



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

**CASE NO: EL 599/2024
OF INTEREST**

In the matter between

SHOPRITE SUPERMARKETS (PTY) LTD

Applicant

and

EASTERN CAPE LIQUOR BOARD

First Respondent

NTOMBEKHAYA M NTSHEBE N.O.

Second Respondent

**BUFFALO CITY METROPOLITAN
MUNICIPALITY**

Third Respondent

MASSMART WHOLESALE (PTY) LTD

Fourth Respondent

**JUDGMENT IN RESPECT OF OPPOSED
APPLICATION FOR JUDICIAL REVIEW**

HARTLE J

[1] Shoprite (the applicant) in its notice of motion seeks an order reviewing and setting aside a decision of the Eastern Cape liquor board (*“the Board”*) to refuse Massmart’s (the fourth respondent) application to transfer its off-consumption registration certificate to it, a related declarator going to the interpretation of section 22 (2)(d)(i) of the Eastern Cape Liquor Act, No. 10 of 2003 (*“the impugned provision”* and *“the Liquor Act”* respectively), and a mandamus directing the second respondent, the responsible ward councilor of Ward 37, Qonce, to comply with the section’s provisions, alternatively an order directing the Board itself to take steps to ensure that she, or the current ward councilor, complies with the section’s provisions within a period of 10 days.

[2] When the matter was argued before this court the applicant asked only for the alternative mandamus relief consistent with its stance that it is the Board that bears the obligation indicated by the impugned provision, to ensure compliance by the responsible ward committee with its statutory obligation to consult with the community and to submit the contemplated report where the latter fails to bring his/her part.

[3] The provisions of section 22 of the Liquor Act are engaged *inter alia* when an application is made to the provincial Board by the registered certificate holder for the transfer of his/her/its registration certificate to another person.¹ A *“person”*, by definition, includes an entity such as Shoprite.

[4] The registered certificate holder here concerned is Massmart. Shoprite acquired certain parts of Massmart’s liquor business including a liquor store operated from premises on Buffalo Road in Qonce. The National Liquor authority transferred Massmart’s liquor distribution license to Shoprite. The Board, however, declined to accede to Massmart’s formal request at provincial level to transfer the off-consumption registration certificate, application for which was made on behalf of both Shoprite and

¹ The Liquor Act does not suggest in what situations a transfer is competent but there is no dispute in the present instance that Massmart was entitled to apply to the Board for the transfer of its certificate to Shoprite.

Massmart by a consultant on 13 January 2023 (*“the transfer application”*).² It is this decision which is the subject of the review relief sought.

[5] The manner in which such a *transfer* is to be applied for and effected is in accordance with the same procedure and consultation process as provided for in section 22 (2) of the Act for an application for registration in the first place.³

[6] The full section’s provisions, with its inherent idiosyncrasies, is quoted below:

“22 Application procedure for registration, transfer or removal

(1) An application for a category of registration contemplated in section 20(a), (b), (c), (d) or (e) must-

(a) be made to the board;

(b) subject to subsection (13) and section 71(2), be made in terms of this section.⁴

(2) An application for registration contemplated in subsection (1) must be made by submitting to the board-

(a) the prescribed form properly completed and specifying-

² The 2004 Regulations promulgated under the Liquor Act (per PN 17 of 28 May 2004, as amended by PN 35 of 2005) sanction the assistance of a consultant who is referenced therein as *“the person who prepared the application”*. The application was lodged by *Snowstorm One Trading (Pty) Ltd t/a EC Viljoen Liquor Licence Consultants*. Ms. Erika Cornelia Viljoen filed an affidavit confirming as much and more particularly that she gave notice to the Board and the ward committee councilor of the application for transfer of Massmart’s holding certificate to Shoprite.

³ Whilst the 2004 Regulations provide for three distinct applications for registration, transfer or removal, each with their own separate requirements and forms, section 22 lumps them all together. Lest there may be any imagination applied that less municipal oversight or community consultation is necessary where the applicant for transfer was successful in its application for registration in the first place on the basis that the ward committee thought it suitable to permit the sale of liquor from the premises in question, section 22 (14) (a) makes it plain that the procedure and consultation process provided for in respect of applications for registration are also applicable to a transfer or a removal. Such oversight measures and consultation afresh would certainly be valuable from the point of view that a transfer application introduces a new person as the holder of the right to sell liquor albeit from previously approved and therefore registered premises. See in this regard the observation of the court in *Skillfull 1059 (Pty) Ltd v Eastern Cape Liquor Board and Another* (2851/2017) [2018] ZAECPHC 38 (31 July 2018) at [23]. There is certainly no contention in the present matter that the report of the ward committee serves a vitally necessary component of an application to register, transfer, or remove and that its absence will confound the Board’s ability to adjudicate such applications in the manner envisaged by the Liquor Act sensitive to the necessary object that community considerations on the registration of retail premises are taken into account.

⁴ There does not appear to be a sub-section (13) but (14) is read in its place.

- (i) the particulars of the applicant which, in the case of-
 - (aa) a natural person, must include his or her full name, identity number and residential address and a statement that he or she is not disqualified for registration in terms of section 21;
 - (bb) a company or close corporation must include its full name, registration number and the address of its registered office;
 - (cc) a company, except for a company which is listed on the Johannesburg Stock Exchange, must include the names, identity numbers and residential addresses of all shareholders and a statement that none of them is disqualified from registration in terms of section 21;
 - (dd) a close corporation, the names, identity numbers and residential addresses of all its members and a statement that none of them is disqualified from registration in terms of section 21;
 - (ee) a trust, must include the names, identity numbers and residential addresses of all its trustees and known beneficiaries, and a statement that none of them is disqualified from registration in terms of section 21; or
 - (ff) an association or partnership, must include the names, identity numbers and residential addresses of all its members or partners, and a statement that none of them is disqualified from registration in terms of section 21;
- (ii) the physical address and the erf, street or farm number and a description of the premises from which the applicant intends to sell liquor, including a plan of the premises;
- (iii) the category in respect of which registration is being sought;
- (iv) in respect of the premises from which the applicant intends to sell liquor, whether the premises concerned are-

- (aa) in existence, or
- (bb) the premises concerned are not yet in existence, in which case the applicant must furnish details of the steps to be taken in the event of the application for registration being approved to construct the premises.
- (b) other information that may be required by the board to enable the board to determine whether or not the applicant meets the requirements of registration;
- (c) the prescribed fee which must be paid in the prescribed manner;
- (d) *proof of service of the notice contemplated in the prescribed manner on the-*
 - (i) *ward committee* ⁵*which must on receipt of the notice consult the community of the area where the premises are situated and simultaneously submit a report to the board and the relevant municipal council;* ⁶*and*
 - (ii) governing body of every education institution or place of worship within a radius prescribed by the MEC from the premises in respect of which the application is made.

