

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No. 1364/2010

Heard on 16/09/2011

Delivered on 21/10/2011

In the matter between

S CARTWRIGHT T/A SOLLY'S TAVERN

APPLICANT

and

THE LIQUOR BOARD, NORTHERN CAPE

1ST RESPONDENT

CHAIRPERSON: LIQUOR BOARD, NORTHERN CAPE

2ND RESPONDENT

KOCK VENNOOTSKAP T/A SHAKES PLACE

3RD RESPONDENT

Coram: KGOMO JP et PAKATI AJ

JUDGMENT

BY THE COURT

1. The applicant, Mr Solomon Ruben Cartwright, who proposes to trade under the name and style Solly's Tavern, seeks from the Northern Cape liquor Board (1st respondent), the Chairman of the Liquor Board (2nd respondent) and Kock Vennootskap t/a Shakes Place (3rd respondent) the following relief:

- 1.1 That the decision of the Chairman of the Liquor Board to refuse to grant an on-consumption liquor licence to the applicant be reviewed and set aside;

1.2 That any party who opposes this application be ordered to pay the attendant costs; and

1.3 Further and/or alternative relief.

1.4 In the body of his deposition the applicant adds that: *“No relief is sought against Kock Vennootskap t/a Shakes Place in that it has merely being cited as an interested party in the result of this matter.”*

2. On 10 November 2008 the applicant served a notice in terms of s19 of the Liquor Act, No 27 of 1989, in terms of which notification was given of his intention to lodge an application with the Magistrate Kimberley on 05 December 2008 for a liquor licence. On 01 December 2008 the application was indeed lodged. The following day (02 December 2008) the Liquor Board (through its secretariat) received the lodged dossier. The premises designated for trading (as a tavern) is stand 31823 Soapberry Street, Jacksonville, Roodepan, Kimberley.

3. It so happened that Shakes Place (3rd respondent) had already lodged an application for an on-consumption liquor licence on 29 September 2004, (some four years earlier) in terms of the same statutory provision and at the same location and street, the only distinguishing factor being the actual premises. For Shakes Place the designated trading premises is Stand 31717. It was common cause that these designated premises were only 30 meters apart.

4. Section 19 of the Liquor Act provides that: *Any person may make application for a licence referred to in section 20*” and section 20 merely lists the “Kinds of licences”.

5. In SOLANI v LIQUOR BOARD NC & ANOTHER [2006] 4 ALL SA 628 (NC) at 638f-g (para 23) this Court remarked as follows:

“The Repeal of the Liquor Act 27 of 1989 by the Liquor Act 59 of 2003

“The Liquor Act 27 of 1989 has been repealed by the Liquor Act 59 of 2003. The latter Act was assented to on 20 April 2004. However, as far as could be established Act 59 of 2003 has not been made applicable to the Northern Cape by the MEC as contemplated by the transitional provisions of the new Law. The responsible MEC may wish to look into the matter as well, for the sake of uniformity.”

6. We are pleased to note that the Liquor Act, No 27 of 1989 has since been replaced by the Northern Cape Liquor Act, No 2 of 2008. The latter Act was assented to on 18 March 2009 but the date of its commencement was 01 April 2010. Section 54 of this Northern Cape Liquor Act provides that:

“54 Transitional arrangements

Any application for the issuing of a licence made before the commencement of this Act, is to be disposed of in terms of the Liquor Act, 1989 (Act 27 of 1989), as if that Act is still applicable, but-

- a) the Board must dispose, or further dispose of such application; and*
- b) such licence must be converted in the manner and within the period provided for in section 55.”*

7. It is for these reasons that the applications forming the subject-matter of this hearing were disposed of under the old Act (Act 27 of 1989), regard being had to the dates reflected in paras 2 and 3 hereof that predate the coming into operation of the new Act.

