

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 064786/2024

Reportable: No
Of interest to other Judges: No
Revised: No


SIGNATURE

Date:

In the matter between:

ALPINE HOUSE CC AND 47 OTHERS

Applicants

and

THE GAUTENG PROVINCIAL LIQUOR BOARD

Respondent

JUDGEMENT

MOOKI J

- 1 The applicants are commercial enterprises that applied for liquor licences from the respondent. They applied on different dates, some having applied in 2023 whilst others applied in 2024. The respondent has not determined the applications.
- 2 They seek the following orders: that the respondent finalise the pending applications within 30 days of the date of the order and communicate the decision to the applicants; that the applicants be authorised to trade in liquor as if their licences had been issued, pending the final decision in respect of each application. The applicants also seek relief that, should an application be refused, that the applicant which application had been refused be authorised to continue trading pending finalisation of a review of a refusal of the application.
- 3 The respondent filed its opposing affidavit late. The applicants elected to proceed without filing a reply. The court indulged the late filing of the answering affidavit.
- 4 The applicants brought the application “in order to be able to trade in liquor, which is a basic right...” They say that they “... planned their affairs in accordance with the reasonable time laps expectation inherent in the

provisions of the empowering legislation and that the respondent was frustrating their rights in terms of sections 22 and 33 of the Constitution.

5 The applicants contend that establishing a new liquor licensed business entails entering into a lease agreement “before any steps in respect of the application can be taken as the application for the liquor licence cannot be considered in vacuo. It must be in respect of specific premises and this means that such an Applicant must enter into an agreement and pay rental.”

6 The applicants formulated the bases to their relief as follows. They seek:

“4.1 [...];

4.2 Mandamus orders in terms of the Common Law and/or Section 6(2)(g) of the Promotion of Administrative Justice Act, Act 3 of 2000 – PAJA – directing the Respondent to finalise the respective applications of the Applicants for Liquor Licenses (sic) pending before the Respondent, as is more fully detailed below;

4.3 Interim relief in terms of the Common Law and/or a positive interdict in terms of Section 8(1)(e) of the Promotion of Administrative Justice Act, Act 3 of 2000 – PAJA – authorising each of them respectively to trade in their businesses as if the licence/licences each of them applied for, was granted and issued, until it is in fact so granted and issued, or, if declined, until such time as the Applicant could have taken such refusal on review before the Honourable Court provided that such review must be issued within one

month from the date on which the refusal was communicated and received in writing by such Applicant;

4.4 Costs of this application in the event of opposition and costs of counsel on Scale C of the High Court Rules;

4.5 [...];

7 The applicants' motivated their application as follows:

“7.5 In in all of these cases a decision is overdue, and in all cases, the applications have not been finalised, thus entitling the Applicants to approach the Honourable Court in terms of section 6 (2) (g) of PAJA, as well as the Common Law, for a mandamus order;”

8 The application is said to concern protection of constitutional rights of the citizen in terms of section 33 of the Constitution.

9 The applicants made their case under the heading “INTERIM RELIEF” as follows:

“I respectfully submit that interim relief can be applied for by an applicant in accordance with the Common Law, alternatively, the Honourable Court has a wide discretion in terms of section 8 (1) (e) of PAJA to grant a positive interdict as interim relief;”

- 10 The applicants say the court can grant them interim relief, authorising them to trade in their relevant businesses as if their licences as applied for were granted and issued until their applications are in fact finalised. The applicants contend that the court has granted similar relief in the past.
- 11 The applicants launched their application after the respondent failed to meet its self-imposed dateline to consider applications by 31 May 2024, following a notice to that effect by the respondent on 23 April 2024. The respondent had previously advised that the application process should not take more than 3 months absent objections.
- 12 The applicants say they meet all requirements for the grant of licences applied for. They say there were no objections to the applications. The applicants rely on the following as the bases for having met the requirements for the grant of interim relief.
- 13 They contend that a licence is “a right”, not a privilege, to which each of the applicants is entitled. They say that they planned their new ventures against the timelines advised by the Respondent as to when an application will be determined from the date of submission. They say the respondent’s failure to determine the applications has caused them and their staff financial harm. The financial harm is said to be caused by the applicants having to pay rent, salaries and for the refurbishment of premises where alcohol is to be sold.
- 14 The respondent opposes the application on various bases. The procedural objection includes that the applicants did not serve their application at the

