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| Verslagwaardig:             | JA/NEE |
| Sirkuleer onder Regters:    | JA/NEE |
| Sirkuleer onder Landdroste: | JA/NEE |

**IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
***(Noord-Kaapse Afdeling / Northern Cape Division)***

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**Case No:** 127/03  
**Date Heard:** 16 May 2003  
**Date Delivered:** 23 June 2003

In the case between:

**MATHEKA PETRUS LEOGANG** **1<sup>st</sup> Applicant**

**STRENGTH KOK** **2<sup>nd</sup> Applicant**

**JOSIAH LEGOBANG MODUPE** **3<sup>rd</sup> Applicant**

**GEORGE MONNAGANGADIWA THEBEGAC** **4<sup>th</sup> Applicant**

**TSHEPO NELSON LEDWABA** **5<sup>th</sup> Applicant**

**ESTHER MARIA MODUPE** **6<sup>th</sup> Applicant**

**MARENCA ESTELE VAN WYK** **7<sup>th</sup> Applicant**

**DAISY MAHIMONYANE** **8<sup>th</sup> Applicant**

**PATRICK SAMUEL KGOMO** **9<sup>th</sup> Applicant**

**JOHANNES BUYS** **10<sup>th</sup> Applicant**

**JENNY PHETLO** **11<sup>th</sup> Applicant**

**ANNA MASIETSI MODUPE** **12<sup>th</sup> Applicant**

**ISAAC ITUMELENG MEKGWE** **13<sup>TH</sup> Applicant**

**And**

THE LIQUOR BOARD OF THE  
NORTHERN CAPE PROVINCE

1<sup>st</sup> Respondent

THE CHAIRPERSON OF THE LIQUOR  
BOARD OF THE NORTHERN CAPE  
PROVINCE

2<sup>nd</sup> Respondent

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## JUDGMENT

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**TLALETSI AJ:**

### INTRODUCTION AND ORDER

1. *This is the return date of a **Rule Nisi** issued by my brother Buys, J which was brought on urgency on the 21 February 2003. The relief sought by the thirteen applicants was more or less to the following effect:*

- 1.1 *That the first respondent ("The Northern Cape Liquor Board") be interdicted or prohibited from considering or hearing the applicant's individual applications for liquor licences in public on the 26<sup>th</sup> February 2003 whether it be at the Kimberley City Hall or at the MetLife Tower Building.*

- 1.2 That the Northern Cape Liquor Board and its chairperson (the second respondent) were called upon on the return

date to furnish reasons why:-

1.2.1 The Court must not issue a Declaratory Order directing the chairperson of the Northern Cape Liquor Board not to exercise the powers or discretion vested in him in terms of Section 12(1) of the Liquor Act, Act no: 27 of 1989 arbitrarily or capriciously, but must do so judicially or legally;

*1.2.2 The Court should not make a finding that the Liquor Board and/or its chairperson erred in not having heard the applicants' application for liquor licences in **camera** or in private;*

*1.2.3 The Court should not make a finding and Order that the aforesaid applications be heard and determined in **camera** by the Liquor Board and its members.*

1.3 In addition the two respondents were called upon to furnish reasons, in the event of the Court directing that the applications may be heard and determined in public in the City Hall, why the Court should not find that:

1.3.1 The Chairperson used the powers or discretion

vested in him by Section 12(1) of the Liquor Act arbitrarily or capriciously by inviting (in addition to applicants and the designated police officer) other persons and/or bodies to make inputs in the applicants' applications.

1.3.2 Regard must only be had by the respondents to the contents of the applicants' applications as supplemented by the report of the designated police officer and if deemed necessary to the oral evidence of the applicants and/or legal argument.

1.4 That the respondents be ordered jointly and severally to pay the costs of the application.

## **BACKGROUND**

2. *A brief background is necessary to enable the matter to be understood in context. All the applicants have lodged their individual applications for the grant and issuing of the Special Liquor Licence (on consumption) by the Liquor Board, situated within the boundaries of the Sol Plaatjie Municipality (the Municipality).*
3. The applicant's notices of intention to lodge the applications were advertised in the relevant Government gazette at different

dates and were lodged with the Magistrate office. The time allowed for the submission of objections, if any, lapsed without any objection. The designated police officer submitted his report in respect of each application in which he states that the South African Police Services possess no information why the applications should not be granted.

