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SOUTH AFRICA / JUDGMENT

## Yeoville Bellevue Ratepayer's Association and Another v MEC for the Department of Economic Development Gauteng Provisional Government and Others (07129/2014) [2017] ZAGPJHC 322 (1 November 2017) [2017] ZAGPJHC 322

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COURT

South Gauteng High Court, Johannesburg

BEFORE

K E Matojane

CASE / FILE NUMBER

07129/2014

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REPUBLIC OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO:07129/2014

Not

reportable

Not

of interest to other judges

Revised.

1/11/2017

In the matter between:

YEOVILLE  
BELLEVUE RATEPAYERS'  
ASSOCIATION First  
Applicant  
MELUSI  
EMMANUEL  
NCALA Second  
Applicant  
and  
THE MEC FOR THE  
DEPARTMENT OF ECONOMIC  
DEVELOPMENT  
GAUTENG PROVISIONAL GOVERNMENT First  
Respondent  
THE  
CHAIRPERSON OF GAUTNG LIQUOR BOARD Second  
Respondent  
THE  
MINISTER OF TRADE AND  
INDUSTRY Third  
Respondent  
YVONNE  
NOMVUYISEKO  
NGALO Fourth  
Respondent  
MMAPI TI  
RINA  
MABOTJA Fifth  
Respondent  
JOSEPH  
THULARE Sixth  
Respondent  
ERNESTINE  
MAKOMA  
RAMETSI Seventh  
Respondent  
DANIEL  
SHIBAMBO Eighth  
Respondent  
GLADYS  
KEBONENG  
NGUNYANE Ninth  
Respondent  
MXOLISI  
DUMA Tenth  
Respondent  
MOSIMA  
EUGENE  
MALAPANE Eleventh  
Respondent  
JABULANI

BARNEY  
DUMA Twelfth  
Respondent  
BONGANI  
JOSHUA  
MAHAPA Thirteenth  
Respondent  
BAJANNE  
LORNA  
MASHIGO Fourteenth  
Respondent  
CATHERINE  
NTOMBIZODWA MADINGWANE Fifteenth  
Respondent  
SHALUZA  
MARTHA  
MABUNDA Sixteenth  
Respondent  
DANIEL  
NAKAMPE  
RAKGWAHLA Seventeenth  
Respondent  
MANASE  
ALFRED  
RASEALOKA Eighteenth  
Respondent  
ARNOLD  
MPULAMPULA Nineteenth  
Respondent  
ALFRED  
MOLOTO Twentieth  
Respondent  
CONCERNED  
TSHWANE LIQUOR TRADERS  
ASSOCIATION Twenty-  
First Respondent  
NATIONAL TOURISM AND  
HOSPITALITY  
ASSOCIATION Twenty-Second  
Respondent

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**JUDGMENT**

MATOJANE J

**Introduction**

[1] This case concerns the validity of the Gauteng Liquor Regulations Shebeen licences (“Regulations”) made under the Gauteng Liquor Act (“the Act”), which were promulgated in 2013 by the Member of the Executive Committee (“MEC”) of the Department of Economic Development of the Gauteng Provincial

Government.

[2] The applicants contend that the regulations are ultra vires the powers of the MEC and or are otherwise in breach of the provisions of the Promotion of Administrative Justice Act, 2000, (“PAJA”) on a variety of procedural and substantive grounds.

The nature of the relief sought by the applicants

[3] The applicants seek an order:

- a. reviewing and setting aside the decision of the MEC to promulgate the provisions of the Gauteng Liquor Regulations and Shebeen Licences published under Government Notice 586 in Provincial Gazette 56, dated 1 March 2013 (“the Regulations”)
- b. declaring that the provisions of the Regulations are ultra vires and therefore invalid, without any suspension on the declaration of invalidity; and that
- c. All licences granted under the Regulations be declared null and void and of no effect.

The parties

[4] The first applicant is a voluntary non-profit association set up and incorporated to represent the collective interests of its members who are home owner Ratepayers in the suburbs of Yeoville, Bellevue, Bellevue East, Randview, Highlands and upper Lorentville in the city of Johannesburg.

[5] The second applicant is an adult male student who is a resident of Yeoville Bellevue. In his supplementary affidavit, he sets out his experiences concerning the effect that the proliferation of shebeens has had on Yeoville Bellevue and its residents.

[6] The first respondent is the MEC of the Department of Economic Development of the Gauteng Provincial Government, who is cited in this application in his official capacity as a member of the Government of the Gauteng Province responsible for and tasked with the drafting, adoption and administration of the Gauteng Liquor Act, 2003, as amended.

- [7] The second respondent is the chairperson of the Gauteng Liquor Board, who is cited in this application in his official capacity as the chairperson of the board.
- [8] The 4th to 20th respondents are individual owners and proprietors of shebeens in Gauteng, as well as the concerned Tshwane Liquor Traders Association. ("the CTLTA"). Each of the Traders owns a shebeen in Gauteng which is operated lawfully. Hair
- [9] The 21st respondent is a liquor trader's association which represents the interest of a broad class of liquor traders including shebeen owners, liquor store owners, tavern owners and similar establishments. It's members hold valid shebeen permits granted under regulations published under section 141 of the Gauteng Liquor Act.