8. On 10 March 2009 the designated South African Police Service police officer, Superintendent Mienies, filed separate reports in terms of s140 (a) of the Liquor Act in respect of both the applicant and Shakes Place. The officer recommended the application of Shakes Place but not that of the applicant. Section 140(a) of this Act provides:

“A designated police officer shall-

(a) in respect of every prescribed application made in terms of this Act, report to the competent authority on such matters as may be prescribed or which ought, in the opinion of that officer, to be taken into consideration in respect of the application concerned.”

9. On 16/17 April 2009 the Liquor Board informed all applicants in terms of s11(3) of the Act that their applications will be considered on 11 May 2009 from 10h00 at Perm Building, First Floor Board Room, Kimberley. They were informed to make representations in person or through a legal representative (s12(2)) and may be required to give evidence or to produce any supporting document or material (s14(a).
10. On 15 May 2009 the applicant (Mr Cartwright t/a Solly’s Tavern) was informed that his application had been turned down. The letter reads;

‘APPLICATION IN TERMS OF SECTION 19 OF THE LIQOUR ACT-SOLLY’S TAVERN.

We would hereby like to inform you that the matter came before the Board where after intense deliberation and careful consideration it was decided against the granting of the licence.

There is already an existing licence just opposite the proposed one.”

The “existing licence just opposite the proposed one” of course refers to the granted licence in respect of Kock Vennootskap t/a Shakes Place (3rd respondent) which was considered at the same seating as that of the applicant but was approved.

11. The applicant was aggrieved and through his attorney of record wrote to the Chairman of the Board on 22 June 2009 as follows:

“REQUEST FOR COPIES: SOLLY’S TAVERN ERF NO 31823 SOAPBERRY STREET, ROODEPAN, KIMBERLEY

We refer to the above matter and confirm that we act for and on behalf of Mr. LJ Smith.

It is our client’s instructions that his application in terms of Section 19 of the Liquor Act for Solly’s Tavern was submitted on the 5th of December 2009. Our client confirms that his application was submitted before the application of Shakes Place.

Our client was informed by your office that an existing licence was granted just opposite his Erf (letter annexed hereto marked “A”).

It is further our client’s instructions that he intends opposing the decision of the application granted on the basis that his application was submitted first, but was not granted.

We kindly request copies of the application in terms of Section 19 of the Liquor Act – “Shakes Place”, in order for us to advise client accordingly.”

NB: “Mr LJ Smith” in the above quotation was in fact the applicant’s representative before the Liquor Board, and “(the letter annexed hereto marked “A”)” is the letter of 15 May 2009 quoted in para 10 (above).

12. On 13 July 2009 the Board responded:

“RE: REQUEST FOR COPIES: SOLLY TAVERN ERF NO. 31823 SOAPBERRY STREET ROODEPAN KIMBERLEY

Your letter dated 22nd June 2009 has reference.

According to our records, your client advised you incorrectly regarding the submission date of his application and the one of Shakes Place.

Shakes Place application was [lodged] on the 01st\10\2004 and your client on the 05th\12\2008, which obviously is more than four years before your client [lodged] his application.

As you are aware that the two are just across from each other hence the Board's decision to refuse your client's application as it was deemed not to be in the public's interest.

Find as attached, first page copies of Shake's Place and Solly's Tavern for your reference.

Based on the above we hope you will be satisfied and we will close this matter."

13. The applicant brooded on this dispute and only reacted eight months later (on 19 March 2010) in this manner:

"We now have been placed in possession of complete copies of both applications and wish to respond as follows:

- 1. Firstly we are of the respectful view that the application of Shakes Place which was allegedly submitted in 2004 prior to the submission of our client's application and which was only placed before the Liquor Board for consideration of the application on the 11th of May 2009 (nearly 5 years later!) and on the same date as the application of our client cannot in a fair and just administrative process count against our client. Surely the merits of the applications should be the deciding factor.*
- 2. Secondly you have correctly stated that the premises of Solly's Tavern and Shakes Place are just across the road from each other. We annex hereto copies of the recommendation of the SAPS (JJ Du Plessis and R Mienies), both dated the 10th of March 2009 in respect of Solly's Tavern and Shakes Place.*