(3) Upon receipt of the application contemplated in subsection (2), the board must in the prescribed manner enable the public to-

⁵ The form of notice indicated by paragraph 10 of the 2004 Regulations for applications for transfer is one substantially in the form of Form 8 of Annexure 2. Notice is required to be given to the ward committee where the premises are situated.

⁶ What the report is required to address and what the nature of the consultation is, is best understood with reference to the object of the Liquor Act in section 2 (d) and its preamble. The object is realised by the ward committee consulting and reporting as provided for in the impugned provision. There is no definition of "*ward committee*" in the Liquor Act, but it is a commonly known political structure established in terms of section 73 and defined in section 1 of the Local Government : Municipal Structures Act, No. 117 of 1998. The function of a ward committee (one is established for each ward in the municipality) is to make representations on any matter affecting its ward to the ward councillor or through such incumbent, to the municipal council. A ward committee consists of the councillor representing the relevant ward in the council, who is also the chairperson of the committee, and ten other members. It follows logically from the foregoing that the ward committee would be best placed to bring the community considerations regarding the registration of premises, or their removal, or the transfer of a holding certificate pertaining thereto, to the Board in adjudicating any such decision.

- (a) have access to, inspect or obtain a copy of the application; and
- (b) lodge representations or objections to any application.

(4) Within 60 days after receiving an application which complies fully with subsection (3), the board must consider the application, the report from the ward committee and any further information provided by the applicant and register the applicant by entering the applicant's name in the register if it is satisfied that-

- (a) the applicant complies with the requirements for registration contemplated in subsection (3); and
- (b) no objections have been received by the board.

(5) If, after considering an application for registration contemplated in subsection (1), the board is of the opinion that the application does not comply with the requirements for registration referred to in subsections (2) and (3); or if an objection to the application has been received, the board must notify the applicant in writing of the reasons for its decision or must provide the applicant with a copy of any objection received, and inform the applicant that he, she or it has 30 days from the date of service of the notice to comply with the requirements and respond to any objection.

(6) The period contemplated in subsection (5) may be extended by the board on good cause shown by the applicant.

(7) If an applicant who has been served a notice contemplated in subsection (5) complies with the requirements as set out in that notice or responds to any objection timeously and adequately, the board must register the applicant by entering the applicant's name in the register.

(8) If an applicant who has been served a notice contemplated in subsection (5) has not complied with the requirements as set out in that notice timeously and adequately or has failed to respond to any objection, the board must refuse to register the applicant and notify the applicant in writing of the refusal and the reasons therefor.

(9) The board must within 30 days of its final decision on the registration of an applicant, serve on all objectors to that application a notice in writing of its decision and the reasons therefor.

(10) The provisions of subsection (2)(d) shall not be applicable in respect of an application for registration in terms of section 20(d).

(11) *The holder of a registration certificate may at any time make application to the board for the transfer thereof to another person.*

(12) The holder of a registration certificate may at any time make application for the removal of the registration certificate from the registered premises concerned to other premises situated in the same district municipal area as the registered premises.

(14) (a) *The procedure and consultation process provided for in this section is applicable to an application for a transfer or removal.*

(b) The provisions of section 21 are applicable in respect of an application for removal.”

(Emphasis added)

[7] It is not in dispute that Massmart’s application was seemingly in order⁷ but the Board reckoned, as it does in these proceedings, that it was constrained to perfunctorily reject it for want of the necessary report of the ward committee, which it believes that Massmart was expected to action in support of its transfer application.

[8] The Board opposes the application and has raised technical defences to the review. This has as its basis the complaint that the Board’s decision was materially influenced by an error of law in interpreting the impugned provision to mean that the legal duty to cause or action the provision of the ward committee’s report, in compliance with the latter’s statutory duty to consult with the community and simultaneously submit a report to the Board and the municipal council, rests on an applicant seeking to transfer

⁷ The refusal letter suggests that service of the registration notice to prompt the report was not given to the ward committee at all, but it is not in dispute that this step was undertaken. The applicant put up proof that it was done, which was in turn acknowledged by the Board per email dated 26 January 2023.

its registration certificate to another person.⁸ (As an aside, because it was only raised by this court co-incidentally, this is how the word “*simultaneously*”, employed in subsection (2) (d)(i) probably falls to be interpreted, namely that the ward committee must at the same time it furnishes the Board with its report, copy it to the relevant municipal council.)

[9] Neither the third respondent nor the relevant ward councilor have opposed the application or offered any salve in the wake of these proceedings, though the councilor’s lack of effort is at the heart of all the trouble.

[10] Massmart, who was joined in the present proceedings on the basis of its interest in the subject matter of the application, indicated that it will abide the court’s decision.⁹

[11] The stance of the Board is that the impugned provision requires that it must be provided with the report from the ward committee and that it is simply not empowered to finalize an application without it. That much is conceded by Shoprite but their difference in approach lies in the interpretation thereof. There is no contest that the ward committee has a statutory obligation to consult and report as provided in the subsection, or that there is a good public reason for such requirement in pursuit of the objects and purposes of the Liquor Act, but the question as to who bears the obligation to action or cause to action the report arises especially in the context of the Board’s refusal of Massmart’s application in this instance for want thereof which the Board in a sense seeks to hold it responsible for. The focus therefore is on the impasse that results in

⁸ By implication the interpretation adopted by this court will apply in respect of registrations and removals as well, as each application envisages a common consultation process culminating in the anticipated ward committee’s report.

⁹ Shoprite in its replying affidavit disavowed that it was joined at the hip as it were with Massmart, the Board having implied that Shoprite was taking up the cudgels to vindicate the Board’s refusal of the transfer application after Massmart had missed the opportunity to invoke an internal appeal against the decision. Shoprite clarified in this respect that after the sale of its liquor business to it, Massmart was no longer in the business of running liquor stores and that its failure to have taken any further participation in the present proceedings was therefore quite unsurprising. The important point made is that they are separate entities and that it was not in Shoprite’s power to force Massmart to do anything, including appealing the refusal decision.

such eventuality, and on whom it falls to resolve such hiatus according to the import and tenor of the Liquor Act.

