

SOUTH AFRICA / JUDGMENT

Match Padel Cedar Square (Pty) Ltd v Gauteng Liquor Board (058697/2024) [2024] ZAGPPHC 702 (16 July 2024)

[2024] ZAGPPHC 702

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi

CASE / FILE NUMBER

058697/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION,

PRETORIA)

Case No. 058697/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHERS JUDGES: NO

(3)

REVISED

DATE:

16 JULY 2024

SIGNATURE

In

the matter between:

MATCH

PADEL CEDAR SQUARE (PTY) LTD

Applicant

And

THE

GAUTENG LIQUOR BOARD

Respondent

This

matter was heard virtually (MS Teams) and disposed of in terms of the directives issued by the Judge President of this Division.

The

judgment and order are accordingly published and distributed electronically.

JUDGMENT

KUBUSHI J

INTRODUCTION

- [1] The applicant, a company duly registered in terms of the company laws of the Republic of South Africa, approached court on urgency seeking a rule nisi calling upon the respondent to give reasons why an order authorising the applicant to trade in liquor as if the restaurant liquor licence applied for by the applicant with the respondent for its business, has been granted and issued, pending the review in terms of rule 53 of the Rules of Court of a decision of the respondent to decline the application of the applicant for such a licence.
- [2] The respondent is opposing the application on urgency and on the merits. The issue of urgency shall be dealt with first as it might be dispositive of the application.

FACTUAL MATRIX

- [3] The facts of the application are simple and mostly common cause between the parties. The nature of the business of the applicant is said to be that of a Match Pedal franchise, where people play a game akin to tennis, according to rules which makes the game a cardiovascular intensive sport, resulting in combatants usually wanting to enjoy a beer or like beverage after completing a competitive but social game of sport. In order to have such beverages available to players, and their spectator friends, the applicant requires a liquor licence. The business is dependent upon offering a full service in order to be sustainable and profitable.
- [4] The applicant says that it planned its business with proper allowance for the process of applying for a liquor licence and entered into the necessary lease agreement for the premises, employed staff, and established a coffee shop type of complimentary facility, where liquor is to be served with drinks, snacks and meals to patrons who have completed a Match Pedal game. An amount of R9 000 000 is said to be invested in the establishment of the

business with a projected break-even turnover of R600 000. When the sale of liquor is included, the expected turnover is calculated as R900 000.

At the moment because there is no liquor sold, the turnover is R600 000.

- [5] The applicant employed fifteen employees for the business on the presumption that a liquor licence will be on hand when the business opens. Without liquor being available to be served, the applicant will have to retrench four of the employees.
- [6] The applicant applied for a liquor licence which was declined on 16 January 2024. The reason for declining the liquor licence application is on the basis that, “the applicant does not have a proper business permit that allows him [Sic!] to trade in South Africa”. The decision rejecting the liquor licence application was communicated by email to the applicant on 15 April 2024.
- [7] It is alleged that after learning about the denial of the liquor licence application by the respondent, the applicant was referred to a liquor consultant, who unsuccessfully, tried to resolve the matter with the respondent. The urgent application was, subsequently, launched on 28 May 2024, on an urgent basis.

LAW APPLICABLE TO THE ISSUE OF URGENCY

- [8] Before a court makes a finding on the merits of an urgent application, it must first consider whether the application is indeed so urgent that it must be dealt with on the urgent court roll.
- [9] The procedure for urgent applications is governed by rule 6(12)(b) of the Uniform Rules of Court (“the Rules”), which provides that

“In every affidavit filed in support of any application under paragraph

- (a) *of this subrule,[1] the applicant must set forth explicitly the circumstances which is [sic!] averred render [sic!] the matter urgent and the reasons why the applicant claims that applicant cannot be afforded substantial redress in due course.”*

- [10] The rule is trite and has been applied and given emphasis in numerous cases. In *Heathrow Property Holdings*,[2] the court stated that –

“... In terms of the rules of court an applicant is required in an application which is brought as a matter of urgency to pertinently and expressly set out the grounds which justify it not following the ordinary rules and process, and to provide adequate and cogent reasons that it cannot be expected to await a hearing in due course.”

- [11] The court in *East Rock Trading 7 (Pty) Ltd & Another*,[3] when dealing with the test to be applied in urgent applications, stated that:

"It means that if there is some delay in instituting the proceedings an applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at the hearing in due course. I must also mention that the fact that the applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and crucial test is whether if the matter were to follow its normal course as laid down by the rules an applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If, however, despite the anxiety of an application he can be afforded a substantial redress in an application in due course, the applicant does not qualify to be enrolled and heard as an urgent application."