We respectfully refer you to the following discrepancies:

	<i>SHAKES PLACE</i>	<i>SOLLY'S TAVERN</i>
<i>NEAREST CHURCH</i>	<i>200M</i>	<i>150M</i>
<i>NEAREST SCHOOL</i>	<i>+ - 900M</i>	<i>+ - 700M</i>
<i>OTHER (a)</i>	<i>A further tavern will not interfere with the work of the church</i>	<i>A tavern is situated 400m from the premises, as a result a further tavern is not in the interest of the community</i>
<i>OTHER (b)</i>	<i>No reason exists why the application should not be granted</i>	<i>A liquor license will possibly lead to alcohol abuse in the specific area</i>
<i>RESULT</i>	<i>Application granted</i>	<i>Application not recommended</i>

From the above it is clearly evident that for a reason unknown to us a favourable report was written for Shakes Place whilst our client's application was not recommended. Furthermore it must be noted that both letters were dated the same day and signed by the same person.

Surely if a liquor license for our client is not recommended due to possible alcohol abuse and not being in the interests of the community this very same principle applies to Shakes Place. In contrast, however, the recommendation for Shakes Place indicated that the granting of a liquor license will not interfere with the work of the church and that no reason exists why the license for Shakes Place should not be granted.

What is of further concern to us is that the members of the liquor board who considered both applications had to be aware of the different recommendations, yet still proceeded to grant the application of Shakes Place.

In the circumstances it is clear that a fair and just administrative process was not followed.

Our instructions are to request that the license of Shakes Places be reviewed and set aside and that both our client's applications and the application of Shakes Places be considered on their respective merits.

We await your reply within 14 days of this letter failing which we hold instructions to approach the Court for legal relief herein."

This review was filed with the Registrar on 24 August 2010 but the papers were only served on the respondents on 20 October 2010. Whereas nothing much revolves around this dilatoriness, same is hard to understand.

14. Based on the applicant's affidavit Mr Van Tonder's (counsel for the applicant's) heads of argument and indeed the heads of Mr Mphaga, for the Liquor Board and its Chairman, the following four grounds can be distilled as constituting the purported grounds of review on which the applicant relies.

14.1 That the police reports compiled by the designated officer contained irreconcilable inconsistencies which therefore constitute a gross irregularity by virtue of the fact that the Chairman of the Liquor Board relied on their contents for the decision the Board arrived at. S 6(2) (a) (iv) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

14.2 That the Board took into account irrelevant considerations whereas it ignored relevant considerations in favour of the applicant. S 6(2) (e) (iii).

14.3 That the Board's refusal to grant the applicant a liquor licence was unfair by reason of having been based on a police report which was patently incorrect. (s6 (2) (c)). Alternatively, it is contended, the Board's refusal was influenced materially by a mistake of law.

14.4 That the fact that the police refused to recommend applicant's application but recommended that of a competitor, the third respondent, constituted a gross irregularity. Bias was suggested.

15. In response to applicant's allegations and accusations the chairman explained

amongst other things in his answering affidavit that:

15.1 *“The First Respondent had prior to considering the Applicant’s application, adjudicated and awarded the licence application to the Third Respondent, which application preceded that of the Applicant, in that it was brought earlier than that of the Applicant. Having granted the Third Respondent’s tavern licence which was 30 metres away from the Applicant’s envisaged premises, it was deemed by the First Respondent that it would not be in the public interest to award a further licence within such close proximity.”*

15.2 *“The First Respondent also considered the recommendation of the police report that the area where the premises of both the Applicant and the Third Respondent were located, has a serious problem of alcohol abuse thus, granting of the liquor licence to the Applicant would not have been in the public interest as it would also lead to the oversupply of liquor and access thereto.”*

