14. The applicant's application was opposed by the respondents and in doing so they relied on the affidavit of one Angelo David John Sebastian ("Sebastian"), the senior manager for business regulations, which included liquor and gambling regulations. Sebastian has noted that clearly the applicant stated that she was doing business as Seisho Pub and Braai Restaurant and in terms of the documents issued to the applicant by the Department of Home Affairs attached to her application, the applicant has submitted that she was a temporary resident in the Republic of South Africa and furthermore that she was an Asian woman born in Fujiane.

15. Blom did not deny that the applicant's temporary permit was about to expire on 30 December 2010 nor did he deny, in his replying affidavit, that he was quite aware that the only permit that the applicant possessed at the time as a foreigner in South Africa was a Temporary Residence Permit with specific purpose to be employed by Shui Qiang Trading which was a clothing store. Her attorney was also aware or should have been aware that the only permit that the applicant as a foreigner held was a temporary resident permit which

had been issued to her on condition that she took up employment as an employee at a clothing store called Shui Qiang Trading. Nowhere in the whole application was it stated on behalf of the applicant that the temporary residence permit that the applicant possessed was a business permit. Furthermore nowhere in the application was it stated that the conditions of the applicant's temporary residence permit had been altered.

16. What was the chief reason the respondents were opposed to the applicant conducting business as she did? Sebastian contended that the applicant did not have a business permit to conduct any business transaction in South Africa. The applicant had not even applied for a business permit to the relevant Department. No foreigner may conduct business in this country without a business permit or without the consent of the Director-General's permission or without the conditions of his Temporary Resident permit having been altered accordingly.

17. Without a business permit, so contended the respondents, the applicant was conducting an unlawful business for which she had been subsequently charged in terms of the provisions of s. 154(1) (a) of Act 27 of 1989 Liquor Act as amended. In reply to the aforementioned contentions by the respondents, the Blom stated that even if these allegations were true, which he denied, *"it still did not justify the actions of the Warrant Officer Le Roux in contravention with s. 22 of the Criminal Procedure Act ("the CPA") and the content of paragraph 5 is actually"* in this paragraph.

18. It is as clear as crystal that the Blom was unable to dispute the contention that the applicant did not have a business permit which entitled her to conduct business in this country. It was never the applicant's case that she had a liquor licence which entitled her, as at 2 December 2010, to conduct business that admitted she was conducting. At any rate the duty lies on the applicant to satisfy this court that indeed a business permit had been issued to her in terms of the provisions of s. 15 of the Act or that she had the permission of the Director-General to conduct business or that the conditions of her Temporary Resident Permit had been so altered as to allow her to conduct business. The applicant's case was that she was entitled to conduct the said business as she had been nominated in terms of s. 39 of the Liquor Act in respect of business and was therefore not disqualified from holding a licence in the Republic of South Africa with or without a permit.

On the contrary Blom stated in the replying affidavit the following:

"Even if the allegations contained in the paragraph are true which is denied then it still does not justify the actions of Warrant Officer Le Roux in contravention with s. 22 of the Criminal Procedure Act at the conduct of paragraph 5 is actually irrelevant to this dispute."

Accordingly in the absence of any proof by the applicant that she had been issued with a business permit as indicated above and in the face of failure by the applicant to deal specifically with the allegations that she did not have a business permit which entitled her to conduct business, this court must therefore accept the respondents' version.

19. The fact that a person may be nominated in terms of the provisions of s. 39 of the Liquor Act to manage and be responsible for a business does not mean that the provisions of the Immigration Act do not apply to the person so nominated. Accordingly any nomination made in terms of s. 39 would still be subject to the provisions of the Immigration Act.

20. It must be emphasized that the question whether or not the applicant may, as a foreigner, conduct business in this country is not an issue that may be determined in terms of the Liquor Act only. This may render other laws that affect the status of foreigners in this country nugatory and useless. The issue of the rights of foreigners to conduct business in this country must be determined in terms of the Liquor Act in conjunction with all the other relevant laws, even when such relevant laws have not been specifically referred to by the said Liquor Act. The fact that such laws have not been specifically referred to in the said Liquor Act does not in any way mean that such laws are irrelevant and should therefore be simply ignored.

