REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO

17/01/25
DATE

Case Number: 043519/24

In the matter between:

PARADISE HOTEL & ENTERTAINMENT LOUNGE (PTY) LTD (REG NO: 2018/489185/07) **Applicant**

and

GAUTENG PROVINCIAL LIQOUR BOARD **Respondent**

JUDGMENT

Joyini J

INTRODUCTION

[1] This is an application to review and set aside the decision taken by the respondent to withdraw the Hotel Liqour Licence ("the licence") of the applicant.

[2] The application is brought in terms of the section 6(2) of the Promotion of Administrative Justice Act, Act 3 of 2000 (herein referred to as "PAJA").

[3] The decision by respondent was taken on 30 March 2023 and communicated on two occasions, being 19 April 2023 and 25 October 2023, by means of an official electronic communication ("email"),[1] directly to the applicant's legal representative.

[4] The court appreciates the insightful and engaging submissions from both parties' legal representatives, which greatly assisted in adjudicating this matter.

BACKGROUND FACTS

[5] According to the parties to this matter, the factual background to this application is largely common cause, but for the allegations that the applicant was found to be *"in contravention of the licence conditions"*. It is also common cause that the applicant's business was closed down on 28 December 2023, and remains closed up and until this date.

[6] The applicant was issued with a licence as far back as 18 October 2018, authorising the applicant to trade as a *bona fide* hotel at its premises situated in Vanderbijlpark.[2] On the same day, an inspection was conducted at the applicant's premises by the South African Police Services ("SAPS"), and more specifically by Captain Alwyn Wilken.

[7] On 29 September 2022, the applicant was issued with a renewal certificate regarding its licence.[3]

[8] Subsequent to that, a report was filed by SAPS requesting that an inquiry be held in terms of section 105, alternatively, section 106 of the Gauteng Liqour Act 2 of 2003 (hereinafter referred to as "the Act").[4]

ISSUES FOR DETERMINATION

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[1] Caselines 02-187; 02-190 para 10.
[2] Caselines 02-46.
[3] Caselines 02-47.
[4] Caselines 02-48 to 02-81.

[9] Whether the answering affidavit deposed to by Mr Otto Mbongeni Shabangu constitutes inadmissible hearsay evidence;

[10] Whether the decision of the respondent is reviewable on the grounds for review as set out in terms of section 6(2) of PAJA, and as such, stands to be reviewed and set aside;

[11] Whether exceptional circumstances exist which would justify the court to direct the respondent to take the decision it should have taken in the first place (without remitting the matter to the respondent to consider it afresh).

POINT IN LIMINE

[12] Counsel for the applicant raised a point *in limine* on the issue of the deponent (Mr Otto Mbongeni Shabangu) to the answering affidavit of the respondent.

[13] Counsel's concern is that Mr Shabangu has no personal knowledge with what had transpired during the deliberations between the members of the Board and the Chairperson, who ultimately made the decision and signed the letter withdrawing the applicant's licence.

[14] Counsel for the applicant put this matter before court for determination, more specifically, whether the answering affidavit deposed to by Mr Shabangu constitutes inadmissible hearsay evidence.

[15] Counsel for the respondent referred the court to *Plettenburg Bay Country Club v Bitou Municipality,*[5] where the court held: *"[6] In motion proceedings any person, who can positively attest to the facts, is entitled to depose to an affidavit, whether it is the founding affidavit or any ancillary affidavit, and no*

[5] (6163/04) [2005] ZAWCHC 79; [2006] 4 All SA 395 (C) (24 October 2005).

specific authority is required. It is the institution of the proceedings that must be authorised."

[16] Counsel for the respondent argues that in *casu*, the said deponent (Mr Shabangu) is a senior employee of the respondent, who is responsible for all legal matters thereof and is the one who ordered the inspection of the applicant. He participated in the hearing and was aware of how it concluded. He is therefore fully conversant with all the facts of the matter at hand. Due to the non-availability of the erstwhile chairperson and deputy chairperson who are no longer members of the respondent at the time of the drafting of the answering affidavit, the deponent was readily available to depose. The respondent requests this to be condoned, on the undertaking that a confirmatory affidavit shall have been filed ahead of the hearing of this application.

