

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5034/2011

In the matter between:-

TARGAZEST (PTY) LTD

Applicant

and

VRYSTAAT DOBBEL EN DRANKOWERHEID First Respondent

DIE VOORSITTER VAN VRYSTAAT Second Respondent
DOBBEL EN DRANKOWERHEID

JUDGMENT BY: KRUGER, J

HEARD ON: 1 DECEMBER 2011

DELIVERED ON: 8 DECEMBER 2011

[1] The applicant requests the court to authorise it to sell liquor pending consideration of its application for a registration certificate for a restaurant by first and second respondents. The second respondent is the chairperson of the first respondent.

This is an application in terms of section 7 read with section 6(2)(g) of the Promotion of Administrative Justice Act, 3 of

2000 (“PAJA”). The interim relief which applicant seeks until its application can be considered by the first respondent, is the granting of temporary relief as contemplated in section 8(1)(e) of PAJA.

- [2] The applicant submitted an application for a restaurant registration certificate in terms of section 27 read with section 31 of the Free State Gambling and Liquor Act, 6 of 2010, (“the Act”). On 5 August 2011 the applicant’s attorney wrote a letter enquiring about the progress with the application and whether the reports of the designated police officer and the municipal and liquor inspector had been requested as prescribed by section 31(3) of the Act, stating that the matter was extremely urgent. No response was received.
- [3] On 2 November 2011 the attorney wrote another letter to the first respondent, stating that the restaurant was to open in the month of November and that a restaurant of its magnitude could not be opened without having a liquor licence. In the letter the attorney again states that he has not received the reports of the municipality, liquor inspector and designated police officer which in terms of the regulations

under the Act must be requested by the first respondent within seven days of the lodgement of the application. In his letter of 2 November the applicant's attorney states that he has been instructed to apply for a special events registration, but that first respondent decided that a special events registration certificate could not be issued in these circumstances. The respondents did not reply to that letter.

- [4] On 11 November 2011 applicant's attorney sent an e-mail to the first respondent, stating that applicant intends opening on 28 November 2011 and that applicant will have to launch a court application. No response was received from the first respondent.
- [5] On 15 November 2011 applicant's attorney sent a further e-mail to the first respondent, stating that the Liquor Board had held a meeting on 10 and 11 November 2011 and that applicant's application was not dealt with at that meeting despite the fact that first respondent had repeatedly been informed that the application is extremely urgent. No response was received.

- [6] On 18 November 2011 the applicant caused this application to be issued by the registrar and set it down for hearing on 24 November 2011. The respondents were given six days notice (the application was served on 18 November 2011), but the notice of motion stipulated no time for the noting of defence or filing of the answering affidavit.
- [7] On 23 November the respondents gave notice of their intention to oppose. On 24 November an unsigned affidavit was given to the applicant and on 25 November the answering affidavit was filed. On 24 November the matter was by agreement postponed to 1 December, the applicant to file its replying affidavit by Monday 28 November.
- [8] The answering affidavit is made by the second respondent, the chairperson of the first respondent. He takes a number of points *in limine*:
- (1) Lack of urgency;
 - (2) *Locus standi*;
 - (3) Non-joinder.
- [9] On the merits the second respondent's main argument is that

there are serious and fatal flaws in the application, which make it impossible for the first respondent to consider it:

- (i) The lodgement fee for a restaurant licence application is R2 500,00, but the applicant paid only R1 500,00.
- (ii) In the advertisement the applicant describes the premises as Erf 6721, Shop F18, Preller Square Shopping Centre, whereas in the motivation the description is Erf 7621, Shop F18, Preller Square. The Erf number differs. Respondent says the location is unknown because of this discrepancy.
- iii) Section 31(2)(b) of the Act stipulates that the application is to be accompanied by building plans of the premises as approved by the municipality. Second respondent says there is no approval stamp on the plans lodged with the application.
- iv) According to the papers filed with the registration application, the deponent to the founding affidavit is not a director of the applicant. This evokes a defence of lack of *locus standi* from the respondents.

Second respondent says all these difficulties need to be addressed since they are factors which could influence the

first respondent to refuse the application.

[10] The second respondent says they are not refusing or neglecting to hear the application, but they do not have all the required information. The respondents do not say when they requested the reports of the police, the liquor inspector and the municipality. The applicant says they only requested those reports after the court application was served on them.