- [12] The requirement as stated is that the applicant must 'pertinently and expressly' set out the reason why the matter is urgent and provide adequate and cogent reasons why the applicant cannot be afforded substantial redress in due course. These reasons must appear in the founding affidavit.
- [13] It is the respondent's proposition that the matter is not urgent and that no reasons are set out in the founding affidavit why the matter is urgent and why the applicant will not be afforded substantial redress in due course.

ARGUMENTS

- [14] The applicant's allegations of urgency are set out in the heads of argument and are contextualised against the facts that the applicant submitted in the founding affidavit. The allegations are that –

14.1 the refusal of the applicant's application occurred on 15 April 2024;

14.2 the applicant, thereafter, appointed a liquor consultant to make further submissions to the respondent regarding the applicant's application;

14.3 the liquor consultant made certain representations to the respondent, which representations were met with a response that the respondent is functus officio;

14.4 the applicant, thereafter, approached its current legal representatives, who advised the applicant that this application had to be launched on an urgent basis;

14.5 the application was, thereafter, finalised, commissioned and served on the respondent on 28 May 2024;

14.6 despite being granted nine days to serve its answering affidavit, the respondent elected to only serve its answering affidavit two days thereafter on 12 June 2024 at 18:00 (without any request for condonation);

14.7 despite the late filing, the applicant attended to prepare and serve its replying affidavit before 12:00 on 13 June 2024.

- [15] The applicant contends that the urgency and the lack of substantial redress, in this application is manifest, and that the application ought to be heard on an urgent basis.

[16] The respondent is opposing the application on urgency contending that there are no facts set forth in the founding affidavit that renders this matter urgent. According to the respondent, rule 16(2)(b) mandates the applicant to set out in the founding affidavit facts that establishes the circumstances that the applicant avers render the matter urgent, and the reasons why the applicant cannot be afforded substantial redress in due course. This, the respondent argues, the applicant failed to do, as such the matter should be struck from the roll with costs.

Whether the urgency is self-created

[17] The applicant's reason for the delay in launching the urgent application is alleged to be the utilisation of a liquor consultant who advised the applicant to take the route of 'further representations' to the respondent. It is the applicant's submission that it discovered in hindsight that the liquor consultant who was recommended to it for assistance after the liquor licence application was declined, was not a person with the necessary legal qualification. The liquor consultant advised the applicant to make further submissions to the respondent notwithstanding that the respondent was functus officio. The applicant followed this advice and allowed the liquor consultant to make further submissions which obviously did not have any resultant change to the decision as the respondent was functus officio by then. The result was that the applicant being bona fide, wasted time in an endeavour to challenge the decision of the respondent, only to find that it is only the court that can be of

assistance, under the circumstances.

[18] The respondent on the other hand, contends that the applicant brought this application as an urgent application, whilst there was nothing urgent about it, and if any urgency is claimed, it is clearly self-created. In fortification of the submission, the respondent relied on the judgment in *E M W vs S W*,^[4] wherein it was held that

"Likewise, where the facts indicate that the urgency is self-created, an applicant will not be entertained and the application will be struck from the roll."

[19] It is the respondent's submission that the administrative decision taken to decline the applicant's application for a liquor license was taken on 16 January 2024 and communicated to the applicant on 15 April 2024. The urgent application was only brought on 28 May 2024 which is months later since the applicant became aware of the decision. The period from 16 January 2024 to 28 May 2024 is not substantively accounted for, in the founding affidavit. Rule 6(12) mandates an applicant in an urgent application to set out such facts in the founding affidavit. This has not been done, so it was argued. The respondent, argued, consequently, that this is a classic case of self- created urgency and an abuse of court process.

