11/9/07

**IN THE HIGH COURT OF SOUTH AFRICA / ES**
**(TRANSVAAL PROVINCIAL DIVISION)**

**CASE NUMBER:19469/2006**

**In the matter between :**

**KHIWA MORGAN NKOMO** **Applicant**

**and**

**THE GAUTENG PROVINCIAL LIQUOR BOARD** **Respondent**

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## JUDGMENT

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**MOKGOATLHENG J**

(1) This is an application to review and set aside the decision of the respondent made on 25th January 2006 refusing the former's application in that the applicant failed to respond to queries since January 2004.

(2) he applicant in terms of section 131 of the Liquor Act 27 of 989 and section 6 of the Administrative Act 3 of 2000 seeks a review of the respondent's decision because the latter has exceeded its power or has exercised its powers in an arbitrary, mala fide or grossly unreasonable manner.

(3) The applicant contends that in terms of section 19 of the Liquor Act, 27 of 1989 he applied for a special on-consumption liquor licence pertaining to his business enterprise West Village Tavern in respect of premises situated at Stands 47 and 48, Tom Muller Street West Village, Krugersdorp.

(4) The applicant contends that his application was properly completed, advertised and lodged in accordance with the provisions of sections of section 19 of the Liquor Act 27 of 1989 that no objections were lodged against the application.

(5) The respondent's grounds of refusing the application are that:

(a) the application was defective in that the applicant failed to furnish information requested by it ;

(b) the application was defective since the premises are residential premises, there was no approval from the relevant local authority or a certificate of rezoning by such local authority authorizing the use of the premises in accordance with the licence sought, and

(c) the grant of the licence would contravene the by-laws of the local authority concerned as well as ordinance 15 of 1986(T), that it cannot therefore not be compelled to perform an act which may lead to illegality.

(6) On 28th July 2004 and 25th August 2004 respectively, the respondent in a letter addressed to the applicant's consultant, requested,

(a) a proper local authority approval of the intended business-typed on the relevant letter-head-such approval to be signed by a designated executing official and not a ward councilor;

(b) "since your application is in respect of a place situated in a residential area our office needs local authority approval or a copy of rezoning certificate".

(7) The applicant contends that consent by the local authority is not a requirement for the consideration of a liquor application. The respondent contents the opposite.

(8) It is patent that the reason the respondent refused the application is predicated on the failure by the applicant to furnish a local authority approval or a rezoning certificate, because all other requested information was furnished by the applicant.

(9) There is no requirement in the Liquor Act 27 of 1989 which enjoins the respondent to require the applicant to provide it with "an approval from the relevant local authority authorizing the use of the premises in accordance with the licence sought as business premises and/or a tavern". In my view it is fallacious to argue therefore that in the absence of such approval or authority "the grant of the licence would contravene the by-laws of the local authority as well as Ordinance 15 of 1986(T)".

(10) The designated police officer's report in terms of section 140 of the Liquor Act 27 of 1989 has certified that "the proposed premises will be once completed in accordance with the plan submitted with the application , adequately equipped and affords suitable and proper accommodation for the purpose of a special liquor licence".

(11) In my view there is the requirement in the Liquor Act which enjoins the respondent to require the application to submit proof of the right of occupation before the latter's application for a liquor licence is entertained.

(12) I fully concur with JOOSTE, AJ who held in the unreported case of *C Beilings and Six Others v Gauteng Provinsiale Drankraad* that neither the National Liquor Act 27 of 1989 or the newly enacted Gauteng Liquor Act 2 of 2003 create any express authority for the respondent to enforce a town planning scheme. Section 22(2)(b)(1)(aa) of the Liquor Act 27 of 1989 stated that previously, the National Liquor Board could not grant an application for a liquor licence except if:

(aa) the purposes of the licence applied for a right to occupy the premises concerned."
The sub-section was deleted by section 8© of Act 105 of 1993. The right to occupation of the premises is no longer a statutory requirement for the granting of the liquor licence such as the one under discussion, this includes the requirement of zoning as was decided in the unreported decision of the Northern Cape Division of the High Court in the matter of *Wilcaris (Pty) Ltd and Four Others v S D Williams and Three Others* being a judgment of KRIEK J and with whom STEENKAMP J concurred. Once again "there is no provision against granting a liquor store licence for premises situated in a residential area in either the National Liquor Act 27 of 1989 or the Gauteng Liquor Act 2 of 2003. The only possible relevant section is section 22(2)(b)(1)(cc) of the Liquor Act 27 of 1989 which enjoins the respondent to consider the question whether the particular business will be conducted in such a manner as to negatively impact on the residential area. This is therefore not a prohibition *per se* for the granting of a licence in a residential area.

There was no evidence of any nature whatsoever to this effect before the respondent when it considered the application.

The fourth reason is that no plan approved by the local authority was provided to the respondent. Once again there is no requirement in either of the liquor acts referred to earlier that the plan submitted with an application for a liquor licence must be approved by the local authority.

In my view when the respondent which is a creature of statute required of the applicant to furnish it with proof that the premises were zoned for business purposes, or proof of the right to occupation, this is impermissible and "amounts to an encroachment upon the function and institutional integrity of another sphere of government, in this case this being the local authority".

(13) In *Pharmaceutical Manufacturers association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2002 2 SA 674 (CC) it was held that "the ground norm of administrative law is now found in…the principles of our Constitution". Section 33 of the Constitution provides that:

> "(1) Everyone has a right to administrative action that is lawful, reasonable and procedurally fair."

(14) Section 6 of PAJA provides that:

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of administrative action if-

(a) the administrator who took it-

(i) was not authorized to do so by the empowering provision;

(e) he action was taken-

(i) for a reason not authorized by the empowering provision:

(f) the action itself-

(i) contravenes a law or is not authorized by the empowering provision; or

(i) is not rationally connected to-

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(h) The exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(15) In my view the respondent failed to apply is mind to the relevant issues in accordance with the "behest of the statute and the tenets of natural justice," The misconception of the statute renders the respondent's decision susceptible to review. See *Johannesburg Stock Exchange and Anotherv Witwatersrand Nigel Ltd and Another 1988 3 SA 132A at 152A-D.*

(16) In my view the respondent acted in a grossly unfair manner in refusing the application by unreasonably insisting that the applicant should comply with the condition not enjoined or required by the statute.

(17) It is trite that the law empowers this court in exceptional circumstances to grant a liquor licence. There is no indication that the respondent having completely misconstrued the statute, will act differently if the matter is referred back to it.

(18) In the exercise of y discretion I am of the view that it will serve no purpose in referring the matter back to the respondent for a *de novo* hearing, because all the issues have been properly ventilated in this court. This application was lodged in 2003, a considerable period of time has elapsed since its adjudication.

(20) in the premises the following order is made.

(1) The decision of the respondent not to grant the applicant a special on-consumption liquor licence in respect of its business known as West Village Tavern is reviewed and is set aside with costs.

(2) The applicant is granted a special on-consumption liquor licence in respect of premises known as Erf 18, Blue Hedge Street, Lawley Extension, Western Area.

R R D MOKGOATLHENG
ACTING JUDGE OF THE HIGH COURT

HEARD ON:
FOR THE APPLICANT: ADV. TEESON
INSTRUCTED BY:
FOR THE RESPONDENT: ADV. ENGELBRECHT S.C
INSTRUCTED BY:
DATE HEARD:
DATE DELIVERED: 11/9/2007