4. During December 2002 applicants received letters from the Liquor Board which invited them to a meeting to be held to afford them an opportunity to address the Board on two issues namely: public interest and whether the applications had been advertised in the Government gazette and to provide copies of such publications.
5. *Mr. Lodewikus Jacobus Smith, a consultant who prepared and lodged the applications on behalf of all the applicants is said to have conducted an investigation at the administrative offices of the Liquor Board. He is a former designated police officer of the Liquor Board. He obtained from an undisclosed source a controversial letter marked Annexure P1 dated 31 March 2002 addressed to the "Head Liquor Affairs, Northern Cape Province" for the attention of one J K Shai. It purports to originate from the Office of the City Manager and has been signed on his behalf.*

6. In terms of the letter Ms Connie Seoposengwe, the MEC for Safety and Liaison is said to have intimated at a meeting of 8 April 2002 that Local Government has a role to play and that role players must communicate with each other in order to solve problems. Alcohol abuse was identified as a key problem. A request was made to the addressee for his Board not to issue any liquor licence on residential sites, before the City Council has complied with the procedure stipulated in the Northern Cape Planning and Development Act. A further request was made for future correspondence in respect of liquor licence applications to be referred to the Chief: Urban Planning for his attention.
7. The respondents have taken the liberty to invite Mr. Raymond Gouvea an official of the Municipality, the MEC Safety and Liaison as well as a Ward Councillor to the meeting of the Liquor Board scheduled for the 26 February 2003 to make their inputs. Section 12 of the Act authorises the Chairman of the Liquor Board to cause any person to be present who may be affected by or is concerned in the consideration of a particular matter by the Liquor Board. The Chairperson of the Liquor Board is further authorized to cause any person to be summonsed to give evidence or produce any document or any other thing which is in his possession or custody or control which in the opinion of the Chairman relate to any matter to be

considered by the Liquor Board.

8. *The public meeting of the 23<sup>rd</sup> February 2003, the decision to invite persons referred to in paragraph 7 above, as well as “Annexure P1” are the main causes that precipitated these proceedings. This application is brought in terms of Section 19(1)(a)(iii) of the Supreme Court Act, Act no. 59 of 1959, which gives the High Court, **inter alia** the authority at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation notwithstanding the fact that such person cannot claim any relief consequential upon the determination. It is a discretionary remedy which should not be exercised to decide issues which are merely abstract, academic or hypothetical in nature.*

### **POINTS IN LIMINE**

9. *The respondents are opposing the confirmation of the **Rule Nisi**. They have raised a number of points **in limine**:-*

*It is advisable to dispose of the points **in limine** at this stage because should the respondents succeed on these points it will not be necessary to deal with the merits of the application. Mr. Mphaga who appeared on behalf of both respondents submitted that the applicants’ application should have been*

*brought as a review application before two judges and not a Declaration of rights. The relief sought by the applicants, he argued, was to set aside the decision of the Chairman of the Liquor Board to convene the meeting of the Liquor Board under the pretext of a public meeting and also the decision of the Chairman of the Liquor Board to invite certain persons or bodies as witnesses to attend the hearing. He further submitted that the applicants are seeking a **mandamus** against the respondents which can only be granted after the decision of the respondents have been set aside in exceptional circumstances which circumstances have not been established in this case.*

10. *A further point argued on behalf of the respondents is that the “ruling” made by the Chairman of the Liquor Board on the form or nature which the meeting will take and the invitation of witnesses is ‘interlocutory’ and is not reviewable under the circumstances. It was furthermore contended that the entertaining of the application brought by the applicants at this stage and in its present form is tantamount to piece-meal adjudication of issues and pre-empts the respondent’s conduct of the proceedings, which may be a subject of review at a later stage.*

11. Mr. Botha on behalf of the applicants argued in response to the points **in limine** that although the effect of the relief sought by the applicants is the setting aside of the decision of the respondents not to entertain the applicants' applications **in camera**, that this is not a review application and that it is therefore not necessary to follow the procedure set out in Rule 53 of the Uniform Rules of Court. He further argued that failure to follow the procedure in Rule 53 did not in any way prejudice the respondents as they have responded to the applicant's case.

12. Kriegler AJA, as he then was, in **Jockey Club of South Africa v Forbes** 1993(1) SA 649 (A) at 661 E – G stated:

*“Counsel for the Jockey Club made much of the peremptory language in which Rule 53 is couched, for example ‘all proceedings... shall be...’ in subrule (1) and the repeated use of ‘shall’ in the succeeding subrules. Clearly that use of language cannot be overlooked, but equally clearly it is to be understood conceptually and contextually. The primary purpose of the Rule is to facilitate and regulate applications for review. On the face of it the Rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the Rule, slavishly – and pointlessly – to adhere to its provisions.”*

*The learned judge further found that in that particular instance the provisions of Rule 53 were inapposite and their invocation would merely have resulted in a fruitless exercise and the*

*wastage of time and money. He found that the Court **a quo** correctly accepted the procedure followed by the applicant under the circumstances of that application.*

13. The Act makes provision for the grounds for review and gives the High Court certain powers when dealing with review proceedings. Section 130 of the Act gives the aggrieved applicant or objector the right to request the competent authority to furnish reasons for its decision. The competent authority is obliged to comply with the said request. Regulation 91 and 92 of the Regulations promulgated in terms of Sec 182 of the Act regulate the procedure to be followed when an application for reasons for a decision is to be made and how the competent authority should comply with such request. The reasons furnished are to be the same as in respect of a judgment in a Magistrate's Court in civil proceedings.