[17] In *Sasol South Africa t/a Sasol Chemicals v Penkin*,[6] the court held: "*Proper administration of justice and interests of justice – this is an instance where there is no real prejudice to the applicant. The correct approach to less than perfect procedural steps is to consider them in the context of prejudice and the interests of justice. The interests of justice is the yardstick for the court's discretion to overlook such steps where objections thereto would have no effect other than to foment delay and increase costs. The rules of civil procedure exist to ensure that every litigant has an opportunity to place its case before the Court so that a proper ventilation of the dispute between parties can take place. Where a litigant takes steps to prevent this from happening, this undermines the right in section 34 of the Constitution, the proper administration of justice and results in unnecessary delays and increased costs. In the absence of real prejudice, this conduct should not be permitted, and ought to meet with strong censure from the Court.*"

[18] In light of the authorities referred to above, I am of the view that the applicant in *casu* does not suffer any prejudice resulting from this issue of the deponent. As such, it is my considered view that there is no harm in dismissing the point

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[6] (06609/2020) [2023] ZAGPJHC 329; 2024 (1) SA 272 (GJ) (14 April 2023).

in limine raised by the applicant. Therefore, the answering affidavit deposed to by Mr Shabangu does not constitute inadmissible hearsay evidence.

APPLICANT'S CONTENTION

[19] According to the counsel for the applicant, on 5 January 2023, Mr Shabangu (Director: Law Enforcement and Compliance Unit of the respondent) requested the Inspectorate of the respondent to investigate complaints received from Captain Wilken.

[20] On 20 January 2023, an inspection was held by the inspectors of the respondent at the applicant's premises.

[21] On 23 January 2023, a report was submitted by the Inspectorate of the respondent.[7] It was indicated that there is no evidence of any contraventions of the Act as per the findings of the Inspectorate in their report. The inspectors, however, recommended in their report that the owner of the applicant as well as Captain Wilken be summoned in terms of section 10 of the Act to appear before the Inspectorate to give clarity regarding certain allegations.

[22] Subsequent to some correspondence having been exchanged between the respondent and the applicant and/or his legal representative, a hearing was conducted before the respondent on 30 March 2023, in terms of section 106 of the Act. According to the counsel for the applicant, there is not an iota of evidence from the record that the applicant was in any contravention of any of its liquor licence conditions. A letter of withdrawal was issued on 26 September 2023 and it was signed on 25 October 2023. The ultimate decision by the respondent to withdraw the applicant's hotel liquor licence is in contradiction with the finding and report submitted by its own Inspectorate.[8] Remember, Captain Wilken from SAPS did not disagree with this report in the hearing.

[23] The withdrawal of the licence prompted an urgent application which was issued in the Gauteng Local Division, Johannesburg, under Case No: 134629/23 and

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[7] Caselines 02-106 to 02-108.
[8] Caselines 02-106 to 02-108.

thereafter this present application for review which was served on the respondent on 2 May 2024.[9] Counsel for the applicant submits that this application for review was lodged timeously within the prescribed 180 days as is required in terms of section 7(1) of PAJA.

RESPONDENT'S CONTENTION

[24] Counsel for the respondent contends that the application must fail for the following reasons: The respondent had the authority to take the decision it took; it was authorised by the empowering provisions of the Act and its action was not materially influenced by any error of law; etc.

[25] In response to the applicant's contention that the respondent's decision was irrational and unfair, counsel for the respondent argues that the respondent exercised its discretion and took the decision based on the Act, regulations, reports from SAPS and the Inspectorate, a procedurally fair process leading to a hearing, and weighing all the evidence before it.

[26] Counsel for the respondent referred the court to *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*[10] where the court held that the exercise of public power will be rational if it is connected to the purpose for which the power was conferred. In *casu*, nothing the respondent did that contradicted the purpose of the power it has.

[27] Counsel for the respondent submits that in the process of enforcing adherence to the licence conditions, the respondent may receive reports about the conduct of a licence holder, and in their discretion, take an appropriate decision and this is exactly what the respondent did.

[28] Counsel for the respondent argues that the decision to withdraw the applicant's licence was warranted and justified. The applicant's contention is that in

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[9] Caselines 26-1 to 26-2.

[10] (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000).

reaching its (respondent's) decision, the respondent did not consider Captain Wilken's response at the hearing where he did not disagree with the report of the inspectorate. The findings of this report exonerated the applicant by indicating that there were no contraventions of the Act. In response to this, counsel for the respondent argues that in respondent's assessment, in the context of a cordial hearing, the respondent viewed the Captains's response as avoiding to over-reach.

[29] Counsel for the respondent referred the court to *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board*[11] where it was held: "... a court must be careful not to overturn a decision on review merely because it disagrees with it. It must be alive to the fact that it was primarily for the decision maker to determine which facts are relevant and which not. But, once the court is satisfied that the decision could only properly be taken if certain facts, overlooked by the decision maker, were taken into account, it is entitled to interfere. Similarly, once it is satisfied that in taking the decision certain facts that were taken into account should not have been, it may interfere.[12] Even when all relevant facts were considered the court will have to consider the weight attached to the facts.

ANALYSIS

[30] Administrative action must be reasonable and rational. This means that the action taken must make sense given the information that is available to the person who makes the decision to take the action. When the administrator is using discretion, they can only take relevant factors into account. If relevant factors are not considered, or irrelevant factors are taken into account, then the decision is not taken for good reasons. In such a case, a court can review the decision.

