

SOUTH AFRICA / JUDGMENT

Simply Fish Moreleta Park CC and Others v Tshwane Local Committee of the Gauteng Liquor Board (20158/2006) [2007] ZAGPHC 353 (7 February 2007)

[2007] ZAGPHC 353

COURT

High Courts - Gauteng

BEFORE

A. P. Ledwaba

CASE / FILE NUMBER

20158/2006

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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL
PROVINCIAL DIVISION)

Date: 07/02/2007

Case No: 20158/2006

UNREPORTABLE

In the matter between:

SIMPLY FISH
MORELETA PARK CC First
Applicant
CAFÉ
GRENADINE - THE VILLAGE Second
Applicant
WEKKER RESTAURANT
CC Third
Applicant
WONDERJOHN
RESTAURANT CC Fourth
Applicant
And
THE TSHWANE LOCAL COMMITTEE OF
THE GAUTENG LIQUOR
BOARD Respondent

JUDGEMENT

LEDWABA J

- [1] The parties agreed that the three matters under case numbers, 20158/06, 23887/06 and 24871/06, be enrolled together or be consolidated as the same point of dispute concerning the interpretation of the wording of section 31 (2) of the Gauteng Provincial Liquor Act 2 of 2003, (the 2003 Act), has to be adjudicated upon in all the abovementioned cases.
- [2] The applicants are represented by Advocate A. J. Louw Se. Respondents are represented by different counsel. In case number 20158/06, Advocate Sithole se assisted by Advocate T. A. N Makhubele appears for the respondent. In case number 23887/06 and case number 24871/06, respondent is represented by Advocate J. Engelbrecht se assisted by Advocate S. M. Lebala and Advocate M. B. Matlejoane.
- [3] The section in issue of the 2003 Act; section 31 (2) reads as follows:
- "(2.) The local committee shall not grant a catering or occasional permit under sub-section (1) unless the Applicant can show exceptional circumstances that warrant the granting of the catering or occasional permit for a period of not longer than 7 (seven) consecutive days."*
- [4] Advocate A. J. Louw SC, on behalf of the applicants submitted that having regard to the history of the previous legislations on liquor, more particularly Act 87 of 1977, (the 1977 Act) and Act 27 of 1989, (the 1989 Act), the 2003 Act should not be ascribed the meaning contended for by the applicants being that section 31(2) should be interpreted to mean that a catering permit can, under one application, be granted by the respondent for any number of weeks as long as it is not granted for more than seven (7) consecutive days at a time. To support his argument he emphasised that in terms of the Liquor Act 89 of 1977 a "special licence" could be granted for a total of 30 (thirty) days per year in respect of a specific premises and it could be granted for not more than 7 (seven) consecutive days. The Liquor Act 27 of 1989 (which repealed the 1977 Liquor Act) makes provision for temporary and occasional liquor licences. Section 23(2) reads as follows:

"2 (a)...the Magistrate shall not grant a temporary liquor licence...

(i) to particular person; or...

(ii) ...

(iii) for a longer period than seven consecutive days and for more than a total of thirty days per year..."

Section 31(2) of the Gauteng Liquor Act 2 of 2003 (which repealed 1989 Liquor Act for the province of Gauteng) reads as follows:

"(2) The local committee shall not grant a catering or occasional permit under sub-section (1) unless the Applicant can show exceptional circumstances that warrant the granting of the catering or occasional permit for a period not longer than 7 (seven) consecutive days.

[5] It was submitted on the applicants' behalf that in the unreported case of DOMITZ RESTAURANT CC vs. THE LOCAL COMMITTEE FOR TSHWANE OF THE GAUTENG LIQUOR BOARD, (the Domitz case), under case number 14111/2006, Transvaal Provincial Division, the court decided that the interpretation contended for by the applicant is correct. It was argued on the applicant's behalf that in terms of the stare decisis principle, the decision in the Domitz case should be followed.

[6] On the other hand, it was argued by Advocate Sithole SC and Engelbrecht SC, on behalf of the respondent, that a permit under the 2003 Act cannot be issued for more than one period of seven (7) consecutive days under one application.

[7] What can be gleaned from the aforesaid sections is that the period for which a temporary licence or permit could be granted is as follows:

7.1 In the 1977 Act and 1989 Act the maximum days is 30 (thirty) days per annum subject to the proviso that the period for the temporary

licence is not more than 7 (seven) consecutive days.

7.2 In the 2003 Act the maximum period per annum for the permit is not stated and the period cannot be granted for more than 7 (seven) consecutive days.

BACKGROUND

[8] The applicants applied for liquor licences. When this matter was heard, their applications had not yet been finalised.

[9] In the Domitz Case the applicant submitted that section 31 does not prohibit the granting of a catering permit for a period of more than 7 (seven) days for several weeks as long as there were exceptional circumstances to justify such grant and such grant is not in respect of periods exceeding 7 (seven) consecutive days. Bertelsman J granted the following order on 26 May 2006:

"1. THAT a rule nisi do issue calling upon the respondent to show cause/ if an~ before this court at 10:00 on the 19th of June 2006 why the following order shall not be confirmed.