- [20] The applicant is objecting to this proposition by the respondent, and argues that it only became aware of the decision of the respondent on 15 April 2024 when the respondent transmitted an email to the applicant informing it about the decision that was taken on 16 January 2024. It was contended on behalf of the applicant that the date was erroneously stated as 16 January 2024, and that the error was not taken up or rectified in the replying affidavit because the respondent admitted in the answering affidavit that the deponent became aware of the decision on 15 April 2015.
- [21] The evidence upon which the respondent relies for the proposition that the applicant had knowledge of the respondent's decision on 16 January 2024, stems from a paragraph in the Founding Affidavit,[5] whereat it is stated that the applicant wasted three months in an endeavour to challenge the decision of the respondent. The time wasted could only be three months if calculated from 16 January 2024 and not April 2024.
- [22] The parties do not agree on the date on which the applicant had knowledge of the decision rejecting the liquor licence application. This is the date that will assist in determining whether the application warrants a hearing in the urgent court. The initial inquiry will be to ascertain the precise moment/date at which the applicants acquired knowledge regarding the aggrieved administrative decision that necessitated this application. This, as the respondent argues, is a trigger event.
- [23] In the heads of argument, it is submitted on behalf of the applicant that the refusal of the applicant's application occurred on 15 April 2024. Whereas in oral argument it was alluded that the decision was taken and communicated to the applicant on 15 April 2024 and that is when the applicant became aware of the decision, and thereafter employed the services of a liquor consultant.
- [24] The respondent's counsel interjected the applicant's counsel during argument, contending that the applicant's counsel was making submissions from the bar in regard to his argument that the applicant became aware of the decision on 15 April 2024. It was, then, submitted on behalf of the applicant that the deponent to the founding affidavit made a mistake in alleging that the applicant became aware of the disqualification of the licence already on 16 January 2024. The contention is that if consideration is given to what is stated in annexure "D" to the founding affidavit, that is, the decision of the licence application, it is clear that the applicant only became aware of the fact that the respondent elected not to allow the applicant to obtain a liquor licence on 15 April 2024.
- [25] A further contention by the applicant was that the error was not corrected in the replying affidavit because the respondent had, in the answering affidavit, made common cause with the fact that the applicant became aware of the respondent's decision on 15 April
2024. In this regard the court was referred to a paragraph in the respondent's answering affidavit stating that –

“The Applicant has been aware of this decision since 15 April 2024 but only approached this court on urgent basis on 28 May 2024 and set the matter down for hearing on the 18th of June 2024. This is almost 2 months since the awareness of the decision, and consequently, the urgency has since fallen away in the hands of the applicant.”[6]

- [26] From this paragraph, it is clear that the respondent had conceded that the applicant became aware of the respondent’s decision on 15 April 2024. It was disingenuous of the respondent’s counsel to want to argue that the applicant became aware of the decision on 16 January 2024 when a concession had already been made. It is, also, patently clear that the period at issue here is two months and not three months as the respondent’s counsel sought to argue. The eventual decision of the respondent’s counsel not to pursue this point, was, under the circumstances, fairly made.
- [27] Counsel argued that even if the argument pertaining to 16 January 2024 is abandoned, the applicant has not been able to account for the period between 15 April 2024 to 28 May 2024. The applicant has in the founding affidavit stated the reason for the delay in approaching the court earlier. The applicant’s evidence is that from 15 April 2024, after learning about the decision, the applicant employed the services of a liquor consultant to have discussion with the respondent in order to resolve the issues. And that when the negotiations fell flat, the applicant, on 28 May 2024, launched the urgent application. A mere month and half after the applicant became aware of the decision.
- [28] Rule 6(12)(b) requires the applicant to explicitly set forth the circumstances which are averred render the matter urgent. The requirement is that the circumstances must be set out in a clear and detailed manner, leaving no room for confusion or doubt. The applicant, however, has set out facts without dates indicating when it first approached the respondent or made the alleged representations; how long it took the respondent to respond to the representations; and when the applicant or the liquor consultant first became aware that the applicant cannot be assisted by the respondent. These facts, in the manner that they have been set out, leave much to be desired.
- [29] A question may, also, be asked why the applicant chose to challenge the decision of the respondent by making presentations to the respondent when the decision had already been taken, and there are no internal processes available. The answer that the applicant acted on the advice of the liquor consultant begs a further question of why an incompetent liquor consultant was employed, and why the negligence and/or lack of knowledge of the procedures of the respondent by a person who professed to be a liquor consultant, should be placed at the door of the respondent.