#### History of Yeoville Bellevue

- [10] Yeoville and Bellevue are neighbouring suburbs in Johannesburg. Over the years they attracted their fair share of artists, musicians, students and political activists. The principal business streets through the two suburbs, named Raleigh Street in Yeoville and Rocky Street in Bellevue became the Bohemian cultural centre of South Africa with some nightspots and restaurants moving from nearby Hillbrow. It became a liberated zone as black-and-white met and ate and listened to music together in defiance of prevailing apartheid laws. Some blacks even lived in the area in flat rented for them by white nominees.
- [11] From the mid-1990s, through lack of adequate urban management, Yeoville Bellevue entered a period of rapid urban decay and neglect. The area is widely perceived as the home of rampant crime and urban decay. In the course of time, the area became a community of migrants, mostly economic migrants from all over the country and the rest of Africa.
- [12] Since 1995 community organisations like the first applicant and individuals have been working to try to arrest the decay and

influence the social, economic future of the area. The area is currently undergoing some significant upgrading including the physical regeneration of Rocky and Raleigh Street. The park has been upgraded, and the library has been relocated to a more prominent and

better-equipped premises. At five intersections, closed-circuit television (CCTV) cameras have been installed to reduce the incidence

of crime.

- [13] In 2007, the City of Johannesburg concluded a so-called Inner City Charter with property owners, business and community organisations,

and set up the Inner City Charter Partnership Forum. This represented a commitment on the part of the City of Johannesburg to improve urban management and by law enforcement.

[14] On the downside, drug dealers and criminal element also moved into the area. Unemployment, lack of service delivery and enforcement of the law by SAPS and the unregulated or poorly regulated proliferation of shebeens in residential areas is causing social ills.

[15] It's against this background that the applicants are concerned about the shebeen Regulations. They argue that the shebeen

Regulations deprive residents of the opportunity of participating in decisions over the licensing of shebeens which have had a

far-reaching and mostly negative impact on the character of Yeoville and Bellevue.

The history of licensing of shebeens in Gauteng

[16] There is no dispute on the papers that as a consequence of discriminatory laws under Apartheid which precluded black people from obtaining liquor licences shebeens proliferated. To earn an income many women resorted to brewing beer and shebeens became the sole source of income for many people to support their families and educate their children.

[17] In the 1980s, to curtail the number of shebeens and to convert them into legally recognised entities, the Government encouraged the transformation of shebeens into taverns. After 1994, the number of shebeens increased dramatically.

[18] During November 2004, the MEC published regulations under section 141 of Gauteng Liquor Act[1] to regulate the sale and consumption of liquor at shebeens and to identify all the shebeens in operation Gauteng, Any person

running a shebeen in Gauteng could apply to the MEC for a shebeen permit to operate it. An applicant did not have to meet any substantive requirements, save for the proper completion and submission of Form 10 which was published in the 2004 Regulations.

[19] A shebeen permit issued under the 2004 Regulations would be valid for 18 months from the date of promulgation. The Regulations set in place an interim system to facilitate the transition of the regulation of shebeens from a permit system to a more formalised licensing one that was in due course to be determined by the MEC.

[20] During the application process contemplated in the 2004 Regulations, interested and affected residents were provided with no opportunity to comment upon or to object to any such applications.

[21] On 20 December 2007, the MEC published the Gauteng Liquor Amendment Regulations in the Provincial Gazette, No. 365. The 2007 Regulations provided that a shebeen permit issued would be valid for an extended period of fifty months from the date of promulgation of the 2004 Regulations.

[22] On 17 August 2010, the MEC published the Second Gauteng Liquor Amendment Regulations. Under the 2010 Regulations, the validity of shebeen permits issued under the 2004 Regulations was again extended to a period of ninety-two months from 1 November 2004.

[23] On 5 October 2012, the MEC published the draft Gauteng Liquor Regulations on Shebeen Licences, 2012. The Draft Regulations

provides, among others as follows:

- a. Any current holder of a shebeen permit would be allowed to apply to the MEC to convert it into a shebeen licence
- b. only the holder of a valid shebeen permit would be entitled to convert it to a shebeen licence no new applications would be considered
- c. interested persons were free to submit their written comments within 30 days of publication of the Draft Regulations.

[24] On 1 March 2013, the MEC published the Gauteng Liquor Regulations on Shebeen Licences.

[25] On 10 May 2013, the MEC published a notice concerning the rollout of shebeen licence applications inviting holders of valid shebeen permits in the various administrative areas within Gauteng to submit applications for their conversion to shebeen licences. The holders of shebeen permits within the Johannesburg area were required to lodge their applications from September to October 2013.