21. It is abundantly clear from the authority of **Sidoro v. The Minister of Home Affairs [2001] 3 All SA 419 T** that in order for a foreigner to conduct business in this country, such a foreigner must either have temporary residence permit and a business permit or must have been granted permission by the Director-General to conduct business in South Africa. In order to be in this country Sigodi required a temporary residence permit and he had to have a business permit which allowed him to conduct business in this country. The applicant's situation is not different from Sigodi's.

22. It is accordingly not enough for Blom to state that the applicant was not disqualified by the provisions of s.25 and s. 31 of the Liquor Act to be the holder of the licence. It is the duty of any foreigner who seeks to conduct business or who seeks to remain in this country for that purpose to show that he or she holds the necessary temporary residence permit or document required under the Immigration Act. The provisions of the Immigration Act must be regarded by such foreigner as additional qualification requirements.

23. The question now is did the applicant have a permit issued to her in terms of s. 15 of the Immigration Act or did she have the permission of the Director-General or had the conditions attaching to her residence permit been altered by the Director-General (see s.10 (5) and (6) of the Immigration Act), at the time when she conducted the said business or at the time the respondents seized and removed certain items from the said business on 2 December 2010? This was the date which determined whether or not the applicant qualified in terms of the Immigration Act. It is clear that Blom is trying to mislead this court. It is not and never was the applicant's case that she challenged the said seizure and removal of certain items from the aforementioned business on the ground that when such items were seized and removed she was a person who had been appointed in terms of s. 39 (2) of the Liquor Act. Her case had always been that she was conducting business lawfully on the said premises.

24. In my view, the applicant could not conduct a lawful business if she did not have business permit. The applicant's appointment in terms of the said section 39 of the Liquor Act is still subject to the provisions of the

Immigration Act. She may not be lawfully appointed in terms of the said Act if she did not qualify in terms of the Immigration Act. Accordingly a holder of a temporary residence permit may not be appointed as a responsible person in terms of s. 39 of the Liquor Act if such appointment would constitute a contravention of any section of the Immigration Act. The liquor Authorities must be allowed to either approve or disapprove such an application for the appointment of a responsible person in terms of s. 39 of the Liquor Act. Their duty must include, among others, ensuring that such a person is legible and qualified in terms not only of the Liquor Act but also of the Immigration Act.

25. On further investigation, after raid, some members of the South African Police Force discovered that the applicant had herself bought liquor from Ultra Liquors and that she was already trading. Sebastian has attached two invoices dated 23 November 2010 both from Ultra Liquors and both issued to Ms. Weng, the applicant. It is not in dispute that Ms. Weng is the applicant in this matter. The total of the purchase price of the liquor that Ms. Weng, the applicant, purchased was R41 127.57. The applicant signed for the receipt of the liquor. According to Sebastian, the applicant bought the said liquor while she was still awaiting the result of the application to the third respondent which is proof, firstly, that at the time of the said seizure and removal she was conducting a liquor business without the necessary liquor licence and, secondly, she was conducting business in this country without the necessary permit and without any permission by the Director-General.

26. Sebastian contends furthermore that the type of licence the Liquor Board had issued was a Restaurant Liquor Licence whose main objective was to prepare and serve food on a *bona fide* basis on the licensed premises. According to him, the quantity of the liquor that the applicant had purchased and which was seized was far in excess of the needs of a restaurant liquor licence. This contention by Sebastian was not disputed by Blom.

27. The temporary residence permit which the applicant possessed was of a temporary nature and only allowed her to be employed at a particular place and for a specific period.

28. It is clear that the applicant purchased the restaurant liquor licence with the intention of conducting business. It is also clear that at the time she purchased the said licence she had planned to conduct business. It is also clear that even before the licence could be transferred to her she was already conducting business. It is not in dispute that at the time she traded, she was only armed with a Temporary Residence Permit.