- [30] It was argued on behalf of the applicant that the delay occasioned by the employment of the liquor consultant should be acceptable since these were efforts by the applicant in trying to resolve the matter before approaching the court. In this regard, the applicant relied on the judgment in *East Rock Trading 7 (Pty) Ltd & Another*,^[7] wherein it was held that the applicant should not be said to be dilatory in bringing the application, where efforts were taken to try and settle the matter first before rushing to court.
- [31] The challenge for the applicant, however, is that in this instance, there was no issues to resolve and/or settle. The respondent had become *functus officio* immediately after issuing the decision refusing to grant the liquor licence, and could do nothing to assist the applicant in resolving the matter. It is not in dispute that the respondent's processes do not allow for internal remedies. Once a decision has been taken, the proper procedure is to approach the court if not satisfied with the decision of the respondent. The applicant, instead, whether out of ignorance or for having been ill-advised opted to engage the respondent, and correctly so, found no relief.
- [32] The respondent's argument that "the urgency has since fallen away in the hands of the applicant", though for different reasons, has merit. The applicant should have launched this application as soon as it gained knowledge that its application for the liquor licence has been rejected. If they did so, urgency would not have been an issue now. Thus, the applicant failed to pass the first hurdle for the requirement of urgency as set out in rule 6(12)(b).

Whether the applicant cannot be afforded substantial redress in due course

- [33] It was held in *East Rock Trading 7 (Pty) Ltd & Another*,^[8] correctly so, that the delay in instituting proceedings is not, on its own, ground for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course.
- [34] It is trite that the question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in due course. The threshold to establish this juristic fact of "absence of substantive redress" is said to be lower than that of "irreparable harm" for the purposes of establishing an interim interdict.^[9]
- [35] It was, also, held in *East Rock Trading 7 (Pty) Ltd & Another*,^[10] that
- "... the procedure set out in rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress."*

- [36] Whether an applicant will not be able obtain substantial redress in a hearing in due course will be determined by the facts of each case. An applicant must make out his case in that regard.
- [37] The facts in this instance as alleged in the founding papers, are that the customers of the applicant's business, who play the match padel game, usually want to enjoy a beer or like beverage after completing the game. In order to have such beverages available to the players, and their spectator friends, the applicant requires a liquor licence. It is said that the business is dependent upon offering a full service, which is liquor, drinks, snacks and meals, in order to be sustainable and profitable. The contention is that if the business remains unprofitable, four staff members have to be retrenched. The liquor licence will be able to make the business profitable in order to carry these four employees, so it is argued. In order to show that the business is not profitable, the applicant alleges in the founding affidavit that the expected turnover,
- including the sale of liquor, was calculated to be R900 000 but currently the business is running at a break-even turnover of R600 000.
- [38] The reasons why the applicant claims that it cannot be afforded substantial redress in due course, are that firstly, the current operation of the business is not sustainable and profitable due to the fact that it does not serve liquor; secondly, if the business continues not making a profit four staff members will have to be retrenched; and, lastly, if the applicant follows the normal review through the normal course it will take too long.
- [39] The question is whether the applicant has made out a case that it will not obtain substantial redress in due course if it is not granted the liquor licence now.
- [40] The facts upon which the applicant relies for its contention that it will not be afforded substantial redress in due course are couched in such a way that the harm that the applicant stands to suffer if it continues to operate without the liquor licence, is the loss of the four employees. The applicant argues that it has to retrench the four employees because the business is not making profit and/or the turnover of the business is R600 000 instead of R900 000. The four employees, it appears, were hired for the service pertaining to the liquor side of the business, and that without that service, they have become redundant (overburdening the business), and should be retrenched. Thus, in order that they should not be retrenched, this court must grant an order allowing the applicant to trade as if it has been issued a restaurant liquor licence.
- [41] In fortification of this reasoning, it was emphatically argued on behalf of the applicant that the applicant needs the business to survive and make profit so that the four employees should not be retrenched. It was also argued that the applicant needs to be able to trade and allow the restaurant to run in order for the business to survive, because if the applicant waits, it will have to retrench the employees. And, the applicant had no alternative remedy but to approach court on urgency, as it did.

