

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case no:	656/07
Date heard:	2008-10-31
Date delivered:	2008-11-07

In the matter of:

KURUMAN HOTEL CC

APPLICANT

versus

**THE LIQUOR BOARD,
NORTHERN CAPE PROVINCE**

1ST RESPONDENT

**CHAIRMAN OF THE LIQUOR BOARD,
NORTHERN CAPE PROVINCE**

2ND RESPONDENT

KURUMAN LIQUOR FORUM

3RD RESPONDENT

Coram: BOSIELO AJP *et* MAJIEDT J

JUDGMENT ON REVIEW

MAJIEDT J:

1. This is an application in terms of Rule 53 for the review and setting aside of the First Respondent's decision not to award a liquor licence to the Applicant.
2. Most of the facts are not in issue and can be succinctly summarized as follows:
 - 2.1 The Applicant applied for an off-consumption liquor licence

at the Kuruman Hotel, which the Applicant owns. The Applicant already holds an on-consumption liquor licence at the said hotel.

- 2.2 The Applicant's application for a liquor licence complied with all requirements set forth in the Liquor Act, 27 of 1989 (*"the Act"*) and was accepted as such by the First Respondent.
 - 2.3 The designated police officer submitted a written report in accordance with the provisions contained in s140(1) of the Act.
 - 2.4 The Third Respondent, whose members are businesspeople active in the liquor industry in Kuruman, filed an objection against the Applicant's application for a liquor licence.
 - 2.5 The Applicant was thereafter informed that his application had been declined by the First Respondent and, at the request of the Applicant, reasons were furnished by the First Respondent for its refusal to grant the liquor licence. These review proceedings followed thereafter.
3. While the application has been brought in accordance with the procedure set forth in Rule 53, it is now settled law that a Court's power to review administrative action flows from the Constitution, Act 108 of 1996, and from the Promotion of Administrative Justice Act, 3 of 2000 (*"PAJA"*). The review grounds and review powers contained in sections 131 and 132 respectively of the Act, must therefore be read and applied, subject to the aforementioned

legislation.

See:

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004(4) SA 490 (CC) at 504 F – 505 A (par [22]).

4. The Applicant has attacked the First Respondent's decision on a wide array of grounds, in reliance of the provisions contained in PAJA. In its papers, the Applicant contended that the refusal to award the licence applied for, constitutes unfair administrative action in one or more of the following respects:
 - a) That the First Respondent's decision not to award the liquor licence was biased or reasonably suspected of bias as contemplated in s6(2)(a)(iii) of PAJA;
 - b) That the decision was materially influenced by an error of law (s6(2)(d) of PAJA);
 - c) That the decision was taken for a reason not authorised by the empowering legislation and/or for an ulterior purpose or motive as contemplated in s(6)(2)(a)(i) of PAJA;
 - d) That the decision was taken in bad faith (s6(2)(e)(v) of PAJA);
 - e) That the decision was taken arbitrarily or capriciously as contemplated in s6(2)(e)(vi) of PAJA; and
 - f) That the decision is not rationally connected to the purpose for which it was taken and/or the purpose of the empowering provision as contemplated in s6(2)(f)(ii) of PAJA.

5. Properly assessed, the gravamen of the dispute which requires adjudication is whether the following grounds advanced by the First Respondent for its decision to refuse the granting of the liquor licence are good in law or whether its decision ought to be reviewed and set aside:
 - a) That the granting of the licence would not be in the public interest as contemplated in s22(2)(d)(i)(ee) of the Act; and
 - b) That the possibility exists that the granting of the application may cause a harmful monopolistic condition to arise or be aggravated in the liquor trade or a branch thereof as contemplated in s22(2)(d)(ii) of the Act.
6. The following uncontroverted facts can be gleaned *ex facie* the designated police officer's written report:
 - a) The premises in respect whereof the Applicant applied for a licence is situated in the central business district of Kuruman at the Kuruman Hotel;
 - b) There is a church and a primary school located approximately 200 metres from the premises;
 - c) The Savoy Liquor Store is located approximately 150 metres from the premises;
 - d) The Grand Liquor Store is situated approximately 30 metres from the premises;
 - e) The town of Kuruman has eight liquor stores, including the Savoy and Grand Liquor Stores;