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[11] (221/2015) [2015] ZASCA 202; [2016] 1 All SA 704 (SCA) (2 December 2015).

[12] *Jacobs en 'n Ander v Waks en Andere* [1991] ZASCA 152; 1992 (1) SA 521 (A) at 550D-H.

[31] The precise point at which a court is entitled to interfere may not be entirely clear, but as Henning J said many years ago,[13] *'where a factor which is obviously of paramount importance is relegated to one of insignificance, and another factor, though relevant is given weight far in excess of its true value'* interference is warranted. I would suggest that it is essential.

[32] The only ground for review to which we need to have regard in *casu*, is that set out in s 6(2)(*e*)(iii) of PAJA. That provides that a court may review administrative action if it was taken because irrelevant considerations were taken into account or relevant considerations were not considered. This encapsulates a principle that was part of our administrative law prior to s 33 of the Constitution or the enactment of PAJA, namely that a functionary who *'took into account irrelevant considerations or ignored relevant ones'* was liable to have their decision overturned on review.

[33] With the utmost respect to the respondent in *casu*, it seems to me that it (respondent) failed to give sufficient consideration to the fact that its (respondent's) decision to withdraw the applicant's hotel liquor licence is in contradiction with the finding and report submitted by its own Inspectorate.[14] Remember, Captain Wilken from SAPS did not disagree in the hearing with this report which indicated that there were no contraventions or violation of the Act by the applicant. This means that this factor which is obviously of paramount importance was relegated to one of insignificance by the respondent. This, on its own, warrants court's intervention in the form of reviewing the respondent's decision.

[34] While it is true that it is, generally speaking, for the decision-maker to decide how much weight to attach to each relevant factor, he or she still has to give them proper consideration. In *Bangtoo Bros & others v National Transport*

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[13] *Bangtoo Bros and Others v National Transport Commission and Others* 1973 (4) SA 667 (N) at 685C-D.

[14] Caselines 02-106 to 02-108.

Commission & others[15] Henning J held that the tribunal concerned in that case was *'essentially obliged to consider all relevant and material information placed before it'* and to *'pay mere lip service to this obligation is not sufficient, just as it would be a dereliction of duty to hear representations which are pertinent, and then to ignore them'.*

[35] A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensive justification. Instances of irrational decisions include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decision, or where there is absence of evidence in support of the decision.

CONCLUSION

[36] Taking into account the totality of the evidentiary material, arguments and submissions by parties' counsel, I am of the view that the respondent, in *casu*, failed to give sufficient consideration to the fact that its (respondent's) decision to withdraw the applicant's hotel liquor licence is in contradiction with the finding and report submitted by its own Inspectorate.[16] Remember, Captain Wilken from SAPS did not disagree in the hearing with this report which indicated that there were no contraventions or violation of the Act by the applicant. This means that this factor which is obviously of paramount importance was relegated to one of insignificance by the respondent. This, on its own, warrants court's intervention in the form of reviewing the respondent's decision.

COSTS

[37] One of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.[17] The last thing that our already

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[15] 1973 (4) SA 667 (N) at 685C-D.
[16] Caselines 02-106 to 02-108.
[17] Union Government v Gass 1959 4 SA 401 (A) 413.

congested court rolls require is further congestion by an unwarranted proliferation of litigation.[18]

[38] It is so that when awarding costs, a court has a discretion, which it must exercise after a due consideration of the salient facts of each case at that moment. The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court.

[39] No hard and fast rules have been set for compliance and conformity by the court unless there are special circumstances.[19] Costs follow the event in that the successful party should be awarded costs.[20]

[40] In light of these considerations and both parties' argument relating to the costs of this application, I am accordingly inclined to grant costs in favour of the applicant on a party and party scale.

ORDER

[41] In the circumstances, I make the following order:

[41.1] The point *in limine* raised by the applicant on the issue of the deponent (Mr Otto Mbongeni Shabangu) to the answering affidavit of the respondent is hereby dismissed;

[41.2] The decision of the respondent to withdraw the applicant's hotel liqour licence (NO. GLB 8000001802), originally issued on 18 October 2018, is hereby reviewed and set aside;

[41.3] The respondent is hereby ordered to pay the costs on a party and party scale.

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[18] Socratous v Grindstone Investments (149/10) [2011] ZASCA 8 (10 March 2011) at [16].
[19] Fripp v Gibbon & Co 1913 AD 354 at 364.
[20] Union Government v Gass 1959 4 SA 401 (A) 413.

[redacted]

T E JOYINI

JUDGE OF THE HIGH COURT, PRETORIA

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Date of Hearing: 15 November 2024

Date of Judgment: 17 January 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 17 January 2025 at 10h00.