29. The said Temporary Resident Permit was issued to the applicant in terms of the provisions of paragraph 10(2) of the Immigration Act 13 of 2002. The said section provided as follows:

"Subject to this Act upon application in the prescribed form one of the temporary residence permit contemplated in Sections 11 to 23 may be issued to a foreigner."

Section 10(4) provided that:

"A Temporary Resident Permit is to be issued on condition that the holder does not become a prohibited or undesirable person."

Section 10(5) states as follows:

"The Director General may, for good cause attach reasonable terms and conditions as he may prescribe to a Temporary Resident."

Section 10(6) states as follows:

"Subject to this Act a foreigner may apply to the Director General in the prescribed manner and on the prescribed form to change his or her status or the conditions attached to his or a Temporary Residence Permit or both such status and condition as the case may be, while in the Republic."

30. A Temporary Residence Permit is not a business permit. Therefore it does not entitle its holder to conduct business in the Republic of South Africa. Accordingly the members of the South African Police Force who raided the applicant's store on 2 December 2010 were correct in doing that as the applicant had contravened the law. She was found to conduct business contrary to both the Immigration Act and the Liquor Act 27 of 1989.

31. The applicant has produced no evidence to satisfy this court that she was entitled to conduct business.

32. In his replying affidavit Blom contended that the only question of law before this Court was whether the respondents seized and removed the stock legally or illegally and whether the respondents had the right to close the shop.

33. Blom contends that the s. 22 of the Criminal Procedure Act 51 of 19779"the CPA"), prescribed a warrant of seizure and did not deal with closing down a store at all. The only exception where such a warrant is not necessary is if the police officer *bona fide* believed that a warrant would be granted if he applied for it and that the time it took to obtain the warrant would defeat the very same purpose the warrant would have been required.

34. In terms of s. 143(a) of the Liquor Act a police officer is permitted and authorised to enter and inspect any part of the premises concerned or any place where any liquor is stored in accordance with the provisions of s. 51 (1) and (2) of the Liquor Act. Such police officer need not be armed with any search warrant in order to enter and search the premises nor does he have to make any prior arrangements with the licence holder. It is sufficient if he visits such premises during the times when the licence holder is authorised by the provisions of the Act to conduct his normal business. Accordingly if the purpose of the police officer is to enter and inspect any part of the premises this he can only do during the times in which the licence holder is by law authorized to sell or supply liquor.

35. According to s 143 (b) the police officer may enter and search the premises any time, if he suspects on reasonable grounds that an offence in terms of this Act is being committed on those premises or in that place. Selling liquor

without the necessary licence is such an offence that can be committed in terms of this Act. Accordingly I am satisfied that the members of the South African Police Services who raided Seisho Pub and Braai Restaurant acted correctly in terms of the provisions of s. 143 of the Liquor Act.

36. S. 22 of the CPA provides for circumstances under which articles may be seized without a search warrant. It provides as follows:

"A Police Official may without a search warrant search any person or container or premises for purposes of seizing any article referred to in s. 20-

(a)……

(b) if he or she on reasonable grounds believes.

(i) that a search warrant will be issued to him under paragraph (a) of s. 21(1) if he so applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the purpose of the search".

37. Accordingly I am satisfied that, in the circumstances of this particular case, the police acted correctly and properly within the provisions of s. 22 of the CPA. For this reason the application could not succeed. This court was not asked to look into the issu of *"closing down of the business"* and therefore it merits no further consideration.

P.M. MABUSE
JUDGE OF THE HIGH COURT

<u>Appearances</u>:

Applicant's Attorneys:	*Marius Blom & GC Germishuizen Inc.*
Applicant's Counsel:	*Adv. Pretorius*
Respondent's Attorneys:	*State Attorney*
Respondent's Counsel:	*Adv. Mokadikoa*
Date Heard:	*14 December 2010*