[12] Shoprite argues that on its plain terms the impugned provision only requires an applicant to provide “*proof of service*” of the notice on the ward committee and that once that proof is provided, it would have done what the section requires of it to do *vis-à-vis* the ward committee and the contribution that it is (ultimately) expected to bring. In other words, it suggests that, assuming all other requirements have been met, the submission of proof of service of the notice contemplated in the prescribed manner would result in the submission of a complete application as it were ready (for its part) for adjudication by the Board with reference to such anticipated report, and that its purported non-compliance as a result of the ward committee’s statutory failure to provide it (as it must) should not arise as a reason to finally refuse such an application.

[13] Shoprite appears to recognize that the limited declarator that it seeks, namely, in the first part, that “*an applicant for a certificate of registration complies with the requirements prescribed in section 22(2)(d)(i) of the Act where it has provided proof of service to the first respondent of the relevant notice on the ward committee*”, and, in the second part, that Massmart in actual fact in this instance “*complied with (the subsection) when it submitted proof of service to the (Board) of the notice on the second respondent on 26 January 2023*”, will mean nothing without the mandamus relief it asks for, which is to compel those responsible to bring forth the vitally necessary report.

[14] As indicated above, although Shoprite asks in the notice of motion to compel the relevant councilor cited as the head of the ward committee to consult with the community of the area where the premises are situated and to submit the report that falls to them to procure within 10 days of this court’s anticipated order, Mr. De Beer acting on Shoprite’s behalf indicated that his client’s real interest was in pressing in on the alternative prayer, which asks that the Board itself be directed to take steps to

ensure that the relevant incumbent of the ward committee complies with the impugned provision within 10 days.¹⁰

[15] Mr. De Beer invited this court to find that the Liquor Act in effect puts such a duty on the Board to galvanize the ward committee to do what it is expected to do per the impugned sub-section in order for it to be able to adjudicate the relevant application where the latter has failed to carry out its statutory obligations to consult with the community and report to the Board and the municipal council. It argues that an interpretation of the impugned provision that requires the applicant to do more than merely serving the ward committee with a notice to provide the report is an incorrect one. Otherwise stated, it is submitted that the impugned provision on its plain terms only requires an applicant to provide “*proof of service*” of the notice on the ward committee.

[16] I will return to this aspect of interpretation below, but first a brief background.

[17] It is common cause that the requisite notice that should have prompted the second respondent as the head of the ward committee she served to cause the latter to get on with its obligation spelt out in the impugned provision and the then Regulations of application,¹¹ (read together with Chapter 4, Part 4 of the Local Government : Municipal Structures Act, No. 117 of 1998), was indeed timeously served on her but the ward committee failed to comply with its statutory duty to report to the Board and the third respondent.

¹⁰ Another reason advanced why it would serve no purpose to simply mandate the ward committee to perform its statutory obligation to consult with the community and provide the requisite report is the status of the application. Mr. De Beer submitted that the decision under scrutiny is of final effect and that the Board is *functus officio*. For this reason, the unlawful decision would first have to be set aside according to the well-established principle of administrative law, which is that it stands as a valid decision until set aside by a court. See in this regard *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) (28 May 2004).

¹¹ The regulations promulgated under the Liquor Act have been amended since the launch of the present review application. In the context of the present issues under consideration, they prescribe the manner in which applications for registration, transfer and removal are to be processed. In their current form (since their implementation on 1 March 2025) they provide in terms that where the ward committee fails to do what it is required to do to facilitate the Board's adjudication of an application replete with the necessary community input, the duty to procure the report is placed squarely on the shoulders of the applicant asking to be registered, or to have its certificate transferred, or to have its premises moved elsewhere than where it was registered in the relevant category of business requiring such certificate.

[18] The consultant who was commissioned to lodge the application on behalf of both Shoprite and Massmart meticulously prepared a comprehensive application that addresses all of the Board's requirements generally for a transfer. This was lodged with the Board on 25 January 2023. The application includes a notice to the second respondent on "*prescribed Form 2A*".¹² Understandably it is blank, but it was supposed to have been completed by the second respondent in due course after the community consultation process had ensued. The latter, in turn, acknowledged receipt of her blank form mandate on 25 Jan 2023 by signing on a copy on the relevant notice that she had received the transfer application.

[19] On 30 March 2023 the Board gave notice in terms of section 22 (5) to Massmart care of the consultant that it was required to take certain steps, within thirty days, to remedy what the Board considered to be shortcomings with the application and non-compliance with the requirements of section 22 (2) (d) (i) of the Liquor Act. It advised Massmart what it was required to attend to in this respect as follows:

“- Submit proof of Service of form 8 Notice to the Ward Councillor/Committee.

-To ensure that the Ward Committee submit proof of a proper community consultation as convened by the Ward Councillor/Committee of by submitting a Ward Committee/Councillors report and attendance register with verifiable contacts for the attendees of the community to the ECLB (there is none on file). The proof must contain confirmation that the Ward Committee/Ward Councillor consulted relevant municipal divisions when considering their application and that the subsequent community consultation report was submitted to the Municipal Council.” (Sic)

¹² The 2004 Regulations do not incorporate a Form 2 A but the form (applicable to registrations) has presumably evolved out of convenience and envisages the form that the anticipated report will take in respect of such applications.

[20] It is unclear why the Board raised the first concern, because service of notice was acknowledged in email correspondence dated 26 January 2023 by one Ms. Lefutsa of the Board to have been given to the second respondent per signed acknowledgment of receipt on that same day.¹³ Also, quite curiously in my view, the Board did not copy the section 22 (5) notice to the second respondent or in any manner bring to her attention that her ward committee's inertia might compromise the grant of the application despite the fact that the ward committee is the "*which*" referenced in the impugned provision, without whose immediate consultation and ultimate report, so subsection (4) reiterates, the Board cannot consider the application.

[21] Shoprite does not say what transpired further after the date of the Board's notice in terms of section 22 (5) and the 18 December 2023 refusal letter as between itself and Massmart, who was the official "*applicant*" for the transfer, but it highlights the fact that neither it nor Massmart had/has any control over the ward councilor or committee. Indeed, so it is averred in its founding affidavit filed in support of the present application, they "*could not effectively force the councilor to attend to the preparation and submission of a report*" and further that it was "*impossible*" for either of them to have complied with this aspect of the Board's notice.

[22] As was therefore ineluctable (absent the consultative process and filing of the ward committee's report), the Board declined the application. It wrote to Massmart by letter dated 18 December 2023 to inform it that the application had been refused on the 30th of November 2023 already since it had "*failed and/or neglected to action or cause to action the outstanding requirements in respect of the proposed premises and submission of the outstanding documentation*" as indicated by the section 22 (5) notice.¹⁴ Accordingly – so the Board reasoned, the application did not meet the

¹³ Perhaps the issue concerned the fact that a Form 2A notice had been used. Form 2 notices according to the Regulations concern applications for registration and Form 8 notices, applications for transfer.

