



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

Case Number: 89305/16

26/10/17

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.
26/10/2017
DATE
SIGNATURE

In the matter between:

Izaane Trading and Investments CC

Applicant

and

The Minister of Trade and Industry
The National Liquor Authority

First Respondent
Second Respondent

JUDGMENT

MOLEFE J

[1] This is an application firstly for a *mandamus* order to compel the respondents to forthwith issue to the applicant the prescribed forms NLA 8¹ and NLA 9² registration certificate in respect of the applicant's application as a distributor in terms of the Liquor Act 59 of 2003 ("the Liquor Act") for its business known as Ultra Distributors Klerksdorp, and secondly, an interim order authorizing the applicant to distribute liquor in respect of its business until the forms NLA 8 and NLA 9 registration certificate has been issued.

[2] At the hearing of this application the applicant's counsel³ abandoned the second prayer for an interim order authorizing the applicant to distribute liquor. The only issue to be determined is therefore the *mandamus* order.

[3] The application was initially set down to be heard in the urgent court on 1 December 2016 but was struck off the roll, with costs for lack of urgency.

[4] The applicant has applied to be issued with a certificate as a distributor in terms of the Liquor Act on 29 July 2016 and was given a condition to provide the second respondent with a police clearance certificate on the person of the sole member of the applicant. The applicant does not accept this condition.

[5] The process of the application for a registration certificate as a distributor can be summarized as follows:

5.1 A prospective applicant desiring to be registered as a distributor must submit the required documentation, the NLA 1⁴ form, soliciting the details of the applicant and the address of the premises, details of the person or entities with interest in the matter, their existing interest in the liquor trade, Black Economic Empowerment, job creation, etc.;

¹ Conditions of Registration Form in terms of the National Liquor Regulation, 2004 published in GN R980 in GG 26689 of 17 August 2004 as amended.

² Registration Certificate in terms of the National Liquor Regulation, 2004 published in GN R980 in GG 26689 of 17 August 2004 as amended.

³ Advocate L A Pretorius.

⁴ Application for Registration Form in term so the National Liquor Regulations, 2004 published in GN R980 in GG 26689 of 17 August 2004 as amended.

5.2 The second respondent must peruse the application on behalf of the Minister ("the first respondent") and will issue the NLA 6⁵ form specifying the proposed conditions of registration suggested by the Minister;

5.3 The applicant may elect to accept or refuse the proposed conditions by filing the NLA 7⁶ form. If the applicant chooses to accept the conditions then the second respondent must issue an NLA 8 form with a final statement of conditions of registration;

5.4 Should the applicant refuse the proposed conditions (as is the case in this matter), the applicant must give reasons for the rejection. The first respondent must then consider the reasons submitted by the applicant and may refuse to register the applicant, if it has not responded or finally determine the conditions to be imposed and register the applicant⁷.

[6] In *casu*, the applicant was given the proposed conditions (NLA 6) which included the condition that:

"The applicant should provide the National Liquor Authority with the police clearance certificates for the Directors in the entity annually".

The applicant responded by objecting to the condition on the basis that the condition is contrary to the Liquor Act and the regulations as well as a decision of the High Court. In this regard the applicant relied on the case of *Marius Blom Incorporated and Another v The Minister of Trade and Industry and Others*⁸.

[7] In rejecting the imposed condition, the applicant's application falls under the provisions of section 13(7)(b) of the Liquor Act which provides as follows:

"If an applicant who has received a proposal of conditions-

- (a) consents to the condition being imposed, the Minister must register the applicant, subject only to the conditions as proposed; or
- (b) does not respond, or responds but does not consent to the proposed conditions, the Minister must consider any response submitted by the applicant and may-
 - (i) refuse to register the applicant, if it has not responded; or

⁵ Proposal for Conditions of Registration Form in terms of the National Liquor Regulations, 2004 published in GN R980 in GG 26689 of 17 August 2004 as amended.

⁶ Consent to, or refusal of, proposed Conditions of Registration Form in terms of the National Liquor Regulations, 2004 published in GN R980 in GG 26689 of 17 August 2004 as amended.

⁷ Section 13 (7)(b) of the Liquor Act.

⁸ Case number 57147/2014 (the Risk Rock Trading matter)

- (ii) finally determine the conditions to be imposed, and register the applicant".

[8] The applicant's case is that it is not within the requirements of the Liquor Act that the Minister should impose the condition of a police clearance certificate on a director of the applicant. Applicant's Counsel submitted that the Minister does not have the authority to refuse an application which is properly drawn and lodged, though he is entitled to require additional information within the ambit of the Liquor Act. If the application is not properly drawn he must notify the applicant of his belief and if the applicant does not rectify the defect within fourteen (14) days the Minister can refuse the application. It is further argued on behalf of the applicant that the Minister cannot refuse the registration, if one objects to the conditions, but can simply take a final decision in respect of the conditions and if the applicant does not agree, the matter may then be taken on review.