14. *Section 131 of the Act affords an opportunity to the applicant or objector who feels aggrieved by a decision made by a competent authority in connection with his application or objection to apply for the review of such a decision. Section 134 affords the applicant an opportunity to appeal against the decision of the competent authority. Similarly the procedure to be followed is that followed in appeals against a judgment of a Magistrate's Court in civil proceedings. However the present case is to be distinguished from the **Jockey Club of South Africa** case (supra) in that **in casu** specific reference to review proceedings is made by legislation.*

15. *I agree with the submission that the applicants should not be denied the choice of approaching the Court for a Declaratory Order. However this is not a case that warrant the Court to exercise its discretionary powers provided for in Section 19(1) (a)(iii) of the Supreme Court Act, Act No. 59 of 1959 in favour of the applicants. To argue that because the applicants have in any case made out a proper case in terms of Section 131(a) and that they are therefore entitled to the relief sought in my view holds no water. It is accepted that where review proceedings are not open to a party aggrieved by a decision of a quasi-judicial body or that party decides not to review those proceedings it is in certain circumstances competent for him/her to apply for a declaration of rights. See: **Bayat and Others v Hansa & Another** 1955(3) SA 547 (N) at 551 G and 552 A. However to allow this approach under these circumstances would encourage applications being brought to this Court for determination of issues from incomplete proceedings yet to be decided by the tribunal.*
16. *The next argument presented on behalf of the applicants is that the decision taken by the Liquor Board in terms of section 12(1) of the Act is a procedural ruling which cannot be the subject of review or appeal. In this regard reference is made to: **Guardian National Insurance Co Ltd v Searle NO** 1999(3)*

SA 296 A. Howie JA had the following to say at page 301 B – C:

*“As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time. Where this approach has been relaxed it has been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes. First, they were final in effect and not susceptible of alteration by the court of first instance. Secondly, they were definitive of the rights of the parties, for example, because they granted definite and distinct relief. Thirdly, they had the effect of disposing of at least a substantial portion of the relief claimed.”*

17. I am bound by this principle. The difficulty with the present application is that the cause of complaint seem to be premature. The consideration of the merits of this application will be tantamount to piecemeal disposal of the applications of the liquor licences. The respondents have not yet exercised their discretion in terms of the Act and the Court should be loath to interfere as it may lead to pre-empting the outcome of the application. It cannot be said that the applicants have suffered or will suffer any prejudice as the outcome of the entire applications is yet to be decided.

18. *The next aspect is the nature of the Orders sought by the applicants. It is common cause that the urgency of the matter is now history. The Court is requested in clause 1.2.1 of the **Rule Nisi** (see paragraph 1 above) to order the Chairman of the Liquor Board not to exercise his discretion in terms of Section 12(1) of the Act arbitrarily but to do so lawfully. This is a trite principle of the Law and needs no determination by this Court.*
19. *To order at this stage whether or not the meeting should be held in **camera** and give directions as regards what is or not to be considered by the respondents when dealing with the applicants applications would in my view be an unwarranted interference with the discretionary powers granted to the respondents by the Legislature. It is common cause that the respondents have the authority to decide on the nature of the meeting and further to invite or subpoena persons or witnesses to its meetings. To grant the order sought by the applicants will be usurping the powers of the respondents.*
20. *Section 22(2)(b) directs that the Chairman of the Liquor Board shall not grant an application for a special licence unless exceptional circumstances warrant the granting of the licence. To determine whether exceptional circumstances exist or not is*

*the prerogative of the Liquor Board and it is in my view not advisable to intercede when the process is still in progress. The Court will be in a better position to make a proper determination when the process is completed but only if the need arises. Most of the grievances raised by the applicants are issues that should be raised with the respondents at the appropriate forum. For the above reasons the points in **limine** should be upheld.*

21. It is therefore not necessary to consider the submissions on the merits. What remains is the issue of costs. There is no justification for the departure from the general rule that costs should follow the result. The applicants took a risk by approaching this Court with this application prematurely and in the current format and should therefore bear the consequences.

**I therefore make the following Order:**

- 1. *The point in limine is upheld. The Rule Nisi is discharged.***
- 2. The applicants are ordered to pay the costs occasioned by this application.**

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**L P TLALETSI**

**ACTING JUDGE**

**ADV. BOTHA FOR APPLICANTS: INSTRUCTED BY MESSRS.  
ENGELSMAN, BENADE & VAN DER WALT**

**ADV. MPHAGA FOR RESPONDENTS: INSTRUCTED BY  
MESSRS. MJILA & PARTNERS**