THE LAW

16. In PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SA: In re EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS 2000(2) SA 674 CC at paras 85 and 90 the Constitutional Court, per Chaskalson P, held:

“[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”

“[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision. This is such a case. Indeed, no rational basis for the decision was suggested. On the contrary, the President himself approached the Court urgently, with the support of the Minister of Health and the professional associations most directly affected by the Act, contending that a fundamental error had been made and that the entire regulatory structure relating to medicines and the control of medicines had as a result been rendered unworkable. In such circumstances, it would be strange indeed if a Court did not have the power to set aside a decision that is so clearly irrational.”

17. In *BEL PORTO SCHOOL GOVERNING BODY & OTHERS v PREMIER WESTERN CAPE & ANOTHER* 2002 (3) SA 265 (CC) the Constitutional Court stated at para 45:

*“[45] In support of their argument counsel for the appellants relied on the fact that the Eastern Cape Education Department, which had been faced with a similar problem, had treated the employees of the schools on the same basis as it had treated its own employees. That is irrelevant to the rationality enquiry. **The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.**”*

18. In *BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS & TOURISM & OTHERS* 2004 (7) BCLR 687 (CC) at para 44 O'Regan J made this pronouncement:

“There was some debate in the supplementary heads filed by the parties as to the precise meaning of section 6(2) (h) of PAJA which provides that if a decision “is so unreasonable that no reasonable person could have so exercised the power”, it will be reviewable. This test draws directly on the language of the well-known decision of the English Court of Appeal in Associated Provincial Picture Houses, Limited v Wednesbury Corporation. The repetitiousness of the test there established has been found to be unfortunate and confusing. As Lord Cooke commented in R v Chief Constable of Sussex, Ex parte International Trader’s Ferry Ltd:

“It seems to me unfortunate that Wednesbury and some Wednesbury phrases have become established incantations in the courts of the United Kingdom and beyond. Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, an apparently briefly-considered case, might well not be decided the same way today; and the judgment of Lord Greene MR ([1947] 2 All ER 680 at 683 and 685, [1948] 1 KB 223 at 230 and 234) twice uses the tautologous formula ‘so unreasonable that no reasonable authority could ever have come to it’. Yet judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions. When, in Secretary of State for Education and Science v Tameside Metropolitan Borough [1976] 3 All ER 665, [1977] AC 1014 the precise meaning of ‘unreasonably’ in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court, all succeeded in avoiding needless complexity. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock ([1976] 3 All ER 665 at 697, [1977] AC 1014 at 1064) as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt’. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. . . . Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him.”

In determining the proper meaning of section 6(2) (h) of PAJA in the light of the

overall constitutional obligation upon administrative decision-makers to act “reasonably”, the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of section 6(2) (h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be “reasonable”. Section 6(2) (h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.”

19. The pronouncement 55 years ago in SIMPSON v LEWIN 1956 (4) SA 486 (SR) at 487F-G and 489 A-B are particularly apposite to this case. There the Court held:

“The question of how many liquor licences should be granted in any particular area is a matter left in the Act to the discretion of the board, and there can be no precise yardstick with which to measure the correctness of the board's decision when it decides that an additional liquor licence is not warranted.”

And at 489A-B the Court continued:

“Where, therefore, a board, in the honest and diligent exercise of its discretion, is of the opinion that the interests of the public do not require an additional licence in a particular area, the High Court on appeal should be extremely slow to come to the conclusion that the opinion held by the board is unreasonable.”

CONCLUSION

20. We enquired from counsel for the applicant whether his attorneys had not made a valid point in their letter of complaint to the Board on 22 June 2009 (see para 11 above), if the facts were correct, that in the event of an equilibrium or parity between the applications of the applicant and Shakes Place the fact that his client submitted his application first may be a consideration or factor that could tip the scale in his

client's favour. He conceded the point but prevaricated when the roles were reversed, as matters in fact stand. His logic escapes because what is good for the goose does not seem to counsel to be good for the gander.

