

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

5/9/12

CASE NUMBER: 48915/12

In the matter between:

PICK N PAY RETAILERS (PTY) LTD

MODDERFONTEIN BREWERY (PTY) LTD

And

THE GAUTENG PROVINCIAL LIQUOR BOARD RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ☒ YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

FIRST APPLICANT

5 September 2012

DATE

SIGNATURE

SECOND APPLICANT

JUDGMENT

TLHAPIJ

[1] The applicants approached the court on urgency for the following relief:

- "2. A declaratory order that the respondent and its staff are not legally entitled to refuse acceptance of applications tendered for lodgement, to be processed for a decision before the respondent;

3. An order that the respondent is a creature of statute and cannot require of an applicant more than is prescribed in its empowering Act and Regulations;
4. An order directing the respondent to accept the nominations tendered by the first applicant when handed to it together with the order of the Honourable Court and to accept on the 7 September 2012 lodgement of the application of the second applicant in accordance with the provisions of Section 23 of the Gauteng Liquor Act;
5. That the respondent be ordered to pay costs of this application, inclusive of costs as between attorney and client."

This application was opposed.

BACKGROUND

- [2] During April 2012 the chairperson of the respondent confirmed to Mr Blom, a practising attorney a directive issued to the administrative staff to refuse to accept any documentation tendered for lodgement if they were of the opinion that the application was not properly prepared or complete. This occurred after Mr Blom, who deposed on behalf of both applicants had presented four new applications for licences on behalf of the first applicant. Mr Malebo a member of the first respondent's administrative staff refused to accept the said applications because they were not accompanied by lease agreements, despite the fact that it was not a requirement of the Act that lease agreements be attached.

- [3] The first respondent has persisted with such practice despite being aware of an order against it in the matter of **ZA-POR INVESTMENTS CC v THE GAUTENG LIQUOR BOARD AND OTHERS** (Case Number 58036/2008) where **Du Plessis J** ordered:

“1. That a declaratory order that the first respondent, as represented by the second, third and fourth respondents, did not and does not have the power to refuse to consider any application lodged with it and its administrative staff is not entitled to decide that an application does not comply with the requirements of the Act and does not have the power to send such an application back to the applicant who lodged it.” (my under lining)

- [4] Again in July 2012 the first applicant purchased a liquor store business and presented an application for lodgement in terms of section 40 of the **Gauteng Provincial Liquor Act 2 of 2003** ('the Act') . This was an application for the appointment of a nominee licence holder (responsible person) in respect of an existing licence issued to the business. Again the administrative staff refused to accept lodgement of the documents because they were not accompanied by a police clearance on the person of the nominee. This attitude persists despite the first respondent being aware of an order granted by **Preller J** in the matter of **DANIEL ADJETEY ADJEI AND OTHERS v THE GAUTENG PROVINCIAL LIQUOR BOARD** (Case number 11346/2008) which stated the following:

“3. A declaratory order that the provisions of Section 40 of the Gauteng Provincial Liquor Act 2 of 2003, is a nomination process, not an

application and that such a nomination does not require consideration by the respondent for a decision either to grant or refuse the same."

- [5] On the 17 August 2012 a member of the administrative staff of the respondent, Ms Mapaseka Matihaku of the first respondent wrote the following:

" To Whom It May Concern

This letter is to confirm that Mr Christo van Niekerk from Couzyn Hertzog & Horak Incorporated was at the Gauteng Liquor Board on the 17 August 2012 to submit a section 40 Appointment of Manager application and we could not accept it due to the fact that there were no SAPS Clearance Certificate and that resulted to an incomplete application."

- [6] On the 3 August 2012 the second applicant tendered lodgement of an application for a new liquor licence. Attached to the application was a letter from the auditors explaining that the applicant was a new company which had not as yet incurred any tax liability. One Moses from the respondent's office refused to accept such lodgement on the basis that no tax clearance was attached. Moses refused such lodgement despite a request that the application be placed before the Board to properly decide whether there was compliance and whether it could grant condonation by invoking the provisions of section 140 of the Act.

The existing practice is that new applications must be lodged on the first

Friday of a month to allow interested parties to inspect the applications and to object. The second applicant wants to lodge its application again on the 7 September 2012, however it is not yet in possession of a tax clearance and it knows that such lodgement will not be accepted.

- [7] According to the respondent the secretariat and executive committee established in terms of sections 12 and 13 of the Act have the power to perform any function of the Board and to act on the directions of the Board, and that any act of the executive committee shall be deemed to be an act of the Board. Furthermore that the administrative staff of the local committee and respondent fell within the office of the Secretariat who is a member of the Board and the functions of the Office of the Secretariat was to receive and screen applications to ensure compliance with the mandatory requirements of the Act failing which the applications will not be accepted. The Secretariat had the power to reject such defective applications and that this was done to ensure that all applications which serve before the Board are considered on merit and not on technicalities and to avoid backlog of applications which cannot be considered because they do not comply with the Act. (my underlining)

The respondent averred that the orders above were not immune from attack or criticism, and in particular that the order of Du Plessis J's was bad in law and contrary to the doctrine of separation of powers as embodied in the Constitution.