[11] The second respondent says there is a backlog of licences it has to process and section 17 of the Act limits its sittings to 12 per year. He says the first respondent's first sitting only took place in October 2010 and this Board inherited an almost insurmountable backlog of liquor licence applications dating as far back as 2004. The second respondent says:

“9.4.7 Even though the Act limits the first respondent's sittings to 12 per year because of the backlog there has sometimes been sittings twice a month. A further problem is that first respondent's members are specially selected experts with other jobs who are not all from Bloemfontein and have to travel to Bloemfontein for the meetings and be paid by the tax-payers for their attendance at such meetings. Some

of them are in full-time employment of for instance the Municipality and it really takes effort and money to coordinate these meetings.

9.4.8 The applicant, as stated, has created its own urgency. If the first respondent allows one applicant to jump the queue it will only exacerbate the backlog of more than **700** applications while it is doing its utmost to try to clear the said backlog.”

[12] The second respondent attaches a list of applications heard since October 2010. 1210 matters were heard and 273 liquor applications were approved in that period. It seems as if many applications are still under consideration. The second respondent does not say how many applications have been disposed of. Second respondent says about 733 applications are awaiting consideration by the first respondent. He says there is a huge backlog and that every application forming part of that backlog is in the same position as applicant, which underlines the fact that an “opportunistic application” such as the present “serves to prejudice and delay the consideration of all the other older applications of which the applicants may not have the money to approach court as this applicant did.” He says:

“9.6.1 It is correct that the deponent Mr **Burger** frequently provided the first respondent with lists of outstanding applications on which this applicant’s application for a liquor licence also appears, such as annexure ‘D’ to the founding affidavit. I submit with respect that these lists merely serve to illustrate the point that there is a huge backlog and that every application on that backlog is in the same position as the present applicant and merely serves to underline the fact that such opportunistic applications as this one serves to prejudice and delay the consideration of all the other older applications of which the applicants may not have the money to approach court as this applicant did.”

[13] The second respondent says applicant’s application could not be dealt with at the board’s meeting on 9 November 2011 because it was “not complete”. Second respondent seems to suggest that the application is not complete because the reports of the police, municipality and liquor inspector have not been received. The second respondent does not say when the first respondent requested the reports. Second respondent says it has no power to compel the police, inspector and municipality to provide their reports.

[14] Second respondent says that applicant's attorney is well aware of the fact that there is a huge backlog. It was unrealistic of applicant's attorney to expect a licence to be granted within three months,

"13.5.1 ... unless he attempts to jump the queue as he has done with almost 30 applications this year already and I emphasized that the first respondent cannot keep giving priority to his applications simply because his clients have money to litigate, to the prejudice of all the other applicants abiding by the law and awaiting their turn.

13.5.2 The attorney should have known that it would take at least six months if he followed the ordinary route."

[15] Second respondent repeatedly refers to the lack of the reports without saying when (if at all) they were requested, and the backlog:

"13.8.1 I reiterate that the first respondent could not consider the application which is not ripe for consideration as the reports have not been submitted.

13.8.2 Secondly, the first respondent has to handle the backlog first and can not allow the applicant to simply jump the queue and be accorded preferential treatment just because he took a risk which lead to his alleged losses well knowing that he did not have a licence and that there was no guarantee that he would get one.”

[16] The second respondent says the court cannot grant the applicant leave to trade:

“15.2 I see nothing that enables the court to put itself in place of the specialised statutory body which has to consider all requirements and that would allow the court to circumvent the Act. If the court were to grant the first prayer it would be allowing a person to trade without having considered any of the consequences and without considering any possible prejudice to the public or other entities in its vicinity and would be allowing the applicant to trade without imposing any conditions which the first respondent might have imposed if it had indeed decided to grant a licence.

15.3 That would give the applicant an unfair advantage since he would for instance be allowed to trade without any activation fees and any restrictions which the first

respondent might have wanted to impose. An example would be that the first respondent can restrict trading hours because of the conditions pertaining to that specific application in that specific area in those prevailing circumstances.

16.1 The allegations are not true. The applicant is in fact asking the court for an interim interdict to allow it to trade unconditionally without a licence contrary to the Act.”

[17] The applicant’s response to the alleged defects in the application is as follows:

i) Licence fee

Formerly the fee was R1 500. The attorney overlooked the increase. The balance has been paid.

ii) Approved plans

This is an existing building where another well-known restaurant, the Cape Town Fish Market formerly traded with a restaurant liquor licence before it moved to other premises. The first respondent knows that the plans were approved, but approved plans will be lodged.

