

SOUTH AFRICA / JUDGMENT

Marius Blom Incorporated and Others v South African Revenue Services and Others

(57412/14)

[2016] ZAGPPHC 28 (25 January 2016)

[2016] ZAGPPHC 28

COURT

North Gauteng High Court, Pretoria

BEFORE

M.F KGANYAGO

CASE / FILE NUMBER

57412/14

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)
CASE NO: 57412/14
DATE: 25 JANUARY 2016

In the matter between:

MARIUS BLOM
INCORPORATED.....1ST
Applicant
BOXER
SUPERSTORES.....2ND
Applicant
ROBINSON LIQUORS (PTY)
LTD.....3RD
Applicant
And
THE SOUTH AFRICAN REVENUE
SERVICES.....1ST
Respondent
THE LIMPOPO PROVINCIAL LIQUOR
BOARD.....2ND
Respondent
THE LIMPOPO PROVINCIAL DEPARTMENT OF
ECONOMIC
DEVELOPMENT ENVIRONMENT AND
TOURISM.....3RD

Respondent

JUDGMENT

KGANYAGO. AJ

[1] The applicants have originally brought an application on urgent basis seeking the following orders:

1.1. That non-compliance with the rules of the Honourable Court in respect of dies and service, be condoned in terms of Court Rule 6(12) and that this matter be heard as an urgent application;

1.2. A declaratory order that all payments to be made to or in favour of the Second Respondent in terms of the Provisions of Act 27 of 1989, must be made to the first respondent at any of its offices receiving payments in the Republic of South Africa.

1.3. An order directing:

1.3.1. The first respondent to pay the costs of this application, inclusive of costs as between attorney and client, alternatively

1.3.2. The first, second and third respondents, jointly and severally and in solidum with each other, payment by one the other to absolve, to pay the costs of this application inclusive of costs as between attorney and client; and

1.4. Further and/or alternative relief.

[2] The application on urgent basis was struck off the roll for lack of urgency. The application has now been set down for the remainder of the relief claimed. The second and third respondents are opposing the applicants' application.

[3] According to the applicants, in terms of Liquor Act 27 of 1989 ("Act 27 of 1989") the second respondent is the licencing and controlling authority for the sale and supply of liquor in the Province of Limpopo and it falls under the jurisdiction of the third respondent. The second respondent must consider various matters relating to liquor licences and payments in respect of such liquor licences, renewals, application fees, etc, and must be made to the second respondent by paying same to the first respondent.

[4] According to the applicants, the respondents mero moto changed this requirement of Act 27 of 1989, without any supporting amendment to Act 27 of 1989 or any authority to do so, and required of the applicants to pay at the third respondent at its provincial offices in Polokwane, instead of the first respondent as is prescribed by Act 27 of 1989. The applicants have previously approached this court under case number 53113/2007 wherein the court issued an order that payments should be made to the first respondent, and that it must be accepted by the first respondent on behalf of the second respondent.

- [5] According to the applicants, the respondents complied with the court order for a period of time, but have now once again reverted to their own directive and requirements, wherein the applicants are required to make payments not to the first respondent, but to the third respondent on behalf of the second respondent. The applicants contend that the first respondent is refusing to accept payment of monies on behalf of the second respondent and the third respondent expect payments at its offices in Polokwane in cash and not by way of electronic transfer.
- [6] According to the first applicant, it is having its offices in Pretoria, and it practices country wide in liquor licences application in terms of the Act and Provincials Act. It also applies to the Province of Mpumalanga and the first respondent accepts payments on behalf of the Mpumalanga Provincial Liquor Board but it refuses to accept payments on behalf of the second respondent on the basis that it has been instructed no longer to receive any such payments.

The prescribed application fee which the first applicant expected to pay by cash at the third respondent's offices in Polokwane amounts to R200-00. It is upon this basis that the first applicant felt inconvenienced and brought this application.

- [7] The applicants argues that the second respondent derives its authority from legislation, being Act 27 of 1989, and that it cannot act outside the powers and scope of Act 27 of 1989. The applicants therefore contend that the demand of the second respondent is ultra vires and unlawful.
- [8] The respondents in their answering affidavit have stated that Liquor Act 27 of 1989 operate nationally and was repealed by section 46 of the Liquor Act 59 of 2003 which came into operation on the 13th August 2004, only in those provinces that have promulgated their own provincial liquor legislation. They further stated that the Act remains in force in respect of provinces that have not promulgated their own liquor legislation. However, they do concede that the Limpopo Provincial Government has not yet promulgated its own liquor legislation, and that, in the circumstances, the Act still applies in Limpopo Province.
- [9] The respondents argues that none of the applicants were parties to the order that was obtained under case number 53113/2007, and therefore cannot claim to be entitled to the benefit of the said order, in particular that the order is limited to the licences listed in that order. The parties under case number 53113/2007 was the first applicant, Germishuizen Inc against first and second respondents.
- [10] The respondents argue that the first respondent is not part of the government, and therefore, cannot be used as a collecting agency for all government departments. The respondents contend that the collection of liquor licence fees falls outside the functional area of the first respondent as an organ of the state.