THE LAW

[8] The purpose of the Act is provided for in the preamble:

“To provide for the control of the retail sale and supply of liquor within the Gauteng Province; to establish the Gauteng Liquor Board, local committees and a Liquor Trade Association; to regulate applications for licences and to provide for public notification and participation, to regulate the granting of licenses in respect of different kinds of licences; to prohibit the sale of liquor to certain categories of people; to provide for general matters such as enforcement procedures; and to provide for matter connected therewith;”

8.1 Section 4 provides for the constitution of the Board and for the categories of individuals who shall be appointed to it.

8.2 Section 12 of the Act provides:

“(1) The Board shall in the performance of its functions be assisted by a secretary, officers and employees placed at the disposal of the Board under the provisions of the Public Service Act: Proclamation 103 of 1994.

(2) The secretary shall become an ex officio member of the Board and shall have no voting rights”

Of all the administrative staff appointed in terms of this section it is only the secretary who is appointed as an ex officio member of the Board.

- 8.3 Section 13 provides for the appointment by the Board of at least two its members and the secretary as an Executive Committee of the Board "which shall have the power to perform such functions of the Board during the periods between meetings of the Board..."

In my view the secretary in these circumstances still remains an ex officio member of the Board with no voting rights.

- 8.4 Section 14 provides that the Board may appoint experts and other persons to assist the Board in the performance of its powers, functions and duties with the approval and concurrence of the Member of the Executive Council (of the province responsible for Economic Affairs)

- 8.5 Section 15 provides for the delegation of powers, functions and duties of the Board to any member of the Board or any committee of the Board or any local committee of the Board with the approval of the Member of the Executive Council.

In my view the powers, functions and duties cannot be delegated to any of the Administrative Staff appointed in terms of section 12 of the Act.

- 8.6 Section 23 provides:

"(1) Every application for a new licence shall be made to the relevant local committee of the district or metropolitan area in which the licence is sought, in the prescribed form by lodgement with the secretary of the local committee."

In my view, it is envisaged herein that the application shall be placed for consideration before the Board or the Executive Committee or Local Committee constituted in terms of the Act.

8.7 Section 40 provides:

"(1) A person other than a natural person shall not conduct any business under a licence unless a natural person who permanently resides in the Republic and who is not disqualified in terms of the Act to hold a licence by him or her in the prescribed manner to manage and be responsible for its business."

[9] The crisp issue to determine is whether the chairperson of the Board is empowered by the Act to give directives to employees appointed in terms of section 12 of the Act to screen, reject and refuse to accept for lodgement applications for licences or nominations in respect of existing licences (section 40 nominations), before any process as contemplated in section 27 of the Act for the Board or Executive Committee or the Local Committee to consider the matters, is engaged

[10] It is clear from the preamble and the sections dealt with above that it shall be

the Board or the Executive Committee or the Local Committee that must consider the applications or nominations lodged. The applicants correctly submitted that the rejection of the applications by the administrative staff, was a deprivation of an opportunity for the Board to properly consider their matters. Their only request is for their matters to be placed before the Board for consideration and for a fair and reasonable process to be engaged. It is for these bodies to decide whether there is merit in their requests. It should not be about the attitude that applicants want to score on technicalities or that incomplete applications result in unnecessary backlogs for the Board.

Furthermore, it is not envisaged by the Act that all matters which do not meet the requirements should be rejected. In terms of section 140 of the Act, the Board may condone a defect where there has been substantial compliance and if the condonation is not likely to prejudice any person. This is a discretion that cannot be exercised by the administrative staff. The discretion exercised by the Board may extend to other situations.

- [11] Therefore powers, functions and duties of the Board cannot be performed by its administrative staff (i.e. the Secretariat in the opposing papers), appointed in terms of section 12 of the Act. The order by **Du Plessis J** in the **ZA-POR INVESTMENT CC** matter *supra*, was in my view the correct interpretation of the provisions of the Act. The order was not bad in law or contrary to the doctrine of separation of powers.

The directive given by the chairperson for its administrative staff to screen applications and to reject those which do not comply with the requirements in the Act before the matters are considered by the Board or Local Committee,

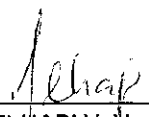
was unlawful and not in compliance with the Act.

URGENCY

[12] I have taken into account all the submissions in this regard and am of the view that the applicant has satisfied me that the application was urgent.

[13] In the light of the above the following order is granted:

1. The respondent is directed to accept the nomination of responsible persons tendered by the First Applicant on the 17 August 2012 under the Liquor Board reference GAU/100560C even though it is not accompanied by police clearance certificates for consideration by the respondent.
2. The respondent is ordered to accept the application for a new liquor licence by the Second Applicant tendered for lodgement on the 3 August 2012 when again tendered for lodgement on the 7 September 2012.
3. The respondent is ordered to pay the costs of this application.



TLHAPI V. V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON : 04 SEPTEMBER 2012
JUDGMENT RESERVED ON : 04 SEPTEMBER 2012
ATTORNEYS FOR THE APPLICANT : COUZYN, HERTZOG & HORAK
INC.
COUNSEL FOR THE APPLICANT : ADV. L PRETORIUS
ATTORNEYS FOR RESPONDENT : THE STATE ATTORNEYS
COUNSEL FOR THE RESPONDENT : ADV. D MOTSHWENE