

Reportable: Yes / No Circulate to Judges: Yes / No
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Circulate to Magistrates: Yes / No

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

Case no: 323/02

Date heard: 2003-04-23

Date delivered: 2003-05-16

In the matter of:

SUSANNA ELIZABETH GERTRUIDA HENDRIKSE

Applicant

versus

NORTHERN CAPE LIQUOR BOARD

1st Respondent

THE CHAIRMAN OF THE LIQUOR BOARD

OF THE NORTHERN CAPE

2nd Respondent

ALF LOUW 3rd Respondent

EERSTE GROEP PETISIONARISSE 4th Respondent

DR. ERWIN COETZEE 5th Respondent

KOOS LOUW 6th Respondent

TWEEDE GROEP PETISIONARISSE 7th Respondent

MEV.K. STEYN 8th Respondent

HANTAMMUNISIPALITEIT 9th Respondent

C. FRYER 10th Respondent

MNR.G. SMITH 11th Respondent

C.G. VAN STADEN 12th Respondent

MEV.ILSE LOUW 13th Respondent

ADRIAAN LOUW 14th Respondent

KERRY LOUW 15th Respondent

COR VAN NIEKERK 16th Respondent

DELARYNA VAN NIEKERK 17th Respondent

Coram: **KGOMOJP** *et* **MAJIEDTJ**

JUDGEMENT

MAJIEDTJ:

1. This is a review application in terms of the provisions contained in Uniform Rule 53. The applicant's papers are in Afrikaans, those of the respondents primarily in English

Judgement: Hendrikse vs Liquor Board

Case no. : 323/02

and both legal representatives' heads of argument were prepared in Afrikaans. Given the outcome of this matter, I deem it prudent to deliver this judgement in English.

2. The applicant seeks the review and setting aside of the first and/or second respondents' decision to refuse her application for a liquor licence in respect of premises situated at 3 Hoop Street, Calvinia (hereinafter referred to as "*the premises*"). The applicant also seeks an order that this Court issues her the licence, alternatively refer the matter back to the first respondent for the approval or reconsideration and approval of her application. The applicant also seeks an order for costs against the first and second respondents.

3. Only the first and second respondents oppose the relief sought by the applicant. The other respondents are objectors and groups of petitioners who were opposed to

the first respondent issuing the liquor store licence which the applicant had applied for.

4. The papers are voluminous, there are numerous allegations and counter allegations contained in the papers (not all of which are germane to the issues at hand) and numerous grounds for review had been advanced on behalf of the applicant by Mr. De Jager. Reduced to its core however, the issues which require adjudication are as follows:

- a. Whether Mr. Lottering, a member of the first respondent, had been disqualified by reason of bias and prejudice towards the applicant from participating in the proceedings;
- b. Whether the fact that the first respondent had been differently constituted on the two occasions when

oral evidence was heard in the course of the proceedings renders the proceedings fatally defective.

5. It is common cause on the papers (or at least not seriously disputed) that Board member Lottering, who is resident at Calvinia, had, at the request of the first respondent during early 2000 laid a formal complaint with the South African Police Services at Calvinia against the applicant with regard to her alleged illegal trading in liquor (i.e. without a valid liquor licence). It is also common cause that Mr. Lottering had thereafter accompanied members of the SAPS to the applicant's business premises and confronted her with her alleged illegal activities. Mr. Lottering subsequently participated in the proceedings regarding the applicant's application for a liquor store licence as a member of the first respondent:

- a. at both sittings where oral evidence was heard,;
 - b. during the Board's subsequent deliberations; and
 - c. in its decision not to approve the applicant's application.
6. It has been submitted on behalf of the respondents by Ms Bester that Mr. Lottering's conduct as aforesaid amounted to no more than an execution of his duties as a member of the first respondent which also fulfills a watchdog role over the illegal trading in liquor. That may be so, but the essence of the irregularity is to be found in his subsequent participation in all the proceedings of the first respondent concerning the applicant's application for a liquor licence.
7. The test for bias in judicial proceedings has been expounded in some detail in the judgements in **S v**

Roberts 1999(4) SA 915 (SCA) at 924 E - 925 C and **BTR Industries South Africa (Pty) Ltd and others v Metal and Allied Workers' Union and another 1992(2) SA 673 (A)** at 693 I-J. In the **Roberts** case Howie JA (as he then was) enunciated the test as follows:

- a. There must be a suspicion that the judicial officer might, not would, be biased.
- b. The suspicion must be that of a reasonable person in the position of the accused or litigant.
- c. The suspicion must be based on reasonable grounds.
- d. The suspicion is one which the reasonable person referred to would, not might, have.

In **President of the RSA v South African Rugby Football Union 1999(4)SA 147 (CC)** at 172 B the test of “apprehension of bias” rather than “suspicion of bias” was preferred by the Constitutional Court (compare

paragraphs (a), (b) and (c) of the test in the **Roberts** case set out hereinabove).

This approach of the Constitutional Court has now also been preferred by the Supreme Court of Appeal over the one in the **Roberts** case;

See: **Sagerv Smith 2001(3)SA 1004(SCA)** at 1009 I-J.

S v Shackell 2001(4) SA 1 (SCA) at 9 C-I.