2. THAT the decision of the respondent not to grant the applicant an occasional or catering permit as applied for, be reviewed and set aside in terms of the provisions of Section 6 of Act 3 of 2000.

3. THAT the Court grant the applicant interim relief in the form of an order, entitling the applicant to trade in liquor as if an occasional or catering permit has been granted to it from Tuesday to Sunday every week until such time as the application of the applicant for a new Restaurant Liquor Licence has been considered and finalised, subject to the proviso that such order shall lapse if the application is not lodged on the 2nd of June 2006.
4. Costs.
5. THAT paragraphs 2 and 3 above/ operate as an interim order with immediate effect.”

[10] The rule nisi was confirmed by Legodi J on 19 June 2006 in the absence of the respondent.

[11] Now the applicants herein based on the order in the Domitz case, filed applications for catering permits for twenty four weeks. The applicants' other reason for filing the applications is that the provisions of the 2003 Act dealing with the catering permits can be used as a bridging mechanism in -between the opening of a restaurant and the eventual grant of a licence.

[12] Despite the applicants' submissions in their applications, the applicants' attorney, Mr Marius Blom, in paragraph 6.14 on page 11 of the founding affidavit in case number 20158/2006 stated the following:

"Out of experience, I know that the Respondent does not have any problem in granting catering permits or occasional permits for extended periods, as long as one applies for seven days per application. I am quite sure that any of the Applicants would apply for twenty four week, each for a period of seven days, even if they run consecutive, i.e. Monday to Sunday per application the same will be granted. I know this, because I have done this for quite a number of clients and the permits are always granted.”

[13] Respondent refused to grant the catering permits stating as the reason, that it can only grant a catering permit per applicant for a period of not longer than seven (7) consecutive days.

[14] In scrutinising and interpreting the provisions of section 31(2), it is trite law that the whole Act should be perused. In *STELLENBOSCH FARMERS WINERY L TD vs. DISTILLERS CORPORATION SA (LTD)*, 1962 (1) SA 458 at 476E, Wessels AJA held:

"In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e., with due regard on the one hand, to meaning or meanings which permitted grammatical usage assigned to the words used in this section in question and, on the other hand to the contextual sense, which involves consideration of the language of the rest of the statute, as well as the matter of the statute, its apparent scope and purpose and within limits its background.”

[15] For the purpose of properly interpreting section 31 (2) of the 2003 Act, it is important, in my view, to further consider the 2003 Act as a whole.

15.1 The Act distinguishes between a 'licence' and a 'permit'. In chapter 1 of the 2003 Act, dealing with definitions, a 'licence' means a licence issued in terms of this Act and a 'permit' means a catering or occasional permit issued in terms of the Act.

15.2 The Gauteng Liquor Board shall after receiving and considering applications referred to in section 21 from the local committees, and after considering such applications, refuse or grant the application concerned.

15.3 Section 21 (4) further states that the local committee shall perform other functions as may be assigned to it in terms of the Act.

15.4 Section 28 of the Act which deals with kinds of licences, in section 28(1)(a)(xiii) also mentions catering or occasional permits.

[16] It is cardinal to note the provisions of section 30 and 31 of the 2003 Act. Section 30 clearly states that an application for a licence shall be considered by the local committee and should be referred to the Board with recommendations for the Board's considerations. Section 31, on the other hand, deals with applications for catering or occasional permits. For the proper interpretation of section 31 (2), it is important to consider the whole of section 31 of the 2003 Act which reads as follows:

"31 (1) An application for a catering or occasional permit shall be considered by the local committee, and the local committee may grant or refuse the application concerned.

- (2) The local committee shall not grant a catering or occasional permit under subsection (1) unless the applicant can show exceptional circumstances that warrant the granting of the catering or occasional permit for a period not longer than seven (7) consecutive days.
 - (3) A catering or occasional permit shall also be granted on application by the secretary, manager, principal director or designated senior office-bearer of a bona fide exhibition, sports club, sports ground, cultural or welfare organisation educational institution, race or sports meeting.
 - (4) The local committee shall be satisfied that the distribution or sale of liquor is not the principal business of the applicant, but incidental to the occasion held by the applicant.
 - (5) The local committee shall approve the plan of the premises and may specifically exclude the sale of liquor on certain places on the premises and may determine the kind of liquor to be sold."
- [17] In perusing the 2003 Act, it makes a clear distinction between licences and catering or occasional permits. It is also clear that the local committee and not the Board can grant or refuse the application for catering or occasional permits.

[18] In cases where a licence has been granted, the liquor shall not be sold at any place other than the licenced premises or as the Board may approve on application by the licence, see section 44 and 51 of the 2003 Act Section 31 (2) as far as catering or occasional permits are concerned, states that the distribution or sale of liquor should not be the principal business of the application, but incidental to the occasion held by the application.