Office of the State Attorney. The substantive objections include that the applicants have not made-out a case for the court to make a decision that should ordinarily be made by the respondent. The respondent also point out that there is to be an inspection in respect of some applications. The respondent further pointed out that the local offices of the respondent have not sent all the applications to the respondent.

- 15 The respondent also contends that it (i.e. the respondent) considers various factors before granting or refusing an application, such as proximity of the premises to a school or a church. The respondent further contends that the checklist by local officers made by those officers on receipt of applications does not mean that a licence must be granted.

Analysis

- 16 The applicants did not enclose their respective applications for the licences applied for. That is because, according to them, including those documents would result in this application amounting to more than 500 pages.
- 17 The foundation for the relief sought by the applicants is unclear. The applicants invoke sections 22 and 33 of the Constitution, sections 6(2)(g) and 8(1)(e) of PAJA, a mandamus in terms of the common law; and the grant of interim relief. The applicants reference all these causes of action as the bases for the relief being sought.
- 18 It is not competent for the applicants to rely on section 22 or section 33 as causes of action. A litigant may not rely directly on a provision of the

Constitution where there is a law that addresses the relief being sought.¹

PAJA is the embodiment of section 33 of the Constitution.

19 The applicants do not seek judicial review in relation to the conduct of the respondent. This was confirmed by their counsel during the hearing. The court cannot act in terms of section 6(2)(g) and section 8(1)(e) of PAJA other than in review proceedings.

20 A *mandamus* requires a litigant satisfy the requirements of a final interdict.² The applicants disavowed reliance on a *mandamus* during the hearing.

21 The applicants, ultimately, made their case on the basis that they met the requirements for interim relief by way of an interim interdict. This is clear from their contention that:

21.1 They have prima facie (if not a clear) right,

21.2 They are suffering harm or stand to suffer harm,

21.3 They have no other remedy, and

21.4 That the balance of convenience favour granting the relief being sought.

22 The applicants pleaded inelegantly. I am doubtful that the applicants can seek relief based on the requirements for an interim interdict:

¹ That is in terms of the principle of subsidiarity. See, for example: *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015), para 53

² *Lipschitz v Watrus N.O.* 1980 (1) SA 662 (T)

An interim interdict is by definition a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.³

- 23 There is no “main dispute” that awaits resolution as between the applicants and the respondent. There is no status quo to preserve or to restore.
- 24 The applicants seek relief that they be allowed to “trade in liquor.” They say being able to trade in liquor is “a basic right.” The “right” contended for by the applicants is unclear to the court.
- 25 The Constitutional Court found that “[...] *Liquor is a potentially harmful substance. It is part of the normal environment in which the liquor trade is conducted in South Africa, and other countries, for selling to be regulated by licences which control not only the right to sell liquor but also where, when and what liquor may be sold. [...]*”⁴
- 26 It is inconceivable that trading in liquor can constitute “a right,” let alone “a basic right,” as opposed to an indulgence given to a person by a public authority. The notion of “a right” is on the verge of losing content, with the result that no distinction is being made between that which, properly considered, is “a right,” as opposed to some other indulgence which a public authority may grant a person. It is unnecessary to embark on Hohfeld’s analysis of rights in this judgement.