21. There is a further complicating factor. On 22 June 2009 in applicant's initial letter (quoted in para 11 hereto) the attorneys wrote that it "is further our client's instruction that he intends opposing the decision of the application granted [ie 3rd respondent's licence] on the basis that his application was submitted first, but was not granted. In addition on 19 March 2010 (see para 13 hereto), nine months later, the applicants informed the Board in the pen-ultimate paragraph that:

"Our instructions are to request that the licence of Shakes Place be reviewed and set aside and that both our client's application and the application of Shakes Place be considered on their respective merits."

22. As reflected in the Notice of Motion and in the applicant's founding affidavit no relief is sought against the owner of Shakes Place. The anomaly would arise that if we were to sustain the relief sought by the applicant the consequence would be that we are in a way imposing, willy-nilly, on the Board to grant identical liquor trading licences side by side. The alternative would be an academic exercise to be undertaken by the Board through which it has to traverse the same beaten path.
23. Jacksonville, Roodepan, is an impoverished area. The applicant says in para 6.2 of his application: *"Daar is nie enige Tavernes of ander binneverbruik dranklisensies in Jacksonville in bedryf nie."* This is not correct. It is unquestionable, as also reflected in the police report and subsequently admitted by the applicant, that: *"Die naaste tavern is +- 400 m vanaf die beoogde perseel."*

The applicant also acknowledge in his application that:

"Die meeste inwoners van Jacksonville beskik nie oor eie vervoer nie en moet gevolglik na bestaande binneverbruik drankpersele loop om drank te kan"

koop.”

The police report also states that “*drankmisbruik in hierdie omgewing baie hoog is.*” This has not been gainsaid.

24. The Liquor Board was mindful of the situation sketched above. That the abuse of liquor can be harmful to individuals and society is a known phenomenon. In *SOLANI v LIQUOR BOARD NC & ANOTHER* supra at 635e-f (para 15) this Court held:

“15 The Liquor Board of a province is a very important and responsible body which fulfils a significant function. It is empowered to exert substantial control over the liquor trade. In terms of section 6 of the Liquor Act [27 of 1989] it has to advise the MEC under whom it resorts and even furnish him/her with prescribed reports or make recommendations to the MEC for consideration arising from the application of the Act or relating to the distribution or control of liquor in the province”

25. In *S v LAWRENCE*; *S v NEGAL*; *S v SOLBERG* 1997 (4) SA 1176 (CC) at paras 54 and 55 (pp1199F-1200A) Chaskalson P held:

“[54] The excessive consumption of liquor is universally regarded as a social evil. It is linked to crime, disturbance of the public order, impairment of road safety, damage to health, and has other deleterious social and economic consequences. These are legislative facts of which this Court can take judicial cognisance.

[55] The Liquor Act describes itself as an Act '(t)o provide for control over the sale of liquor; and for matters connected therewith'. The appellants did not dispute that the excessive consumption of alcohol is harmful and that some control over the sale of intoxicating liquor is needed. This much was common cause.”

26. On an overview of the facts, the statutory provisions and the jurisprudence cited above we are satisfied that the review application is without merit and ought to be dismissed with costs.

ORDER

The decision of the Northern Cape Liquor Board taken at its hearing of 11 May 2009 dismissing the applicant's (Mr. Solomon Cartwright's) application for a liquor licence is not reviewable and is dismissed with costs.

F DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE HIGH COURT

BM PAKATI
ACTING JUDGE
NORTHERN CAPE HIGH COURT

APPEARANCE FOR APPLICANT

Adv AG van Tonder instructed by Haarhoffs Inc, Kimberley

APPEARANCE FOR FIRST AND SECOND RESPONDENTS

Adv M Mphaga instructed by Mjila & Partners, Kimberley