(iii) Discrepancy in erf numbers

This was a mere *lapsus calami*, a slip of the pen;

nothing turns on it, it merely indicates the nit-picking attitude of the respondents.

(iv) **Lack of locus standi**

Applicant's deponent says in the replying affidavit that the applicant was a shell company bought for the purpose of the liquor licence. According to the present records of the Companies Office, Ms Mourtzios is the only director and shareholder of the applicant, and was such at all relevant times. An outdated annexure was *per incuriam* attached to the liquor application.

[18] In response to the backlog argument Ms Pretorius, on behalf of applicant, says that the respondents must appoint more staff or have more meetings. The Act stipulates that the Board may not "meet" more times a year. The Act does not state how long a meeting can be, in days or weeks.

THE REAL REASON FOR THE DELAY

[19] From the answering affidavit it appears that the true reason for the non-consideration of the application is the huge backlog of 773 applications. The respondents apparently, after receiving this court application, went through the

restaurant application with a fine toothcomb looking for defects. Yet by virtue of the backlog, the position is simply that this application was too far back in the queue for consideration. Respondents' view is that applicant is trying to jump the queue, as the applicant's attorney apparently has done successfully 30 times during 2011. Respondents say there is nothing special about this application which requires preferential treatment.

[20] The facts relating to the application are:

- (i) On 5 August 2011 applicant applied for a restaurant registration certificate in respect of the premises at Preller Square where the Cape Town Fish Market traded with a restaurant liquor licence before moving to other premises.
- (ii) Applicant has spent R6.8 million to upgrade the premises.
- (iii) It is a known fact that restaurants without a liquor licence are hardly supported by the public.
- (iv) Applicant's restaurant will be known as Rhapsodys in terms of a franchise which already operates 10 such restaurants in South Africa and three in Africa.

- (v) It is anticipated that liquor sales will represent 40% of turnover.
- (vi) Applicant's rental per month is R57 000,00 per month, payable from 1 September 2011.
- (vii) Applicant will employ 50 employees, of which 28 have already been appointed.
- (viii) Applicant has started the training of 30 waiters and five barmen.
- (ix) If the restaurant cannot open by the end of November applicant will have to dismiss the 28 employees who have already been appointed.
- x) Even if the first respondent considers the application immediately, it will not be able to complete its consideration within two months because the necessary reports are not to hand.
- xi) Applicant will suffer irreparable harm if it cannot trade in the festive season.

INTERIM RELIEF

[21] The second respondent says the first respondent is comprised of members who are appointed by reason of their expertise. The first respondent has to follow specific procedures and consider all the factors listed in the Act and

the regulations before making an informed decision. They serve the public interest. The second respondent continues:

“9.4.20 It could never have been the intention of the legislature to allow a court on the one sided and incomplete version of an applicant to grant such applicant the right to circumvent the Act and to have his application prioritised and considered ahead of any other applications with similar financial interests, except perhaps in the most unusual and special circumstances. There is no evidence that there are any such special circumstances pertaining to this case and I submit with respect that there is no reason why the court would allow this applicant special treatment to the detriment and prejudice of all the other applicants. There is no legal basis for requiring this court without the benefit of the expertise of First Respondent’s statutorily appointed members and in the absence of the essential reports required by the Act, to allow this applicant to practise without a licence in other words without having met the requirements of the Act.”

[22] Ms Murray, for respondents, submits that approaching a

court before an administrative body has been given the opportunity to exhaust its own existing mechanisms undermines the authority of the administrative process with reference to **KOYABE AND OTHERS v MINISTER FOR HOME AFFAIRS AND OTHERS (LAWYERS FOR HUMAN RIGHTS AS AMICUS CURIAE)** 2010 (4) SA 327 (CC) par. [36].

[23] A court should be careful not to usurp the function of a statutory body, unless exceptional circumstances justify such intervention - **RUYOBEZA AND ANOTHER v MINISTER OF HOME AFFAIRS AND OTHERS** 2003 (5) SA 51 (C) at 63 E – F; **BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS** 2004 (4) SA 490 (CC) par. [46]. In the present case, the respondents say the applicant must await its turn, which could take them four years to have its application heard and decided by the first respondent. In such circumstances it would be in the interest of justice to excuse the applicant from exhausting internal remedies, as contemplated by section 7(2)(c) of PAJA.