- [42] It appears that the applicant's concern is more that the four employees will have to be retrenched. The applicant's evidence is not that without a liquor licence the business will not carry on or that it will not be profitable. It is that the business cannot make enough turnover and/or profit to be able to continue employing the four employees facing retrenchment.
- [43] Save to say that the expected turnover, including the sale of liquor, was calculated to be R900 000 but currently the business is running at a break-even turnover of R600 000, the harm the applicant stands to suffer does not appear in the papers. Indications are that the applicant's business will be able to trade without a liquor licence, as it is now trading. The evidence on record is that the business does not only depend on the sale of liquor. There are other services that are currently sustaining the business.
- [44] The applicant does not set out in the affidavit how it would not obtain substantial redress in due course if the four employees are retrenched. There is no evidence on record to indicate that if the four employees are retrenched the business will not be able to operate sustainably and profitably.
- [45] These facts do not support the applicant's contention of lack of substantial redress in due course. At most it might, perhaps, be the four employees facing retrenchment, who it can be said might not obtain redress in due course. There are no facts that establishes the harm that the applicant will suffer which will eventuate in the lack of redress if it is not issued a licence now, and that the applicant cannot await its turn in the queue to be heard at a later date.
- [46] The proposition by the applicant that the review process can drag on for at least a year or more because the respondent, through its legal advisors, is not inclined to be compliant with time frames and especially with the filing of the record of proceedings in accordance with Rule 53, all giving rise to delaying the review matter to be ready for final adjudication, is made without any factual substantiation. Without any factual basis, the contention is speculative and unacceptable.
- [47] Every issue that potentially threatens an applicant's business is urgent to such applicant, and understandably so. However, it is important to distinguish between what the applicant considers to be urgent from what is actually urgent. The applicant, in this instance, premises its urgency on the fact that without a liquor licence its business is not making a profit which will ultimately result in the retrenchment of four of its employees. As stated above, this does not establish the fact that the applicant will not be afforded redress in due course.
- [48] The applicant argues further that the right to fair administrative decision-making as well as the right to make a living, are both entrenched in the Bill of Rights forming part of the Constitution, and that these rights are binding.

- [49] The applicant's rights that are argued to be entrenched in the Bill of Rights and the Constitution, like the rights in terms of section 34 of the Constitution and this court's resultant obligation; the adverse effect upon the equitable remedy in terms of section 172(1)(b) of the Constitution as read with section 8 of PAJA; the inherent urgency in applications to vindicate the rule of law and to ensure that power is exercised by the correct repository of power; and the blatant and continued breach of the Constitutional imperatives ensconced in Section 217 of the Constitution, can only be considered against the backdrop of the applicant being able to obtain substantial redress in due course.
- [50] The applicant has not made out a case in the founding papers why it cannot get substantial redress at a hearing in due course, and reasons provided in the founding affidavit do not found urgency.

CONCLUSION

- [51] It is trite that the applicant in an urgent application must in the founding affidavit set out explicitly the circumstances on which he relies to render the matter urgent and the reason why the claim is made that substantial redress will not be afforded in due course. The applicant failed to do so in this application. The application falls to be struck from the roll.

COSTS

- [52] The applicant seeks to be granted a cost order against the respondent on a punitive scale. It, in the alternative, argued that if the court is not inclined to grant a punitive cost order, the nature of the application, the legal principles applicable, and the importance of the matter justify an order in terms of Scale C of Rule 69.
- [53] This application does not warrant the imposition of a punitive scale of costs, nor is the nature of the application, the legal principles applicable, and the importance of the matter justify an order in terms of Scale C of Rule 69.
- [54] The applicant is entitled to its costs as the successful party. Such costs to be in terms of scale B level of costs as envisaged in Rule 69.

ORDER

- [55] In the premises the following order is made
1. The application is struck from the roll for lack of urgency.
 2. The applicant is ordered to pay the respondent's costs in terms of scale B of rule 69 of the Uniform Rules of Court.

Judge of the High Court

Gauteng Division

Appearances:

For the applicant: Adv V Mukwevho Cell: 083 313 3591 Email: mukwevho@rsabar.com Instructed by: Marius Blom INC Tel: (012) 004 0244 Email: marius@mariusblom.co.za For the respondent: State attorney Email: lnkuna@justice.gov.za Tel: 012 309 1554 Date of argument: 19 June 2024 Date of judgment: 16 July 2024

- [1] Rule 12(a): In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.
- [2] Heathrow Property Holdings No 3 CC v Manhattan Place Body Corporate 2022 (1) SA 211 (WCC) at para [20].
- [3] East Rock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd & Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at para [9].
- [4] E.M.W v S.W (26912/2017) (2023) ZAGPJHC 710 (15 June 2023).
- [5] Paragraph 8.9 of the Founding Affidavit.
- [6] Paragraph 2.3.2 of the Answering Affidavit.
- [7] At Para [8] thereof; see also Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004 (2) SA 181 para 34.
- [8] At Para 8 thereof.
- [9] Luna Meubels Vervaardigers (Edms) Bpk v Makin & Another (t/a Mankin's Furniture Manufacturers) 1977 (4) SA 135 (W) at 137F.
- [10] At para [6].

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