- f) The Applicant is the owner of the Kuruman Hotel and as such possesses an on-consumption licence there;
 - g) The sole member of the Applicant is also the sole member of another close corporation which owns the abovementioned Savoy Liquor Store where there is an off-consumption licence.
7. On behalf of the Applicant, Ms Erasmus contended that the purpose of the Act is to protect the general public against harmful conditions in the liquor industry and not to protect persons with competing business interests in the liquor trade. In this regard she relied heavily on the judgment in this Division in **Asko Beleggings v Voorsitter van die Drankraad NO en Andere 1997(2) SA 57 (NC)** at 67 I – 68 C. As a general proposition this contention is sound in law. In my view, however, the facts in the **Asko Beleggings** matter are clearly distinguishable from the present. In that matter the Third Respondent was in the position that she maintained a monopoly in the liquor trade in that particular town. The Court in the **Asko Beleggings** matter pertinently stated that such a situation was untenable and the *ratio* for setting aside the decision of the chairperson of the liquor board to refuse the licence, was that the interests of healthy competition would not be served should the Third Respondent's monopoly be allowed to persist.
8. What is the “*public interest*?” This concept is not defined in the Act, but has been considered in various decisions of our courts. In the **Asko Beleggings** matter, *supra*, Steenkamp J (as he then

was) quoted with approval the following *dictum* in **Leicester Properties (Pty) Ltd v Farran 1976(1) 492 (D)** at 495 A-B where Miller J said:

*“The public interest could no doubt properly be determined with reference to the requirements **of the inhabitants of the area within which the scheme is to be carried out**; the Act obviously does not require the Court to be satisfied that the national interest would be served by the proposed reconstruction scheme.”*
(emphasis supplied).

Steenkamp J accordingly found that “*public interest*” in s22(2)(d)(i) (ee) of the Act should be interpreted to mean that the granting of the licence must be in the interest of the public of the particular town.

See:

Asko Beleggings v Voorsitter van die Drankraad, *supra*, at 67 B-F.

9. In **Simpson v Lewin 1956(4) SA 486 (SR)** Beadle J considered the meaning of s50(a)(1) in the Liquor Act of the then Southern Rhodesia, which section read as follows:

“(i) *To the question whether a licence is necessary in the interests of the public, having regard to the number of existing licences.*”

His approach in that regard is most instructive and in my view apposite in the circumstances of this case. At 488 F – 489 A he stated that:

“The whole object of the control of the issue of bottle store licences is to restrict the issue of such licences. If the test were simply ‘convenience’ of the public there would be little point in any restriction. The principle behind the Act seems to be that too many liquor licences are not a good thing in the public interest. Too many licences might encourage excessive drinking on the part of the public and might also bring in their train the evils which flow from over-trading. For these and possibly other reasons machinery is devised to restrict the issue of such licences. On the other hand, the Legislature has appreciated that the public are entitled to reasonable facilities to obtain liquor, and for this reason has entrusted to the board the function of striking a balance. The duty of the board appears to be to ensure that, while a sufficient number of licences are issued to supply the reasonable needs of the public, there are not so many issued as would likely to lead to

the abuses and evils which the restrictive provisions of the Act are designed to prevent. The object of sec. 50(a)(i) of the Act, in my view, is nothing more than to direct the attention of the board to the fact that one of its functions is to strike this balance. Where, however, this balance must be struck must always be largely a matter of opinion. The board, which normally consists of five members, is a representative one, and the principle behind the Act is that, in the absence of a positive directive from the Minister, the decision in matters such as this shall be left to the board's discretion. 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."