¹⁴ It is curious that the Board referred to "*proposed premises*" whereas already registered premises would have been the focus of an application for transfer. Both the section 22 (5) notice and refusal letter, although they reflect the Board's reference number concerning an existing certificate, speak of an "*application for a liquor licence registration*" and "*an application for a liquor licence*" respectively. Given the narrow focus of the review (and the fact that a consultation process is common to both registration

requirement set out in section 22 (2)(d)(i) of the Liquor Act. Massmart was simultaneously advised of its right to appeal against the Board's decision within 30 calendar days of receipt of its dismissal letter.

[23] The taunt in the refusal letter that Massmart had failed to “*action*” or “*cause to action*” the “*outstanding requirements in respect of the proposed premises and submission of the outstanding documentation*” (Sic), which read together with the section 22 (5) notice clearly drives home *its* supported failure to have complied with the impugned provision by providing proof of a proper community consultation in the form suggested by the Board, certainly goes beyond mere “*proof of service of the notice contemplated in the prescribed manner*” referenced in the introductory part of subsection (2) (d) and reveals its contrary understanding concerning the manner in which the impugned provision ought to be understood.

[24] This final refusal of Massmart’s application for the contrary view held was clearly the impetus for the present review application and related relief which Shoprite seeks. Indeed, the latter contends that an applicant has no control over the councilor or ward committee and cannot force them to consult the community and produce the report but that the general tenor of the Liquor Act does indeed behoove it rather to ensure that the consultation happens and that the report gets submitted in time for it to adjudicate the applications as it is expected to do.

[25] Shoprite urges upon this court to find that not only is it just and equitable for a court to declare that Massmart complied with the requirements of the impugned provision to the extent that it was legally obliged to in the present context once it provided the requisite proof of service of the application on the ward councilor, but that the declarator which it seeks is vitally necessary to clarify the proper legal position for future cases.

and transfer applications) I will refrain from attaching any significance to this seemingly perfunctory treatment of the application.

[26] Thus, Shoprite's standing to institute the present proceedings for the judicial review of a public power was laid bare. Although it is merely a prospective holder of the registration certificate that Massmart asked the Board to transfer to it, there can be no doubt in my view that its rights are absolutely affected by the refusal determination insofar as the application has been finally determined by the Board.¹⁵ A party acting in their own interest may seek appropriate relief where a decision affects their interests.¹⁶

[27] Whilst a period of just under four months lapsed between the date of the refusal of Massmart's application and the launching of the present application, during which Massmart could have invoked the internal appeal procedure made provision for in section 24 of the Liquor Act if it was so minded, but did not,¹⁷ Shoprite contends, fairly in my view, that it itself would have had no standing to prosecute such a remedy because it was not the holder of the registration certificate neither an applicant within the contemplation of section 22 of the Liquor Act for the transfer of the holding certificate.

[28] This much is conceded by the Board yet it objected in these proceedings, contending that Shoprite failed to exhaust internal remedies before approaching this court for judicial review. In this respect, and with reference to section 7 (2)(a) of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"), the Board argues that Shoprite ought to have exhausted the internal appeal remedy provided for by the Liquor Act in section 24 before it could approach this court to review the refusal decision. This provision is repeated below for convenience:

¹⁵ It was suggested on behalf of the Board that because Shoprite was not an "*applicant*" for purposes of an appeal to the appeal panel that it does not have standing to review the Board's decision. But in making this argument the Board fails to distinguish between an applicant for purposes of section 22 (11) and section 24 (1) of the Liquor Act, which is a narrow concept, and an applicant's standing to apply for the review of the Board's decisions before this court. Section 6 (1) of PAJA provides that "*any person*" may institute proceedings in a court for the judicial review of administrative action. In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) the Constitutional Court held at paragraph [29] that the wide standing provisions of section 38 of the Constitution must be read into the PAJA, as a review under its provisions amounts to a vindication of one or more of the section 33 administrative justice rights in the Constitution. This wide approach to standing applies to legality reviews as well. (See *Kruger v President of the Republic of South Africa and Others* 2009 (1) SA 417 (CC) at paragraph 23)

¹⁶ *Giant Concerts, Supra*, at paragraph 37. See also *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at paragraphs 162 and 166-168.

¹⁷ See footnote 9 above.

“24 Appeals against refusals and conditions

(1) An applicant may, within 30 days after being served a notice of a decision of the board not to approve an application for registration, transfer or removal or of a determination of terms and conditions, appeal against the decision or determination by submitting to the panel of appeal-

- (a) the application to register;
- (b) the notice sent to the applicant by the board in terms of section 22(7) or (10);
- (c) details of the applicant's response to the board's notice; and
- (d) the board's final notice and reasons for the decision which is the subject of the appeal.

(2) An objector to an application may, within 30 days after being served the notice contemplated in section 22(12), appeal against the relevant decision by submitting to the panel of appeal-

- (a) a copy of the objection;
- (b) a copy of the notice contemplated in section 22(12); and
- (c) the grounds of appeal.

(3) Within 90 days after receipt of the relevant documents, the panel of appeal must consider the appeal in the prescribed manner, including providing the appellant, the board and any other interested party with the opportunity to make oral representations, and must send notices in writing of its decision to the appellant, the board and other parties involved, stating the reasons for the decision.

(4) If the panel of appeal upholds an appeal-

- (a) contemplated in subsection (1), the board must register the person; or
- (b) contemplated in subsection (2), the board must consider afresh the registration in respect of which the appeal was made.”

[29] This dogged expectation of the Board that Shoprite should be precluded from proceeding with the present application for want of exhausting internal remedies,

however, runs contrary to the fact that the “*applicant*” envisaged in section 24 (1) above can only mean, in terms of section 22 (11) of the Liquor Act, the “*holder of a registration certificate*”, who in this instance is Massmart. The Board recognizes this yet seeks to suggest as an alternative proposition then that if Shoprite had lodged representations concerning the application for transfer in terms of paragraph 5 of the Regulations (Sic), this would somehow have created a premise from which to appeal to the Board on a question of law.¹⁸ The logic of this argument, however, entirely eludes me especially since the entitlement of “*any person*” to lodge written representations in support, of or objections to, an application in accordance with regulation 12 is neither peremptory nor necessary especially where Shoprite would have said what it needed to say in that part of the transfer application that concerned it as the prospective certificate holder and most especially thereby that it supported the application. Moreover, as Mr. Mpakane who appeared on the Board’s behalf conceded, the representations envisaged by the Regulations would be made before the ward councilor does anything. This presupposes that Shoprite would have to have been prescient that the ward committee was not going to meet its statutory obligation in time to consult or to file its report.