- [11] At issue in this matter is whether the second respondent acted ultra vires and unlawful when it decided that liquor licence fees, renewals fees application fees, etc should no longer be paid to the first respondent, but to the third respondent.
- [12] The exercise of all public powers must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. (See *Pharmaceutical Manufacturers Association of SA and Another: In Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC) at para 20).
- [13] In *Minister of Correctional Services v Kwakwa and Another* 2002 (4) SA 455 (SCA) at 472 D-G the court stated:- “ In the *Fedsure* case supra the Constitutional Court held that the doctrine of legality, an incident of the rule of law, was an implied provision of the Interim Constitution of the Republic of South Africa Act 200 of 1993 (para [58] at 400 D- E):
- ' It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law:
- See also *President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others* 2000(1) SA 1 (CC) at 70 G-4. Like the President of the country, like members of the Executive and like the Legislature and other repositories of power, the appellants, in exercising public power, must comply with the Constitution and must act within the parameters of their statutory powers. ”
- [14] The Liquor Act 59 of 2003 (“Act 59 of 2003”) repealed the Liquor Act 27 of 1989. Act 59 of 2003 has repealed Act 27 of 1989 only in those provinces that have promulgated their own liquor legislation. It is common cause that Limpopo Province has not yet promulgated its own liquor legislation. Therefore in my view, section 46 Act 59 of 2003 is not applicable in Limpopo Province.
- [15] The respondents as I have already pointed out in paragraph 8 supra, have conceded that they have not yet promulgated their own provincial legislation, and are therefore still bound by Act 27 of 1989. Section 182 of Act 27 of 1989 provides that the Minister may make regulations regarding fees payable by the applicants and others. The Minister has published the said regulations, and they came into operation on 08th June 1992. In terms of the regulations, application fees, licence fees are payable to the first respondent.
- [16] Act 27 of 1989 has regulations which regulate how fees must be collected and also where they must be paid. If the respondents is still bound by Act 27 of 1989 and does not have its own Provincial Liquor Act, it follows that the respondents are also bound by the regulations promulgated by the Minister in relation to Act 27 of 1989.

[17] According to the regulations, the required fees must be paid to the receiver of revenue. The respondents argue that the first respondent was only established by South African Revenue Service Act 34 of 1997 ("Act 34 of 1997") which came into operation on the 01st October 1997. According to the respondents, in terms of Act 34 of 1997 there is no provision to the effect that any reference in any statute to the Receiver of Revenue shall have reference to the first respondent. I cannot agree with the

respondents' on this aspect. It is common knowledge that before the 01st October 1997 the first respondent was known as the

Commissioner of Inland Revenue commonly known as Receiver of Revenue (First Applicant). From 01st October 2007 the first respondent is now known as South African Revenue Services. Therefore in my view, in the regulations where it refers to Receiver of Revenue, it refers to the South African Revenue Services.

[18] At no stage was the Act 27 of 1989 repealed to empower the second and third respondents to collect the required fees on their own. The second and third respondents do not have their own provincial liquor Act, and are therefore still bound by Act 27 of 1989 and its regulations. Whatever they are doing must fall within the ambit of Act 27 of 1989 and its regulations.

[19] In terms of the doctrine of legality, the second and third respondents must comply with the Constitution and as well act within the parameters of the powers conferred upon them by Act 27 of 1989.

[20] It was contended on behalf of the respondents that the interpretation contended by the applicants is inconsistent with chapter 13 of the Constitution in that it has got the effect of undermining the competence of the Provinces to levy and collect their own taxes and levies. The question to be asked is whether Act 27 of 1989 or regulations permits the second and third respondents to levy and collect fees on their own, or whether the Provincial Government has enacted a legislation that empowers them to do so. The regulations authorize only the first respondent

to receive fees from the applicants, and at this stage there nothing that authorize the second and third respondents to collect fees directly from the applicants.

[21] Considering Act 27 of 1989 and its regulations as a whole, and the fact that the respondents does not have its own liquor Act, the legislature never intended second and third respondent to have powers to collect fees directly from the applicants. The second respondent has acted outside their powers and scope of Act 27 of 1989, and their actions are therefore ultra vires and unlawful.

[22] Perhaps, if the second and third respondent can be more flexible in accepting other methods payments in relation to liquor licence fees, there will be no need for applicants to pay at the first respondent. It is clear that the applicants are not refusing to pay, but is more about convenience.

[23] In the result I make the following order-

23.1. It is declared that all payments to be made in favour of the Second Respondent in terms of the provisions of Act 27 of 1989, be made to the First Respondent at any of its offices receiving payments in the Republic of South Africa.

23.2. The second and third respondents jointly and severally to pay the applicants costs, the one paying the other to be absolved.

M.F KGANYAGO

ACTING JUDGE OF THE HIGH COURT

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Prepared on 11 October 2026 · Esheria