- 10.1 I am in respectful agreement with the approach of Steenkamp J in the **Asko Beleggings** matter and that of Beadle J in the **Simpson v Lewin** matter, namely that the interests which require consideration is that of the public in a specific area, i.e. where the liquor licence is to be granted. In the present case therefore it would be the interests of the public at Kuruman.
- 10.2 I have already alluded to the fact that it is not in issue, as reported by the designated police officer in his written report, that the sole member of the Applicant CC, Mr. Van Zyl, already holds an off-consumption licence at the Savoy Liquor Store which is approximately 150 metres from the premises and that he holds an on-consumption licence at the Kuruman Hotel itself. The fact that Mr. Van Zyl holds the licence at the Savoy Liquor Store through another Close Corporation of which he is the sole member, is neither here nor there. The fact of the matter is that within a radius of approximately 150 metres there are already two other off-consumption liquor licences in existence and at the Kuruman Hotel itself there is an on-consumption liquor licence. Kuruman already

has eight off-consumption liquor licences. I am not persuaded that the First Respondent had erred in its approach that it was not in the public interest to grant another off-consumption licence in the central business district of Kuruman. While competition is good and generally to the benefit of consumers, the negatives associated with the excessive consumption of liquor as alluded to by Beadle J in **Simpson v Lewin**, *supra*, needs to be considered properly. I am therefore not persuaded that the First Respondent's decision is reviewable on this ground.

11. I turn now to the question of a harmful monopoly. As is apparent from the aforementioned facts, the sole member of the Applicant, Mr. Van Zyl, would hold three licences within a radius of 150 metres should the First Respondent have granted his application. In my view this would be tantamount to a harmful monopolistic condition, given the fact that there are in total eight off-consumption liquor licences in Kuruman, of which Mr. Van Zyl would then hold two. More importantly, he would hold three liquor licences out of five within the immediate vicinity of the Kuruman Hotel. This can not be beneficial to the industry at all and I am of the view that the Third Respondent and its members have rightly objected to his application.
12. The concept of harmful monopolistic conditions as set forth in s22(2)(d)(ii) is not defined in the Act, nor have I been able to find any reported cases on that particular section. In view of the facts and circumstances of this case, however, I am of the view that the First Respondent was justified in its approach that the licence can not be awarded, since this would give rise to a harmful

monopolistic condition.

13. While Ms Erasmus was correct in her contention that the First Respondent had erred in its finding that a ground for the rejection of the application was that the designated police officer did not recommend the application, the application for review must fail on the grounds set forth herein above. The designated police officer had merely stated the facts which he found during his investigation and which were germane to the First Respondent's decision. No recommendation for or against the application was contained in his written report.
14. It is now well established in our law that, in exercising a discretion by balancing competing interests, i.e. the constitutional right to trade freely on the one hand and the need to regulate the issuing of liquor licences as contemplated in the Act, particularly section 22 thereof, on the other hand, the First Respondent was merely required to act reasonably by taking into account all the relevant factors and to arrive at a decision which strikes a "*reasonable equilibrium*" between such competing interests.

See in this regard:

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs, *supra* at par. [49] (515 C-D);

Head: Western Cape Education Department and Others v Governing Body, Point High School and Others 2008(5) SA 18 (SCA) at par. [10] (25 G-H).

15. For the reasons advanced herein, I am of the view that there is no

merit in the application and it should consequently be dismissed.
Costs should follow the outcome.

I would therefore issue the following order:

THE APPLICATION FOR REVIEW IS DISMISSED WITH COSTS.

**SA MAJIEDT
JUDGE**

I CONCUR AND IT IS SO ORDERED

**LO BOSIELO
ACTING JUDGE PRESIDENT**

FOR THE APPLICANT : ADV S ERASMUS
INSTRUCTED BY : ENGELSMAN MAGABANE INC

FOR THE PLAINTIFF : ADV NR RATHIDILI
INSTRUCTED BY : THE STATE ATTORNEY