[9] Respondents' Counsel⁹ argued that the applicant's submissions show that it lost sight of the provisions of section 13(3)(a) of the Liquor Act which provides that:

"The Minister, having regard to the objects and purposes of this Act, the circumstances of the application, the declared wishes of the applicant in terms of section 11 (1) (b) and the criteria set out in subsection (1), may-

(a) propose any reasonable and justifiable conditions on the registration of an applicant who seeks to be registered only as a distributor; or

(b)"

[10] It is clear from section 13(3)(a) mentioned above that the only limitation that is imposed on the Minister is that any condition proposed should be reasonable and justifiable. It is however not the applicant's case that the condition to submit the police clearance certificate is not reasonable and justifiable but that the Minister can only impose conditions, if the application is not properly drawn in terms of the Liquor Act. It is conceded on behalf of the applicant that there is however, no statutory provision that restricts the Minister from imposing such a condition.

⁹ Mr M M Mojapelo.

Mandamus

[11] This application is brought in terms of section 6(2)(g) read with section 3(a) as well as section 8(2)(a) of the *Promotion of Administrative Justice Act 3 of 2000* ("PAJA"). These relevant sections provide as follows:

"6 Judicial review of administrative action"

(1)...

(2) A court or tribunal has the power to judicially review an administrative action if-

(a) - (f)...

(g) the action concerned consists of a failure to take a decision;

(h) - (i) ...

(3) If any person relies on the ground of review referred to in subsection 2(g), he or she may in respect of a failure to take a decision, where -

(a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision".

"8. Remedies in proceedings for judicial review"

(1)...

(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders-

(a) directing the taking of the decision;

(b) ...

(c) ...

(d) as to costs".

[12] The applicant *in casu* applied to be registered as a distributor in respect of its premises by lodging the NLA 1 form and it is submitted on the applicant's behalf that the application complied with all the statutory requirements of the Liquor Act and the regulations thereto. The second respondent acknowledged receipt of the application and issued the NLA 6 form, a notification of approval which also lists the proposed conditions which will apply to the registration and called upon the applicant to comment on the conditions or to accept same.

[13] Subsequent to the lodgment of the application, the applicant found out that the respondents' on-line system indicated that the application was incomplete in that

a police clearance certificate on the person of the sole member of the applicant was not submitted. In this regard the applicant submits that the Liquor Act and the regulations thereto do not require that a police clearance certificate must be submitted when applying for registration as a distributor.

[14] The applicant subsequently lodged the NLA 7 form and thereafter, the respondents issued a NLA 8 form being the conditions of registration from which the annual filing of the police clearance certificate was made a condition. The applicant submits that the NLA 8 form was incomplete¹⁰.

[15] On 16 September 2016, the applicant notified the respondents that the NLA 8 form was incomplete and requested the respondents to submit the complete NLA 8 form together with NLA 9 registration certificate. The applicant also paid the final registration fee of R2000.00, required when registration is finalised.

[16] As mentioned above, the respondents' case is that it had the authority to require the applicant to submit a police clearance certificate and the respondents rely on section 13(7)(b) of the Liquor Act, to support this submission. The respondents also contend that the applicant has failed to properly challenge the administrative decision of an imposition of the condition in terms of a proper review application, instead of a final interdict, to compel the respondents to issue it with a registration certificate as a distributor.

[17] It is the applicant's contention that the Minister must simply issue the NLA 8 form with the final conditions decided on (*in casu*, the police clearance certificate) and the NLA 9 registration certificate, and only then can an applicant decide whether it will accept the conditions or whether it wishes to take any of the imposed conditions not acceptable, on review. It is argued by the applicant that only then has the administrative decision, regarding the registration and the conditions of registration been finally taken after which the applicant can decide whether it wishes to take any of the imposed conditions on review.

¹⁰ Record pages 45 to 48, Annexure "F".

[18] The main issue to be determined is whether or not the Minister has taken a final decision, as contained in the NLA 8 and NLA 9 forms, which decision has been communicated to the applicant for a review application to be relevant. If not, has there been an unreasonable delay on the respondents' part to justify a review application. Applicant's counsel contends that the respondents have unnecessarily delayed, neglected and refused to have the final registration and conditions (forms NLA 8 and NLA 9), issued to complete the decision process. In this regard counsel relied on regulation 15(4) of the Liquor Act which states that:

"(4) Upon receiving a refusal of proposed conditions, and after considering the submission by the applicant in support of that refusal, the National Liquor Authority must deliver a final statement of conditions of registration in Form NLA 8".