³ *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002 (2) SA 715 (CC), para 49

⁴ *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), para 36

- 27 The applicants say their applications comply with the requirements of the empowering legislation. They say, among others, that more than three months had lapsed since the making of the respective applications. They also contend that there are no objections to their applications.
- 28 The licences applied for would allow the applicants to trade in liquor. The applications entail different types of licences. The record shows that the licences applied for include those for 'grocers wine', 'restaurant', 'discretionary', 'liquor store', 'micro manufacturer', and 'hotel.'
- 29 The applicants do not detail the differences in the licences applied for. It cannot be prudent for a court to authorise a person to trade in liquor without the court having considered the type of licence being authorised, albeit pending a decision by the relevant public authority. I agree with the contention on behalf of the respondent that the court is not suited to grant the relief sought. The respondent points out, for example, that the respondent is to examine the supporting documents and, in some instances, an inspection in loco is to be conducted.
- 30 The applicants referred to the checklist by local officers when the applicants lodged their applications as further support that their applications meet all requirements for the grant of a licence. A positive checklist does not mean that a licence will be granted. The wording of the document by the local officials expressly records that the checklist is an acknowledgement of receipt of documents in support of an application. The checklist does not mean that the supporting documents had been checked for conformity with the requirements for the grant of a licence.

- 31 I disagree that a positive checklist supports the applicants' contention that their applications are "compliant" and, on that basis, the court is to grant the relief being sought. I consider that there is no information before court for the court to grant the relief sought by the applicants, even if the court were competent to do so.
- 32 I consider that the relief sought, on the facts, is extreme and that the court is not competent to grant such relief. The relief sought contemplates the court stepping onto the shoes of the respondent. There is no ground for the court to do so. The court does not have the applications. The decision whether to grant a licence to sell liquor is not a judicial function. It is a decision that is informed by policy considerations as detailed in the relevant statute. The mere fact of the applicants, according to them, having lodged all the relevant formal information and the absence of objections, does not mean that a court is competent to order the applicants to trade in liquor "as if" the respondent had granted their applications.
- 33 Licences are granted subject to specific and general conditions.⁵ The applicants do not say anything about the conditions under which the court is to allow the applicants to trade in liquor "as if" their applications have been granted. The court is not competent to issue an order that the applicants trade in liquor "as if" the applicants' applications had been granted, with no conditions on how such trade is to be effected. The court itself is not competent to determine what such conditions may be.

⁵ See, for example, section 37 of the Gauteng Liquor Act, 2 of 2003

- 34 An application for a licence must be accompanied by a written motivation in support of the licence applied for.⁶ The court does not have this information.
- 35 I do not consider it necessary, given the view that I take about the propriety of the relief as formulated, for the court to address the claim that the applicants will suffer harm absent being allowed to trade as if their applications had been granted. The applicants say, for example, that they had to have concluded lease agreements before they could apply for a licence.
- 36 There is no requirement that an applicant must have a lease agreement when applying for a licence. Section 35(1), (4) of the Act contemplates an application being made before securing premises. A licence will be issued once premises are secured.
- 37 There is no support, in any event, that the applicants have concluded lease agreements and that the applicants pay rent. There is no support that the first applicant pays a rental of R16 000.00 per month. The same applies to the contentions on salaries. There is no support that the twentieth applicant employs six staff who receive a salary in the amount of R1,1 million per month.
- 38 The applicants seek to be allowed to trade should an application be refused, on the basis that an applicant whose application had been refused would

⁶ Section 23(1) (a) – (j), Gauteng Liquor Act, 2 of 2003

then launch review proceedings. This would amount to an automatic right of review where an application is refused.

39 PAJA prescribes the exhaustion of internal remedies before a court may exercise its powers of review.⁷ The court is not competent to grant a built-in right to review.

40 I make the following order:

40.1 The application is urgent.

40.2 The application is dismissed.

40.3 The applicants are ordered to pay costs.

[REDACTED]

O MOOKI

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearance:

On behalf of the Applicants:

Mr F W Botes SC

Instructed by:

Marius Blom Inc.

**On behalf of the Respondent:
Respondents**

Mr N Makhani

Instructed by:

The State Attorney (Pretoria)

Date of Hearing: 2 July 2024

Date of Judgement: 11 July 2024

⁷ Section 7(2)(a), read with section 7(2)(c); dealing with internal remedies