[30] The Board also complains that since Shoprite categorizes the determination which this court must make as “*a question of law*”, that it was obliged to appeal, rather than to have challenged the refusal decision as a judicial or legality review.

[31] Section 66 (1) of the Liquor Act provides as follows in this respect:

“(1) A person who has made any application, objection or representations in terms of this Act and who feels aggrieved by a decision on a question of law made by the panel of appeal in connection with the application, objection or representations, may appeal to a division of the High Court against the decision.”

¹⁸ The regulation applicable to the subtype of the application for transfer is in fact indicated in paragraph 12 of the Regulations. It reads exactly the same except for the respective headings, the last of which concerns representations or objections “*to an application for transfer of a certificate of registration*”.

[32] The suggestion in this context is that if Shoprite had lodged representations in terms of Regulation 5, or 12 as applies to transfer applications, which the Board concedes it was not obliged to, and a question of law arose thereanent in that forum, as it has now arisen, that this would have established the basis for an appeal by it rather than a review. The Board argues that Shoprite would supposedly have acquired an automatic right to appeal “*since there is this alleged question of law*”. This proposition too only has to be stated to see its absurdity.

[33] I add that given the parties’ acceptance that any application for registration, transfer or removal cannot be adjudicated without the ward committee’s report, it is anomalous to have expected anything to come from an internal appeal even if Massmart had invoked the remedy at its disposal. The outcome would have resulted in the transfer application coming full circle back to the position that the Board could not adjudicate it without the report, a confounding feature of this whole debacle.¹⁹

[34] The point is well made on behalf of Shoprite that a declarator is necessary to advance the matter and move past the impasse. The Board has made it clear that it is a creature of statute and for this reason it is not in a position internally to entertain the kind of remedy that Shoprite requires in the unique circumstances.

[35] The further complaint that Shoprite did not apply for condonation for its supposed delay in launching the review application is not a correct understanding of its papers. To my mind it plausibly explained that it needed to take legal advice as to how to vindicate its position and promptly got on with the issue of the present application. It further included a prayer for condonation in the notice of motion in the event that this was necessary. In my view this was, however, not essential because there was no obligation on Shoprite to have exhausted the supposed internal remedies contended for by the Board. For the rest it did not in my view delay unnecessarily in launching the present application. I should add that the manner in which the Liquor Act has been

¹⁹ See Section 24 (4)(b) of the Liquor Act.

framed does indeed pose a conundrum bearing on interpretation and that it was not unreasonable for Shoprite to first responsibly have sought a legal opinion.

[36] The *in limine* objections are therefore all without merit.

[37] I turn finally to the issue of interpretation.

[38] The Supreme Court of appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁰ had cause to restate the approach that a court should adopt when interpreting words used in a document, including legislation, as follows:

“The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the

²⁰ (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

provision and the background to the preparation and production of the document.”²¹

[39] What is abundantly clear, first off, is that the Liquor Act does not provide in terms, in words anywhere in its provisions, what Shoprite invites this court to find, which is that there is a duty on the Board to step into the gap when the ward committee does not consult and report or to take this step or that. Indeed, its provisions barely state the primary obligation on the ward committee itself to consult and report which one finds coincidentally tagged on to other provisions.

[40] Section 22(2) (d)(i), for example, in line with the object and purpose of the Liquor Act in section 2, provides coincidentally (because the section purports to relate to a list or collection of things that the prescribed form must specify or other formal requirements needing to be met, like the payment of the prescribed fee) that the ward committee *must* consult the relevant community and submit a report to both the Board and the Municipal Council. It is the “*which*” referenced in the impugned provision, as a tangent, that clarifies who must perform these vital statutory obligations and how. There certainly can be no question that this (with reference to the need preempted in the objects of the Liquor Act) settles the statutory obligation in the first place on a political structure, the ward committee, to bring the community considerations to bear, how this must be done, and to an extent, though quite confusingly, “*when*”. What the report is even supposed to state has to be assumed from the context. Further, the Liquor Act even lacks a definition of “*ward committee*”, which one has to read in with reference to the Regulations that defines “*ward*”, only to be further referred to the definition of such concept within the meaning of section 1 of the “*Municipal Structures Act*”.

[41] The anticipated report’s need, in substantive terms, is indicated only in one other place in the Liquor Act, further below in subsection (4) where it is provided (from the Board’s perspective) that it must consider the application concerned together with the report from the ward committee, which the context assumes will be available within sixty

²¹ At paragraph [18].

days after the application's receipt. (In my view it can only be this provision that underpins the accepted premise by all the parties that the application cannot be adjudicated by the Board without this vital document). The time periods involving the ward committee are twofold. It must "*on receipt of the notice*" consult with the community. Later it must submit a report to the Board and the municipal council. Seemingly that report is required to be provided within 60 days.²²

[42] There is no question that the applicant for registration, transfer or removal is certainly expected to serve a notice on the ward committee. It is that service that starts the ball rolling. The applicant must satisfy the Board that it has served on the necessary role players who have an interest in objecting to the application, namely the ward committee and the governing body of every education institution or place of worship within the prescribed radius of the premises that forms the subject matter of the relevant application.

[43] The prospective holder of the certificate has no obligation on it other than to complete that part of the prescribed form that concerns it in the subtext of an application for transfer. None of the parties have contended differently in this respect.

[44] It is most unfortunate in my view that the necessity for the ward committee's report has been insensibly conflated with the requirements that an applicant, whether for registration, the transfer of its holding certificate to another person, or the removal of his/her/it's business to other premises than the registered premises, must adhere to in the first place in order to place a request before the Board to consider. Those provisions ostensibly indicate the "*how*" and the "*what*" an applicant must do to get the process started, pursuant to which the obligation on the ward committee to consult and report is triggered.

²² Regulation 10 (2), that deals with the sub-type of transfer applications, however, indicates that the report must be submitted within 30 days of receipt by the committee of the notice of the application.

[45] The next step provided for in subsection (3) entails the publication of the application and the invitation to the public generally to have access to the application in document form, to inspect it and to lodge representations or any objection to it. This is to be done by the Board itself. Given that it must invite the public to lodge representations or objections and to have access to a copy of the application “*upon receipt*” of it, the ward committee’s report would not yet be in existence so it is surprising that it would have excepted the application to be replete with the ward committee’s report from a basic compliance perspective.