[19] Respondents' Counsel on the other hand contends that the Minister is empowered and authorised by the provisions of section 13(3)(a) of the Liquor Act¹¹ to impose any reasonable and justifiable conditions and that the applicant's argument that the Liquor Act does not grant the Minister authority to impose the police clearance requirement as condition has no basis in law and logic. The respondents also rely on section 13(4) of the Liquor Act which provides as follows:

"In addition to the provisions of subsection (3), if an applicant has a director, member, trustee, partner or member of its board or executive body who falls in the category of persons disqualified in terms of section 11 (2), the Minister may propose a condition designed to prevent that person from exercising any decision-making authority with respect to the proposed registered activities".

[20] In my opinion there is no doubt that the Minister is empowered and authorised by the provisions of Section 13(3)(a) of the Liquor Act to propose any reasonable and justifiable conditions. It is common cause that it is not the applicant's case that the condition proposed is not reasonable and justifiable but that the proposed condition is contrary to the Liquor Act and the regulations thereto, as well as the *Marius Blom* decision *supra*.

¹¹ The Minister, having regard to the objects and purpose of this Act, the circumstances of the application, the declared wishes of the applicant in terms of section 11(1)(b) and the criteria set out in subsection (1) may-

- (a) propose any reasonable and justifiable conditions in the registration of an applicant who seeks to be registered only as a distributor; or
- (b)

[21] Applicant, in its founding affidavit, attached the Court order granted by Madam Justice Hughes on 19 August 2014 in the *Marius Blom* case¹², which *inter alia* stated the following:

"A declaratory order that it is not a requirement of Act 59 of 2003 that an applicant for registration, who is not a natural person, must submit police clearance certificates on its constituting shareholders, members or directors".

[22] The applicant's reliance on the *Marius Blom* case, does not in my opinion, take the matter further as the case is distinguishable from this application. In the *Marius Blom* case, the administrative staff members of the National Liquor Authority (second respondent) were refusing to accept and process applications tendered for lodgment because the applications did not have police clearance certificates, which on their perception did not comply with the Act.

[23] I however agree with the applicant's submission that in terms of regulation 15(4) of the Liquor Act, the Minister does not have a discretion whether to register or not register an applicant as a distributor if an applicant rejects proposed conditions. The Minister must register such applicant subject to the conditions it deems fit, having considered the applicant's objections. The applicant can thereafter consider whether to institute review proceedings or not, to challenge the imposed conditions. In my view, the Minister is therefore obliged in law to issue the NLA 8 form and the NLA 9 registration certificate.

[24] In my view, the provisions of section 13(7)(b) of the Liquor Act are quite clear and are not in conflict with the provisions in regulation 15(4). The Minister has the right to impose conditions and same must be communicated to the applicant for its comments within a period of thirty (30) days, as already explained *supra*. This is done by the NLA 6 form stating the proposed conditions whereafter the applicant must respond by way of the NLA 7 form, containing an acceptance or as *in casu*, a refusal to accept the conditions and the reasons for same. Once the NLA 7 form is received, the Minister must finally determine the conditions of registration and must then register the applicant by way of a NLA 8 containing the final conditions decided on and a NLA 9 registration certificate must be issued to the applicant. Only then is

¹² Bundle pages 39 – 41 Annexure 'D'.


the administrative decision, regarding the registration and the conditions of registration, been finally taken.

[25] In *casu*, the respondent sent an incomplete NLA 8 form to the applicant and refused to issue the prescribed complete NLA 8 form containing the final conditions. The respondent further failed to issue a NLA 9 form registration certificate, which is the prescribed decision process in terms of the Act and regulations. This is in my view, accordingly necessitates an application for a *mandamus* order to have the final registration and conditions (forms NLA 8 and NLA 9) issued, whereafter the applicant can consider and decide whether to initiate review proceedings or not.

[26] I am satisfied that the applicant has made out a proper case to demonstrate an unreasonable delay by the respondents in issuing the complete NLA 8 form together with the NLA 9 registration certificate.

[27] I therefore make the following order:

1. *The respondents are directed forthwith to issue to the applicant, the prescribed forms NLA 8 and NLA 9, in respect of its application for its business to be known as Ultra Distributors Klerksdorp and to be situated on the remaining extent Erf 1677, Klerksdorp Ext 5, being Shop 2, Western Bazaars Centre, Chris Hani Road, Klerksdorp, Reference number 1263;*
2. *The respondents to pay the costs of this application on a party and party scale.*



D S MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES:**On behalf of Applicant:****Adv. L A Pretorius****Instructed by:****Marius Blom Inc.****On behalf of Respondents:****Mr. M M Mojapelo****Instructed by:****State Attorneys****Date Heard:****11 September 2017****Date of Judgment:****26 October 2017**