[24] In the **RUYOBEZA**-case the applicants applied for refugee

status and the granting of asylum. The committee dealing with the application ignored the first applicant's request for three months, which the court found an unreasonably long time in the absence of an acceptable explanation (at 65 D – E). The court found that the delay would undoubtedly cause further prejudice to the first applicant (65 F – G). The court found it just and equitable as contemplated in section 172(1) of the Constitution to come to the assistance of the applicant and granted an order which was necessary to do justice between the parties as envisaged in section 8(2) of PAJA (65 F – G).

[25] Ms Murray submits, with reference to **AIROADEXPRESS (PTY) LTD v CHAIRMAN, LOCAL ROAD TRANSPORTATION BOARD, DURBAN, AND OTHERS**

1986 (2) SA 663 (A) that the court will only grant relief *pendente lite* where exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless (at 676). Ms Murray makes the point that where interim relief has been granted in the past, such interim relief was granted where the applicants already had licences and then applied for renewal. She refers to the

three cases Kotze JA refers to in the **AIROADEXPRESS-**
 case (above) at 674 – 675, namely **MORKEL AND OTHERS**
AND HAHNER JOHANNESBURG LICENSING COURT
 1914 TPD 395; **GOLOMB v PRETORIA LIQUOR**
LICENSING COURT 1917 TPD 1 and **DE FREITAS v CAPE**
LICENSING COURT 1922 CPD 350.

- [26] In **GROENKLOOF DRANKHANDELAARS (EDMS) BPK**
AND ANOTHER v LIQUOR LICENSING BOARD FOR
AREA NO 3 AND ANOTHER 1965 (1) SA 866 (C) at 870 G
 – H Corbett J (as he then was) makes the point that the
 power to extend the validity of a liquor licence is to be
 exercised by the Board. In the **GROENKLOOF**-case the
 reason why the court was asked to grant interim relief was
 because the renewal of a licence had been refused and the
 licence was due to expire within three weeks of the hearing
 by the court of an appeal against the Board's decision (866
 H).

THE CONSIDERATIONS OF THE BOARD

- [27] In considering an application the first respondent must
 consider the public interest, the suitability of the building and

area and the applicant (Lansdowne's **South African Liquor Law** 5th Edition (1983) 119 – 121).

[28] In the present case the Liquor Board previously approved a restaurant licence on the premises. *Prima facie* the public interest requirements as to the area and the premises have been satisfied. No facts have been put up by the respondents to disturb this *prima facie* view.

[29] A restaurant licence is ancillary to the main business of carrying on a restaurant providing meals. The Board should be very slow to refuse to grant a restaurant liquor licence, because such licence does not encourage people to drink more than they should - **GALANAKIS v LIQUOR LICENSING BOARD OF RHODESIA** 1974 (2) SA 27 (RA) at 31 E – G). A restaurant liquor licence reinforces a responsible drinking pattern, where liquor is used with food.

ADMINISTRATIVE LAW RIGHTS

[30] The applicant has a constitutional right to administrative action that is lawful, reasonable and procedurally fair (section 33(1) of the Constitution). The administration does not have

a free hand to behave as it wishes, in the words of Plasket J in VUMAZONKE v MEC FOR SOCIAL DEVELOPMENT, EASTERN CAPE, AND THREE SIMILAR CASES 2005 (6) SA 229 (EC) par. [11]. The administration has to establish and maintain an efficient, equitable and ethical public administration (PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS 2000 (1) SA 1 (CC) par. [133]). Systemic problems, such as the current backlog of the first respondent, must be addressed.

CONCLUSION

[31] In this case the applicant cannot be forced to follow any internal remedy, because its complaint is that the first respondent is not taking the steps it should, namely considering the application.

[32] Although this is not an application for renewal, or an application pending a review after the first respondent has considered the application, the applicant is fundamentally seeking to continue with a pre-existing service, which was the basis upon which the Appellate Division decided to grant

interim relief in **AIROADEXPRESS**, *supra* at 675 E – G). In that case in 1986 the Appellate Division held that courts have an inherent jurisdiction to grant *pendente lite* relief to avoid injustice and hardship (676 C – D). Now section 8(1)(e) of PAJA, which came into operation in 2000 specifically makes provision for interim relief.