[46] In the next stage, after a period of sixty days from the date of lodgment, the Board is required to consider the application, the ward committee’s report and (there is no comma between these two aspects) any further information provided by the applicant.²³ What would give it the greenlight is the Board’s satisfaction that the “*application*” complies with “*the requirements for registration contemplated in subsection (3)*”²⁴ and that no objections have been received by it. Here some confusion is in the offing in that only the requirement stated in subsection (3) going to registration (which is on the Board) - obviously together with a reading in of the ward committee’s report and “*further information provided by the applicant*”, is listed as the minimum to favorably register the applicant by entering his/her/its name in the register.

[47] A different outcome pertains if the “*requirements for registration*”, whether in form (subsection (2)), or notice to those having an interest (subsections (2) and (3)) are absent or lacking, or they have been complied with but the application has met with an objection. In either of the latter scenarios, the applicant is expected to get an opportunity to speak to any shortcoming in the application or to respond to the objection within thirty days of a notice drawing attention to the issue in concern. The period provided for in a section 22 (5) notice can be extended on good cause shown, but

²³ This subsection also confirms that the existence of the ward committee’s report is not expected until later, reinforcing the more likely interpretation of the impugned provision that all the applicant needs to provide in order to be compliant when it lodges its transfer application is proof that it has given notice to the ward committee to get its processes started.

²⁴ Subsections (3) is referenced twice, once in the introduction to subsection (4) and in subsection (4) (a). The impression is that this was deliberate. Subsection (3) deals with the Board’s responsibility to engage with the public and invite it to object.

otherwise, if the applicant complies with the request set out in the notice, or responds to any objection, “*timeously, and adequately*” the Board must “*register*” the applicant by entering the applicant’s name in the register.

[48] Ironically subsection (5) that preempts the need for a notice under its provisions says nothing about the report of the ward committee as one of those requirements. The only pointer of assistance in this respect is that a reader is referred back to the provisions of subsection (2) which require compliance with this subsection as a requirement “*for registration*”. This is where the impugned provision is again implicated.

[49] The penalty of not complying with the notice, or rather with “*the requirements as set out in that notice*”, as opposed to an unequivocal section of the Liquor Act itself, has as its result in subsection (8) that a Board must refuse to register the applicant (or by necessary implication transfer his/her/its certificate of registration to another person). This seems nonsensical to suggest that what is the subject the notice decides the fate of the application and not some inherent non-compliance with the section’s provisions.

[50] This is what happened here in effect. The notice condemned Massmart to a failure to comply with the impugned provision, spun it further by making it responsible to ensure that the ward committee acquit its statutory obligation to consult and report and asked of it to provide proof of more than the mere notice of service of the application upon the second respondent. It was that failure ultimately, *to comply with the Board’s section 22 (5) notice*, that resulted in the refusal of the application in final form.

[51] If this court is to make any sense out of the impugned provision in context, it is this. The political structure is enjoined to do what the aside, or tangent to the impugned provision mentions, which is to consult - as it must do in terms of the Municipal Structures Act, and to provide a report. This is consistent with the object and purpose of the Liquor Act.²⁵

²⁵ This also fits in with the scheme of the (National) Liquor Act, No. 59 of 2003 regarding the necessary requirement of community participation in applications for registration under its provisions.

[52] Further, the anticipated report is the most vital component of the application, without which the Board cannot adjudicate the application lodged with it. This is accepted by all parties.

[53] The statutory obligation on the ward committee to consult and provide the required report rests on it and no one else. Only it can provide the report and where it fails to, the Board cannot finally determine the application.

[54] Whilst the applicant can be called upon by a notice in terms of section 22 (5), to attend within its powers to shortcomings in its application, causing the ward committee to action or cause to action the ward committee's non-compliance is not stated to be one of its obligations in the Liquor Act although the Board takes such a view. The impugned provision cannot in my view sensibly be interpreted to mean that an applicant must, in addition to providing proof that it alerted the ward committee to its application by service of the requisite notice, also cause it somehow to meet its statutory obligation. (Ironically subsection (5) which provides for the issue of a notice for non-compliance with the application does not even reference the absence of a ward committee's report as a supposed reason why an applicant should be placed on terms to remedy a registration compliance shortcoming.)

[55] I point out finally that subsection 2 (d)(ii) of the Liquor Act does not state what is to ensue once notice is given to the governing body of education institutions and places of worship in the same style as the impugned provision suggests must be done after proof of service of notice to the ward committee is put up. If the two subsections (i) and (ii) were in kilter, it would have been sufficient for the impugned provision to indicate only that proof of service of the notice contemplated in the prescribed manner is a requirement in respect of the "*ward committee of the area where the premises are situated*". That is the manner in which the impugned provisions falls to be read. The further part expounding upon the ward committee's duties that arise upon been served

with notice of an application under section 22 is superfluous to the basic compliance requirements resting upon an applicant.

[56] Given such an interpretation, the Board having asked Massmart to step into the breach of the ward committee, and then to have refused the transfer application by reason that it failed to produce a report that has clearly not yet even come into existence was wrong. The Board's refusal decision therefore falls to be reviewed and set aside on the basis contended for by Shoprite.

[57] It is unfortunate that the important statutory obligation resting on the ward committee, which should be emphasized on its own is added on as a tangent to a proof of notice requirement and not contained in a separate section under the Liquor Act so that there are no misgivings regarding what is expected of the ward committee to do. Therein too lies the rub, that absent the obligation being spelt out as a self-standing requirement (instead of being the tag on that it is in the wrong order of progression), the prospect of the ward committee not bringing up its part is also not especially catered for.

[58] This takes me to the question posed by Shoprite whether instead of throwing up its hands and contending that it has no power to do anything about the hiatus here, the import and tenor of the Liquor Act can be read as imposing an obligation on the Board itself to action or cause to action the ward committee, as it expected of Massmart itself to do, to carry out its statutory duties.

[59] Mr. De Beer referred the court in this regard to the provisions of section 17 of the Liquor Act, which provide under Part 4 thereof concerning "*Meetings and conduct of business*" that the Board is empowered to issue a summons to the ward committee to produce a document. He suggested that what could be done when it does not receive such a report is to notify the ward councilor to come to the meeting at which the Board is to consider the application and produce it there. It occurs to me, however, that this power mentioned in the section to compel one to produce information needed by the Board to adjudicate an application would concern an existing document whereas the

report it envisages the Board would seek to have produced per summons, especially where the ward committee has failed to carry out its statutory obligation, would almost certainly not exist. It is further unlikely if it did exist that it would be withheld by the ward committee. And what could it do, if at that meeting it is informed that the ward committee has not yet consulted? It would have no powers as this court does to compel it to comply.

[60] He contended that by the Board doing nothing it is ignoring the stated duty on it to perform “*any other power*”, especially one that is naturally incidental to its function of adjudication.

