waardig: Ja / Nee
Sirkuleer aan Regters: Ja /Nee

Sirkuleer aan Landdroste: Ja /Nee

IN THE HIGH COURT OF SOUTH-AFRICA (NORTHERN CAPE DIVISSION)

KIMBERLEY

CASE NO.: 655/06

DATE HEARD: 01-06-2007

DATE OF JUDGMENT:29-06-2007

In the matter between:

CAREL GERT VISAGIE	1ST APPLICANT
PETRUS JOHANNES BOTHA	2ND APPLICANT
and	
NORTHERN CAPE LIQUOR BOARD	RESPONDENT

CORAM: C.C WILLIAMS J:

J U D G M E N T

<u>WILLIAMS J:</u>

1. The applicants lodged an application for a liquor licence with the respondent on 29 September 2004, having complied with all preliminary formalities, including a recommendation for the approval of the liquor licence from the South African Police

Services.

2. After nearly twenty months with no decision on the application for the liquor licence forthcoming, the applicants instituted an application in this Court on 26 May 2006 to;

a) Review and set aside the respondents' decision and failure to take a decision regarding the applicants liquor licence application and;

b) Compel the respondent to make a decision regarding the application for the liquor licence and;

c) Costs of this application.

3. On 29 June 2006 the respondent filed a Notice of Opposition wherein it is stated that the respondent intends to oppose the cost order sought against it but abides the decision of the Court insofar as the main relief sought.

4. In the meantime, the respondent had, after service of the application to compel, started processing the application for the liquor licence and issued same on 2 August 2006.

5. Compliance with the main relief having been effected, the sole issue left to be decided is the matter of the costs of the application to compel.

I make this clear since for some or other inexplicable reason the respondent and its legal representatives seem to have laboured under the impression that the costs issue at hand relates to the costs incurred in the application to the respondent for the liquor licence and/or consequential damages.

6. Be that as it may, Mr. Mokutu who appeared for the respondent, even when alerted to the correct position, persisted with his argument that the respondent had acted reasonably and regularly in all respects and should therefore not be made to bear the costs of the application to compel.

7. The respondent filed its answering affidavit, opposing costs, on 15 September 2006 wherein the deponent thereto, Mr. Ounias Pakes Dikgetsi, the responsible MEC, makes the following relevant averments:

7.1 That it came to his knowledge during May/June 2005 that the respondent was heavily understaffed and incapable of dealing properly with the high volumes of applications for liquor licences received as well as court cases against it. As a result the respondent performed an unsatisfactory public function to the members of the public.

7.2 In an attempt to remedy the situation, the deponent dissolved the then existing Board of the respondent during September 2005 with a view to reconstitute the respondent by the end of 2005.

7.3 The respondent was however only appointed and reconstituted on 20 April 2006. the deponent attributes the delay to the fact that *". . . I was called upon to assist the preparations for the holding of Local Government Elections within the Province. As a result, the new Board of the Respondent could not be formed timeously before the end of 2005."*

7.4 That the applicants' liquor licence application was only considered subsequent to the application to compel i.e after 26 May 2006.

7.5 That the applicants' liquor licence application complied with the requirements of the relevant legislation.

8. The applicants filed a replying affidavit deposed to by their attorney of record Mr. Jacobus Michiel Burger. In his heads of argument Mr. Mokutu took the point that the replying affidavit should be ignored, being bad in law, since the deponent thereto did not have the necessary authority. During oral argument, Mr. Mokutu applied for the striking out of the replying affidavit on the basis that the affidavit was deposed to by a person with no personal knowledge of the matter, who fails to state his source of information.

9. Both the abovementioned submissions stand to be rejected for the following reasons:

9.1 In *Unlawful Occupiers, School Site v City of Johannesburg* 2005(4) SA 199(SCA), the Supreme Court of Appeal said the following on the issue of an attorney's authority at 206 G to 207 C:

> "The issue raised had been decided conclusively in the judgment of Flemming DJP in Eskom v Soweto City Council 1992 (2) SA 703 (W), which was referred to with approval by this Court in Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624I - 625A. The import of the judgment in Eskom is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court. The ratio decidendi appears from the following dicta (at 705D - H):
>
> *'The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may*

deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. . . .

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1).'

And (at 706B - D):

'If the applicant had qualms about whether the "interlocutory application" is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.'

9.2 The replying affidavit relates almost entirely to the attorney's interaction with the respondent in bringing the application for the liquor licence on behalf of the applicants and his further dealings with the respondent until the liquor licence was granted. The rest of the allegations therein relate to the form of the affidavits filed in this matter. There is to my mind no other person who could be more able, by virtue of his personal knowledge of the subject matter, to deal with the replying affidavit.

10. The applicants' attorney states *inter alia* in the replying affidavit that he had, prior to the applicants bringing the application to compel, written no fewer than 15 letters to respondent enquiring as to the status of the liquor licence application, with no obvious results.

He states further that he has 20 years experience in handling liquor licence applications for clients and that to his knowledge these applications never take longer than 3 months to be considered.

11. The respondent has to my mind clearly acted unreasonably in delaying the consideration of the applicants' liquor licence application. The reasons for the delay submitted by the respondent are at best sketchy and inadequate. It gives no acceptable explanation as to why the applicants' liquor licence application could not be finalised in the 12 months since its lodgement until the dissolution of the respondent's then Board. The reason for the delay of approximately 7 months in the appointment of a new board shows a complete disregard of the

rights of the public.

The respondent has in fact admitted that it only started processing the application for the liquor licence after receipt of the application to compel. It begs the question as to when, if ever, the applicants' liquor licence application would have been considered had it not been for the application to compel.

12. The applicants have based the present application on the provisions of the Promotion of Administrator Justice Act, Act 3 of 2000 (*"the Act"*). Section 6 of the Act has *inter alia* the following provisions:

"6 *<u>Judicial review of administrative action</u>*

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

. . . . . .

(g) the action concerned consists of a failure to take a decision;

(3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where-

a)(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision;"

Section 8 of the Act provides for the remedies in proceedings for judicial review and reads inter alia as follows:

> "8(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders-
>
> *(a) directing the taking of the decision;*
>
> *(d) as to costs.*

13. Based on my finding herein that there has been an unreasonable delay on the part of the respondent in taking the relevant decision, I can see no reason why the respondent should not be ordered to pay the costs of this application as provided for in the Act.

14. The respondent has in any event clearly conceded the merits of the application and offered no compelling reasons why the general rule, that the costs follow the event, should be departed from.

In the event it is ordered that the respondent pays the costs of the application.

C.C WILLIAMS
JUDGE

For Applicants: Adv L Le R Pohl

Haarhoffs

For respondent: Adv E Mokutu

Towell & Groenewaldt