8. The aforementioned principles apply equally to the first respondent herein as a statutory licensing authority which exercises quasi-judicial or administrative functions -- that much is now trite in our law. Moreover, section 34 of the Constitution determines that:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

9. Where, as is the case here, a member of a court or tribunal sitting with others incorrectly declines to recuse himself or herself from the hearing, that particular decision may well have the effect of fatally contaminating the ultimate decision of the court or tribunal. In the case of **President of the RSA v SA Rugby Football Union,**

supra, it was expressed as follows by the Court at 170 C:

“It follows that if a Judge incorrectly refuses to recuse herself or himself the remaining members of a panel should not sit with that Judge as the proceeding would be irregular.”

- 10.1 In this matter, on the proved or admitted facts, Board member Lottering went further than merely setting the law in motion as far as the applicant’s alleged illegal activities were concerned -- he in fact participated actively in confronting the applicant with her alleged misdemeanour and thereafter formed part of the Board which had to adjudicate on, *inter alia*, the very same applicant’s

suitability as holder of a liquor licence.

10.2 As such the principle *nemo debet esse judex in causa propria sua* is applicable -- having exhibited a substantial direct interest in the matter, Lottering became precluded from acting as a member of the Board hearing the applicant's application for a licence.

Cf.: **Markerv R (1916) 37 NLR 508** where a magistrate had been compelled to recuse himself in a case where, in a prosecution for trespassing on Crown land under the Natal Act 13 of 1874, the magistrate had issued a statutory notice to cease trespassing and had threatened a prosecution.

10.3 Moreover and in addition to the foregoing, I am of the view that there is clear proof of enmity or hostility towards the applicant on the part of Lottering. His conduct in accompanying the members of the SAPS and in

confronting the applicant is indicative of a subjective disposition towards the applicant which demonstrates enmity or, at the very least, hostility towards her.

See: **Nel v Magistrate, Sutherland 1926(1)PH F80 (C).**

See also: **S v Nellmapius (1886)2 OR 121**

10.4 Ms Bester for the respondents had great difficulty in persuading us that the conduct of Lottering did not have the effect of a real apprehension of bias which was reasonable in the circumstances on the part of the applicant. In my view Lottering's subsequent participation in the proceedings of the first respondent in the hearing of oral evidence, its deliberations and its subsequent decision against the applicant was a fatal irregularity in the proceedings.

11. Having come to the aforesaid conclusion, it is not strictly necessary to deliberate any further on the second aspect, namely whether the fact that the Board was differently constituted at the two hearings, constitutes a further ground for reviewing and setting aside the decision of the first respondent. Be that as it may, I have little doubt that

it is a fatal defect in the proceedings, inasmuch as the board member, Mr. Shai, had not been present during the first hearing when oral evidence was led. I find it difficult to comprehend how it could be said that he was able to form an independent, impartial and informed opinion with regard to the merits of the applicant's application, **sans** any participation at the first hearing. A further factor which aggravates matters, is the fact that the audio tapes which were used to record the proceedings during the two sittings when oral evidence was heard, are inaudible and incapable of transcription. Mr. Shai could therefore not even have had the benefit of listening to the audio tapes in order to familiarize himself with that part of the proceedings which he had missed.

12. While I am dealing with these inaudible tapes, I must register my extreme disquiet at the fact that this is the

third matter in succession involving the first respondent, the Northern Cape Liquor Board, where audio tapes used at a hearing of the Board have turned out to be inaudible and therefore incapable of being transcribed. This defeats the purpose completely and is a shortcoming which should be corrected without delay by the Board. It is a defect which may hold substantial potential prejudice to applicants in like applications and may even lead to the first respondent's authority being brought into disrepute since proceedings before it are not properly recorded.

13. It is clear therefore that the first respondent's decision stands to be reviewed and set aside. Mr. De Jager has correctly conceded that the most appropriate remedy in the circumstances would be to remit the matter to first respondent for its deliberation and decision afresh, and that the first respondent should do so in the absence of its

member, Mr. Lottering.

14. As far as the question of costs is concerned Ms Bester submitted that, since no application for recusal had been brought at the hearing when it became apparent that Mr. Lottering should not be participating in the proceedings, the applicant should be punished with a costs order against her, as this review application would not have been necessary. I cannot agree with that submission. Mr. Lottering himself, as well as the other members of the Board, were perfectly aware of the defect in the proceedings and should have terminated the proceedings there and then. In any event, the fact that a legal representative had omitted to raise a matter as pertinent as this at that time, cannot absolve the first respondent from its statutory duties as an administrative organ. In the premises, I am of the view that the costs should follow the

result as is normally the case.

15.1 In the premises the first respondent's decision to refuse the applicant's application for a liquor store licence in respect of the premises situated at 3 Hoop Street (erven 101-105 and 94), Calvinia, is hereby set aside.

15.2 The matter is remitted to the first respondent to consider and decide the application afresh.

15.3 It is directed that the member of the first respondent, Mr. Lukas Johannes Lottering, is barred from participating in any of the first respondent's fresh deliberations and decision in this matter.

15.4 The first and second respondents are ordered jointly and severally to pay the costs of the application.

SA MAJIEDT

JUDGE

I concur and it is so ordered.

FD KGOMO

JUDGE-PRESIDENT

FOR THE APPLICANT	:	Mr. C.J. de Jager
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FOR THE RESPONDENTS : Adv. Albé Bester

ATTORNEY FOR THE APPLICANT : Engelsman Benade & Van der Walt Inc.

ATTORNEY FOR THE RESPONDENTS: Mankoe Inc.

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