

SOUTH AFRICA / JUDGMENT

Panayiotou v Shoprite Checkers (Pty) Ltd and Others (248/2016) [2017] ZASCA 12 (17 March 2017) [2017] ZASCA 12

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Shongwe, Petse, Zondi, Gorven

CASE / FILE NUMBER

248/2016

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 248/2016

In the matter between:

ANDREAS PANAYIOTOU

APPELLANT

and

SHOPRITE CHECKERS (PTY) LTD

FIRST RESPONDENT

GAUTENG LIQOUR BOARD

SECOND RESPONDENT

CHAIRPERSON,

GAUTENG LIQOUR BOARD

THIRD RESPONDENT

Neutral citation: Panayiotou v Shoprite (248/2016)

[2017] ZASCA 12 (17 March 2017)

Coram: Ponnan, Shongwe, Petse and Zondi JJA and Gorven AJA

Heard: 3 March 2017

Delivered: 17 March 2017

Summary: Refusal to grant liquor licence by Liquor Board : decision reviewed, set aside and licence granted by high court along with order that Liquor Board must issue licence after certain requirements met : appeal against review of refusal : liquor licence subsequently issued : no challenge to issue of licence : appeal, if successful, could not set aside the issue of the licence : section 16(2)(a) of Superior Courts Act 10 of 2013 : decision sought would have no practical effect or result : appeal dismissed.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Legodi J sitting as court of first instance):

The appeal is dismissed with costs.

Gorven AJA (Ponnan, Shongwe, Petse and Zondi JJA concurring):

[1] On 7 December 2012, the first respondent (Shoprite) lodged an application for a liquor store licence. It was lodged with the

Gauteng Liquor Board (the Board) under s 23(1) of the Gauteng Liquor Act 2 of 2003 (the Act). The proposed liquor store was to be situated in the Rivonia Village shopping centre. Shoprite had a supermarket in that centre which was licensed to sell table wine. At the time, there was no other liquor store in that shopping centre. The appellant (Mr Panayiotou) objected to the issue of the licence. He operated a liquor store located approximately 150 metres from the proposed new liquor store in the Mutual Mews shopping centre, across a road known as the Rivonia Boulevard.

[2] On 14 April 2014, the Board refused the application. In doing so it referred to the provisions of s 30(2)(c)&(d) and s 30(3) of the Act. It concluded that the grant of the licence would create barriers to entry and substantially lessen competition

at the Rivonia Village shopping centre. It considered that there was the possibility of a harmful monopolistic condition arising under s 30(2)(d) of the Act. It also concluded that the grant of a licence to Shoprite would have a detrimental effect on the business of Mr Panayiotou.

Accordingly, it was not in the public interest to grant the licence to Shoprite in terms of s 30(2)(c) of the Act.

[3] Shoprite approached the Gauteng Local Division of the High Court, Johannesburg (the high court) to review and set aside the decision refusing to grant the licence application and in its stead for an order directing the Board to grant the licence application,

alternatively for a remittal of the matter to the Board. Legodi J heard the application. The high court reviewed and set aside the decision of the Board, granted a licence and directed the Board to issue a notice in terms of s 35(1) of the Act and, on completion of the premises as contemplated in s 35(4) of the Act, to issue the licence in accordance with s 37 of the Act. On 19 August 2015, the high court refused an application for leave to appeal brought by Mr Panayiotou. Neither of the other respondents sought leave to appeal or took any further steps in the matter.

[4] The Board issued a licence to Shoprite on 28 October 2015. This was after the expiry of the time period for an application for leave to appeal to this Court. Shoprite began trading with the licence in November 2015. This prompted Mr Panayiotou to approach the high court for an interdict. The interdict application was heard on 10 December 2015 and judgment refusing it was handed down on 17 December 2015. Shoprite has been trading with that licence since then. There has been no attempt by Mr Panayiotou to challenge the issue of that licence.

[5] Mr Panayiotou applied to this Court for leave to appeal the judgment of Legodi J and for condonation for the late filing of that application. Both condonation and leave to appeal were granted by this Court on 29 February 2016. It is this appeal which is before us. At the hearing before us, the appeal was dismissed with costs and it was indicated that reasons would follow in due course. These are the

reasons.

[6] At the commencement of argument, the parties were informed that the judgment refusing the interdict had come to the attention of this Court that morning.[1] This judgment disclosed that a licence had been issued and that Shoprite had begun trading. It was confirmed that, after the interdict was refused, Shoprite continued trading and was still doing so. None of this had been mentioned in the heads of argument and this

Court was unaware of these facts. It must be said that Shoprite had mentioned the issuing of the licence in its answering affidavit

delivered during February 2016 in opposition to the application for condonation and for leave to appeal to this Court. This application

did not, of course, form part of the appeal record.

[7] Counsel for Mr Panayiotou was asked whether, in the light of the subsequent issuing of a licence, the appeal did not fall to be dismissed in terms of s 16(2)(a) of the Superior Courts Act 10 of 2013. This section provides:

‘(2) (a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined

without reference to any consideration of costs.’

The licence was issued pursuant to a fresh administrative act after s 35 of the Act had been complied with. This administrative act has not been the subject of any challenge to date. Importantly, nothing done in this appeal can affect the issuing or validity of that licence. As this Court has held:

‘[O]ur law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.’[2]

It was candidly and correctly conceded by counsel for Mr Panayiotou that this Court could not in this appeal in any way deal with the issuing of the licence. In the light of this, it was conceded that the outcome of this appeal could not have any practical effect or result.

[8] It has been repeatedly stated that this provision in the present section and its predecessor was enacted to avoid overburdening appeal courts with matters which are of no practical moment.[3] If it is determined that the appeal will have no practical effect or result, a court may nevertheless, in the exercise of its discretion,

deal with the appeal.[4] An instance of this would be where ‘a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required . . .’[5] In the present matter, no discrete legal issue of public importance was alluded to and no submissions were advanced by counsel for Mr Panayiotou in support of the exercise of such a discretion and I can think of none.

[9] That being the case, the appeal was dismissed with costs in terms of s 16(2)(a).

The following order is made:

T R Gorven

Acting Judge of Appeal

Appearances

For the Appellant: L Potter SC (with him S Rose)

Instructed by: Nicole Ross Attorneys, Sandton

Lovius Block, Bloemfontein

For the 1st Respondent: AM Breitenbach SC

Instructed by: Werksmans Attorneys, Tyger Valley

McIntyre Van Der Post, Bloemfontein

[1] Panayiotou v Shoprite Checkers (Pty) Ltd & others [2015] ZAGPJHC 292; 2016 (3) SA 110 (GJ).

[2] Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004

(6) SA 222 (SCA) at 242B-C.

[3] Legal Aid South Africa v Magidiwana & others

[2014] ZASCA 141; 2015 (2) SA 568 (SCA) paras 2-3; Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others

[2000] ZASCA 48; 2001 (2) SA 872 (SCA) paras 7-8.

[4] Centre for Child Law v Hoërskool Fochville & another

[2015] ZASCA 155; 2016 (2) SA 121; [2015] 4 All SA 571 (SCA) para 11.

[5] Centre for Child Law para 11.

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