[61] The powers of the Board are set out in section 9 of the Liquor Act as follows:

“9 Powers and functions of the board

The board-

- (a) must consider and approve or refuse applications for the categories of registration contemplated in section 20(a), (b), (c); (d) or (e);
- (b) may cancel, suspend or vary any registration approved by it in the manner contemplated in this Act;
- (c) may determine conditions applicable to the categories of registration contemplated in section 20(a), (b), (c); (d) or (e); and
- (d) must publish in the *Provincial Gazette* applications received for registration, transfer or removal as prescribed.
- (e) *may exercise any other power and must perform any other duty conferred or imposed on it in terms of this Act.”*

(Emphasis added)

[62] Further, with reference to the objects of the Liquor Act he emphasized that the Board was enjoined imperatively to “*create an environment*” in which community considerations are taken into account on the registration of retail premises.

[63] In this vein, Mr. De Beer referred this court to three decisions of the Free State Division of the High Court which he contended were “*instructive*” and which deal with the same issue that arises in the present matter, albeit under the ambit of the Free State Gambling and Liquor Act. *Reinecke v Free State Gambling and Liquor Authority and Another*²⁶ concerned an application to the Free State liquor authority for a tavern registration certificate. In terms of the relevant provincial legislation, the liquor authority requested the South African Police Service and the relevant municipality to provide reports on the proposed premises and the suitability of the application. These reports were not forthcoming, and as a result the application was not considered within a reasonable time. The court held the South African Police Service and the municipality were the liquor authority’s “*eyes and ears*”, and that the liquor authority’s explanation for the delay was “*wanting, unsatisfactory and unacceptable insofar as it is simply to the effect that the liquor [liquor authority] was helplessly waiting for reports from the SAPS and the municipality*”.²⁷

[64] The import of the decision, so Mr. De Beer sought to highlight is that the liquor authority was required to secure the reports, not the applicant.

[65] This import was also made clear in *Nazo v Free State Gambling & Liquor Authority and Another; In re : Jacobs v Free State Gambling & Liquor Authority and Another*²⁸ in which the circumstances were the same as in *Reinecke*, namely that the reports from South African Police Service and the municipality were outstanding. The court confirmed what was said in *Reinecke*, namely that the South African Police Service and the municipality are the “*eyes and ears*” of the liquor authority.²⁹ The court held that there was no obligation on the applicant to provide the reports.³⁰ Any action to be taken to obtain the reports was to be taken by the liquor authority and nobody else.³¹

²⁶ (3402/2014) [2014] ZAFSHC 196 (30 October 2014).

²⁷ At paras 19 and 26.

²⁸ (2386/2015) [2015] ZAFSHC 227 (19 November 2015).

²⁹ At para 25.

³⁰ At para 36.

³¹ At para 63.

[66] The third matter is *Miles of Meat 2 BK v Free State Gambling and Liquor Authority and Another*.³² There, the court said that because the liquor authority bears the onus to ensure the time frames prescribed by the act are adhered to, it was required to take the necessary steps to secure the reports.³³ The court considered the liquor authority's powers under the provincial liquor act and held that it was the liquor authority who was empowered to take the steps to secure the delivery of reports.³⁴

[67] Mr. De Beer argued that the similarity of these cases to the present matter provided a useful basis for this court's interpretation exercise and urged upon this court to find, in the context of the powers of the Board spelt out in the Liquor Act, that the Board is indeed empowered to take steps to secure the delivery of the ward committee reports.

[68] In its opposition to the application, on the issue of the interpretation contended for by Shoprite, the Board asserts that it is *ultra vires* its power and duties enumerated in section 9 to compel the second respondent to perform her statutory obligation *qua* the ward committee to put up the relevant report. It disavows that it is part of its adjudicative function provided for in terms of section 9 (d), neither does it believe that such an obligation resorts under the general provisions of section 9 (e). The prevailing view it takes is that it exercises no present authority in terms of the Liquor Act to dictate to the municipality and that it is as impotent as Shoprite claims to be in this respect *vis-à-vis* Massmart's expectation that the ward committee would carry out its statutory obligations.

[69] The Board further relies on the provisions of the newest regulations promulgated under the Liquor Act, which it attached to its answering affidavit, as providing an answer to the question who has the responsibility to goad the ward committee to do what it is statutorily obliged to do when it has failed to consult and report so that it can adjudicate an application. These, in the Board's view, "*clarify the matter and put to rest the*

³² (2099/2015) [2015] ZAFSHC 245 (26 November 2015).

³³ At para 10.

³⁴ At para 10.

question as to who is obligated to compel a municipal councilor to provide the consultation results". For interest's sake the new regulation 3 (4) provides that:

"In the event that a ward committee does not attend to their statutory obligations in terms of the Act, the applicant has the duty to ensure the ward committee attends to their legislated duties in terms of the Act."

[70] Shoprite's fair response to this purported resolve of the question who bears the duty in terms of the Liquor Act to force the second respondent's hand is that what is stated therein does not affect the present matter because its provisions are prospective in effect. In my view it is correct to expect that the transfer application must be decided in terms of the law at the time it was made.³⁵ Shoprite also relies on the trite principle of interpretation that subordinate legislation, including the regulations, cannot change the meaning or interpretation of the primary legislation, the tenor of which - so it seeks to assert, requires of the Board to ensure that a ward committee attends to their legislated duties.³⁶ Finally, Shoprite indicates that it reserves its right to challenge the lawfulness and validity of the new regulations.

[71] It is essential to point out the fundamental difference between the Free State Act and the Liquor Act under consideration, which is that the former provides in terms, in section 31 (3) and (4) thereof, that on receipt of the application by the liquor authority, the latter must request the reports. In this province the Liquor Act does not use direct language to oblige the Board to do the same even if the impact is the same that the ward committee tasked with the dual obligation to consult and provide the report are the eyes and the ears of the Board.

[72] As inviting as it is to extrapolate from the tenor of the Liquor Act read in pure form that the Board must take formal steps to cause or to action the ward committee to carry out its statutory duty, the eventuality in my view is not catered for in either the Liquor Act

³⁵ *Veldman v Director of Public Prosecutions* 2007 (3) SA 210 (CC) at para 26.

³⁶ *National Commissioner of Police v Gun Owners South Africa* 2020 (6) SA 69 (SCA) at para 44.

(neither in the regulations of application at the time) although it would not have harmed the Board at the time it issued its section 22(5) notice to Massmart to copy in the ward committee and to bring to its attention that its report was still awaited. Where it failed in my view was only in the respect that it misinterpreted the duty on the applicant to provide more than its mere proof of service of the application on the second respondent, and in finally refusing the application without the necessary report.