[19] In terms of section 75, a catering or occasional permit may be granted in respect of any premises and shall be for on -consumption only.

[20] In my view, the 2003 Act has now introduced a catering or occasional permit which can be applied for by a person who is not a licence

holder. The 1977 Act and 1989 Act referred to temporary licences which only a licence holder could apply for.

[21] The applicants submitted that a temporary licence referred to in the 1977 Act and 1989 Act is now referred to as catering or occasional licence in the 2003 Act I do not agree with the submission because in the 2003 Act, there is a distinction between a licence and permit. The 2003 Act does not mention a temporary licence. Instead it introduces catering and occasional permits.

[22] I fail to understand on what basis can it be inferred that a person applying for a catering or occasional permit can in one application

apply that the permit be granted for no longer than seven (7) consecutive days for many weeks and pay a once off fee of R1000, 00, (one thousand rand), for such application.

[23] Advocate Engelbrecht SC argued that the interpretation contended for by the applicants' is not correct, in that, even the format of the forms, ie. Form 6, do not make provisions for applying for different periods.

[24] Advocate Louw SC submitted that the proper form to be used when applying, for a catering or occasional permit is Form 5. Advocate Sithole SC submitted that it is Form 1 of the Regulations in terms of Act No. 2 of 2003. The 3 (three) Counsel referred me to the Forms that are in the Regulations.

[25] It was brought to my attention later that the Regulations have not been promulgated. I will therefore not have had regard to the format of the form used by the applicants' and anyway the respondent did not object to the forms submitted by the applicants'.

[26] In terms of the 2003 Act a permit issued is for a specific purpose and cannot, in my view, be used to substitute a licence.

[27] The words used in section 31(2) are clear and unambiguous. I cannot find any reasonable justification why reference should be made to the previous Act to justify why a permit should be granted for no longer than seven (7) days and for a certain number of weeks in one application.

- [28] Actually, it is interesting to note that the 2003 Act does not limit the annual period within which the permit may be granted. The previous Act dealt with temporary licences and had limitations to the annual period for such temporary licences.
- [29] I further understood the applicants' counsel to be submitting that the other reason why they applied in one application for various weeks is to avoid paying R1000, 00 (one thousand rand), for each application. If the applicants' problem is that the fee is too high, they should challenge that, and not seek to distort the clear meaning of the section to save on the costs of paying the R1000, 00 (one thousand rand) fee.
- [30] Furthermore, in my view, the section cannot be given another meaning contended for by the applicants simply because there is a delay in processing the applications for liquor licences. If there is such a delay in processing the application for a liquor licence, the applicants are free to seek a mandamus.

STARE DECISIS

- [31] On the issue of whether the respondent should follow the stare decisis principle, it is indeed correct that the stare decisis principle is still applicable. See *AFROX HEATHCARE BPK vs. STRYDOM* 2002 (6) SA 21 SCA at paragraph 26,27, 28, and 29 at 38 to 40.
- [32] The order by Bertelsmann J, which was confirmed by Legodi J is not an order which deals with the interpretation of section 31(2) otherwise, the parties would not have agreed that I should deal with the same issue which was already decided upon.
- [33] Advocate Sithole SC, submitted that when the order was granted, for some reason (which reason is unknown to me), the application was not brought to the respondent's attorney and it is open for the respondent to apply for the rescission of the order because it was obtained by default.
- [34] Advocate Engelbrecht SC, correctly in my view, submitted that the order in the Domitz case would usurp the powers and functions of the board and local committee of regulating applications for licences and permits.
- [35] As far as the order in Domitz case is concerned, there is no application for rescission or review of the order before me. The court made such an order based on the

facts

presented to it.

- [36] In casu, my duty is to interpret the provisions of section 31(2). Having regard to the aforesaid reasons, there is no reasonable justification or any legal ground, in my view, to find that the applicants'

interpretation of section 31(2) is correct.

- [37] I therefore, find that the respondent's interpretation of section 31(2), ie., in applications for catering and occasional permits, the local committee cannot issue a permit for more than one period of seven (7) consecutive days under one application, is the correct interpretation.
- [38] Consequently, I find the applicants' interpretation of section 31 (2) of the Act that a catering or occasional permit can, under one application form, be granted for any number of weeks as long as it is granted for more than seven (7) consecutive days at a time is, to be untenable.

In the result, I make the following order:

1. The applications are dismissed with costs.
2. The applicant in case number 20158/06 is ordered to pay the respondent's costs, which costs shall include, costs of two (2) counsel.
3. The applicants' in case number 23887/06 and 24871/06 are ordered to pay jointly and severally, the costs of the senior counsel who argued the matter on behalf of the respondent's in both matters and to further pay the costs of the assistant counsel in each matter.

A. P. LEDWABA

JUDGE OF THE HIGH COURT

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