[33] For almost a hundred years interim relief has been granted in regard to the renewal of liquor licences (**AIROADEXPRESS**, above, at 674 B – C), the earliest case referred to being that of **MORKEL**, *supra*, 1914 TPD 395). Ms Murray argues that interim relief is not granted where the application has not been considered by the Board at all. Also in **BHARSHILA INVESTMENTS CC v GAUTENG PROVINCIAL LIQUOR BOARD** (North Gauteng Case 32820/11 of 11 June 2011) Tuchten J granted leave to the applicant to trade pending the review of the Board's decision.

[34] In the **AIROADEXPRESS**-case, above, Kotze JA makes the point that the distinction between a new grant and a renewal is unimportant where the application is fundamentally the continuation of a pre-existing service (675 E – G).

[35] In the present case a license was in operation over the premises. There is no allegation of a negative influence on the area or detriment to the public interest. The only new factor is the applicant. No reason has been advanced why the applicant is not a proper entity to be granted the licence. One is here dealing with a franchise which is already operating countrywide in ten outlets. Fundamentally one is here dealing with a pre-existing licence.

[36] This is an exceptional case where interim relief should be granted:

- (i) The applicant has the right to carry on the trade, occupation or profession of its choice. That was law even before the Constitution section 22. See **ESTATE AGENTS BOARD v LEK** 1979 (3) SA 1048 (A) at 1064 C – D:

“It is, of course, clear that ordinarily a person is free to carry on the trade, calling, or profession of his choice.”

- ii) The premises were previously licensed for the

operation of a restaurant liquor licence.

- iii) The applicant applies for exactly the same type of licence which previously operated in respect of the premises, because that former restaurant licence has been removed to other premises.
- iv) Previously the well known Cape Town Fish Market operated a restaurant with a liquor licence on the premises for five or six years.
- v) The previous restaurant attracted no criticism from the respondents or any other person.
- vi) There is no evidence that there were any complaints that the trading of liquor from these premises was not in the public interest or had a negative impact on the area or the public.
- vii) Because of the previous licensing of the premises it is unlikely that applicant's application will fail.
- viii) The applicant has spent R6.8 million refurbishing and upgrading the premises.
- ix) The applicant will employ 50 staff members and at this stage already employs 28.
- x) The applicant has shown an ethos of public responsibility which is one of the objects of the Act

(section 2(1)(b)(iii)) in appointing and training a considerable number of staff, even before commencing business.

- xi) The applicant will operate as a franchise which already operates ten restaurants countrywide.
- xii) The respondents have indicated that applicant must await its turn in the queue of 773 plus applications which have not been considered.
- xiii) The applicant has a lease contract of R68 000,00 per month from 1 September 2011.
- xiv) The applicant applied in good time, on 5 August 2011, taking into account the time periods prescribed for the asking and dealing of the reports of the police, the liquor inspector and the municipality.
- xv) The first respondent has apparently consented to interim trading in 30 cases brought to court by the applicant's attorney this year.
- xvi) The respondents went through the liquor application attached to the founding affidavit with a fine toothcomb and pointed out all the defects it saw, the application has been fully considered and canvassed and all the facts are before the court.

xvii) Conditions normally attached to restaurant liquor licences are standard.

MANDAMUS

[37] In the notice of motion the applicant seeks an order that the respondents be directed to consider applicant's application within 60 days of the court order. In argument Ms Pretorius abandoned that relief, stating that applicants need would be catered for sufficiently by granting interim relief.

COSTS

[38] This application was set down as one of urgency. The respondents were given six days notice, but the notice of motion fixed no time for the filing of affidavits, as is usually done in semi-urgent applications. When the respondents arrived at court on 1 December 2011, the matter had to be postponed. Ms Pretorius, for applicant, did not persist with an argument as to the costs of the hearing on 1 December 2011 and conceded that the applicant could be ordered to pay the wasted costs of 1 December 2011.

ORDER

- [39] 1. Pending the consideration of applicant's application for a restaurant registration certificate by the first respondent, the applicant is authorised to trade as if the registration for which the applicant applied, has been approved until the first respondent has considered the application and decided upon it, and if it is approved until the registration has been issued.
2. The respondents are ordered to pay the costs of the application, except the wasted costs of the hearing on 1 December 2011, which are to be borne by the applicant.

A. KRUGER

On behalf of applicant:	Adv. L.A. Pretorius Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of first respondent:	Adv. H. Murray Instructed by: State Attorney BLOEMFONTEIN

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