[73] I cannot read in to Liquor Act a provision that is not there to the effect that the Board must take steps especially to facilitate community consultation and engagement so that the Board can receive the report.

[74] Mr. De Beer also referred this court to Hoexter and Penfold: “*The Administrative Law in South Africa*,³⁷ which notes that in dealing with multi-staged administrative law matters involving action by more than one administrator, the ultimately decision-maker may not simply blame another administrator for its earlier failure to act. Rather it must take reasonable steps to ensure the performance of those acts. The authors repeat what in *Reinecke* stood out for the court, which is that both bearing their own duties and roles in the process that was time bound, the one could not stand by “*helplessly waiting*” for the necessary reports, but that the relevant liquor authority ought to have put pressure on the other organs of stage to submit their reports. This kind of situation (which follows on a discussion of the trio of Free State cases highlighted by Mr. De Beer) is however entirely distinguishable from the local situation where the duty on the Board to act is not pertinently spelt out in the Liquor Act and where it would more naturally fall to an applicant at the receiving end of the dilatory conduct on the part of the ward committee to vindicate such failure through a court application to compel.

[75] I agree that it would be within the spirit of cooperation between organs of the state to seek to promote the finalization of the application under the overall scheme of the Liquor Act by warning the ward committee to in fact do what is necessary for the Board to be able to adjudicate the application, but there is (or at least wasn't under the

³⁷ Hoexter, 3rd Ed at page 436 – 7.

prevailing regulations at the time) any other formal step that the Board was mandated to take under the Liquor Act's provisions to vindicate the impasse.

[76] An expectation that it should have done more does not seem naturally incidental to the performance of its functions hence its resort to the fact that it is simply a creature of statute and must do only what the Liquor Act provides it should or can.

[77] I maintain that the Liquor Act does not appear to have contemplated the issue of statutory non-compliance by the ward committee. Indeed, it shouldn't ever be an issue if it is mindful of the very reason for its existence, which is to provide the vital link between the community and the municipal council and, in the context of the concerns of society that the Liquor Act foresees, to speak up and be the voice of the community regarding the registration of retail premises in the ward area that it serves. I am surprised that the second respondent has said nothing to assure this court that its failure to have carried out its statutory obligations in this instance wasn't due to a lack of respect or concern for such interests.

[78] In conclusion, I agree that it is necessary to set aside the Board's decision. It was both wrong to proceed from the premise that no proof of service of the application for transfer had been put up, and wrong in the sense that the Board required of it to provide proof of something it could not and is not required to. It was wrong in that it determined that the application did not meet the requirements set out in section 22 (2) (d)(i) of the Liquor Act and equally wrong in penalizing Massmart (and Shoprite in consequence) for its supposed neglect to action or cause to action the "*the outstanding requirements in respect of the proposed premises and submission of the outstanding documentation*" that as a fact does not even exist as yet but which must be produced in order to consider any application under the mantle of section 22. It therefore follows in this regard that the declarator which Shoprite insists on ought to be made to set the position right.

[79] Concerning the mandamus relief settled upon by Shoprite, I cannot agree that the Liquor Act contemplates the Board taking formal steps against the ward committee to comply with its statutory duty or that it equips it to do so. There would however appear to be informal administrative measures that it can take generally, such as addressing letters to the relevant ward committee requesting it to bring forth the report so that it can adjudicate an application for registration, transfer or removal without offending the principles of co-operative government and intergovernmental relationships. This would be in its interests to do to facilitate a meaningful consideration of the applications before it. Further, although there is no obligation on the Board arising in terms of section 22 (5) to give notice to the ward committee of the absence of its report as a reason why it cannot decide an application, it sounds counterintuitive for it not to copy the notice to the applicant who stands to be prejudiced by the fact that this will preclude a proper and final determination of the application.

[80] Although Shoprite held out for the alternative mandamus prayer, it would be a wasteful exercise if it was required to bring a separate application to compel the current councilor representing the ward committee to do what it is statutorily obliged to. Since it has made out a case for such relief on the papers, it would be proper in my view to permit the granting of the initial prayer 3. As it did not ask for costs against the second respondent except if she opposed the application, the order against her will not carry with it such a burden which would coincidentally in my view have been totally justified. It is indeed inexcusable that the second respondent would thwart the very necessary object of the Liquor Act which is to input community considerations on the registration (or related applications to transfer or remove) of retail premises.

[81] As a necessary consequence of the mandamus relief I intend to grant, it follows that the Board will have to determine the application afresh once it has been furnished with the report of the ward committee.

[82] Despite not acceding to Shoprite's prayer that the Board instead be ordered to take steps to compel the second respondent to meet her statutory obligations through

the ward committee to consult and report, it has in my view been substantially successful in these proceedings and costs against the Board should follow that result. Indeed, it is somewhat unfortunate that the Board resisted the application on unnecessary grounds seeking to oust the jurisdiction of this court to review its refusal decision instead of helpfully contributing to an argument on the appropriate interpretation of the impugned provision.

[83] In the result the following order issues:

1. The first respondent's decision of 18 December 2023 to finally refuse the fourth respondent's application in terms of section 22 of the Eastern Cape Liquor Act No 10 of 2003 dated 13 January 2023 (Ref ECP No. 14619/0026/OF) in respect of Browns and Weirs Cash and Carry, Buffalo Road, King William's Town ("*the premises*") on the supposed basis that the fourth respondent failed to action or cause to be actioned the filing of the ward committee's report is reviewed and set aside.
2. It is declared that:
 - 2.1 an applicant for a certificate of registration complies with the requirements prescribed in section 22 (2)(d)(i) of the Act where it has provided proof of service to the first respondent of the relevant notice on the ward committee concerned; and
 - 2.2 the fourth respondent complied with section 22 (2)(d)(i) of the Act when it submitted proof of service to the first respondent of the notice on the second respondent on 26 January 2023.
3. The second respondent is directed to comply with section 22 (2)(d)(i) of the Act by consulting with the community of the area where the premises are situated and simultaneously submitting a report to the first respondent and the municipal council of the third respondent within ten days.

4. The first respondent is directed to reconsider the fourth respondent's application for transfer upon receipt of the ward committee's report.
5. The first respondent is directed to pay the applicant's costs, including the costs of counsel on Scale C.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING **30 January 2025**
DATE OF JUDGMENT **5 June 2025**

Appearances:

For the applicant: Mr. M De Beer instructed by Werksmans Attorneys care of Franz Attorneys, East London (ref. Mr. Franz).

For the defendant: Mr. S Mpakane instructed by The State Attorney, East London c/o Shared Legal Services, King William's Town (ref. Mr. Mosia).