The legislative framework

[26] The overall purpose of the Act is:

- a. To provide for the control of the retail sale and supply of liquor within the Gauteng Province;
- b. to regulate applications for licences and to provide for public notification and participation;
- c. to regulate the granting of licences in respect of different kinds of licences; to prohibit the sale of liquor to certain categories of people; to provide for general matters such as enforcement procedures, and to provide for matters connected therewith”.

[27] Section 28 is headed kinds of licenses. In 2(1)(a) it lists thirteen different kinds of licences that may be granted for the sale and supply of liquor for consumption on the licensed premises concerned – namely:

(i) Hotel liquor licences;

(ii) restaurant liquor licences;

(iii) theatre liquor licences;

(iv) club liquor licences;

- (v) nightclub liquor licences;
- (vi) gaming premises liquor licences;
- (vii) sports ground liquor licences;
- (viii) pub liquor licences;
- (ix) dancehall liquor licences;
- (x) tavern liquor licences;
- (xi) pool club liquor licences;
- (xii) sorghum beer licences (on consumption); and
- (xiii) catering or occasional permits.

[28] 2(1)(b) envisage a bottle store in respect of which consumption is off the licensed premises concerned namely –

- (i) wholesale liquor licences;
- (ii) liquor store licences;
- (iii) grocers' wine licences; and
- (iv) micro-manufacturer liquor licences; and
- (v) sorghum beer licences (off consumption)

[29] 2(1)(c) envisage any other licence that the Board, in its discretion will deem appropriate.

[30] Shebeen is defined in the Act to mean “any unlicensed operation whose primary business is liquor and is selling less than ten (10) cases consisting of 12 x 750 ml of beer bottles”. Historically, shebeens have been informal and unlicensed small liquor traders operating from private homes. Their licences are not included in the kinds of licenses contemplated by section 28 of the Act.

[31] The Act seeks to bring the shebeens, which had previously been unregulated within the regulatory scheme of the Act. It provides in section 141(1)(m) that the MEC may make regulations regarding “a phased-in approach, whereby shebeens would be given an opportunity to comply with the Act.”

[32] During 1 November 2004, the MEC published regulations under section 141 of Gauteng Liquor Act[2] to regulate the sale and consumption of liquor at shebeens and to identify all the shebeens in operation Gauteng. The Regulation

provided that any person who on the date of promulgation has been conducting a shebeen shall within four months from the date of

enactment of the regulations lodged in duplicate an application with the secretary of the local committee for a shebeen permit.

Gauteng Liquor Regulations on Shebeen Licenses, 2013

[33] The Shebeen Regulations define an “applicant” as a “person applying for a shebeen licence in terms of these

Regulations and who carries on the business of selling liquor on the premise to which the application relates”.

[34] The shebeen licence is defined as a licence granted in terms of these Regulations issued to the applicant.

[35] In terms of Regulation 4(1) all the holders of current shebeen permits in Gauteng are eligible to apply for shebeen licences. In terms of regulation 4(2) this includes those who, under section 23 of the Gauteng Liquor Act, applied unsuccessfully for another type liquor licence.

[36] Unlike the regime governing all other applications for licences, the process to convert a shebeen permit to a shebeen licence does not provide for the giving of the notice of application as required by section 24 or the right of any person to lodge an objection to the granting of the licence, as provided for in section 25 of the Gauteng Liquor Act.

[37] Regulation 7(1) provides that the Board must when considering the application take into cognisance “whether the premises are suitable for the purposes for which they will be used as per the Inspectorate report.”

[38] Regulation 12 lists the general categories of conditions of the Gauteng Liquor Act that apply to shebeen licences without mentioning

which specific sections apply. It is not clear to what extent the shebeen licence holders are required to comply with the Gauteng

Liquor Act.

[39] The regulations read:

*“conditions applicable to licensees in relation to-*

- (a) prohibitions;
- (b) exemptions;
- (c) enforcement and judicial proceedings;
- (d) offences and penalties
- (e) compliance; and

(f) renewals

in terms of the Act apply to all shebeen licence holders.”

## Issues

[40] The applicants contend firstly, that when shebeen permits were issued, they legalised illegal shebeens. Persons living near them were affected directly by that decisions. The fact that those persons were not given an opportunity to make representations in respect of those permits constituted unlawful administrative action.

[41] Secondly, the applicants contend that the Shebeen Regulations purport to create a new type of licence, namely a shebeen licence, and that the Gauteng Liquor Act does not provide for shebeen permits to be converted into shebeen licences, to that extent, applicants argue that the Shebeen Regulations are ultra vires the Gauteng Liquor Act.

[42] Section 141(1) empowers the MEC to create the mechanism by which shebeen licences over time “are given an opportunity to comply with the Act”. One of the objects of the Act is to regulate applications for licences and to provide for public notification and participation, to regulate granting of licences in respect of different kinds of licences (own emphasis). This finds expression in section 25(1) which provides that:

*“Every applicant shall give notice of an application by publication in no less than two newspapers circulating in the area in which the premises are situated, in the prescribed manner, and in the Provincial Gazette as well as causing the notice to be affixed at the premises.*

(2) ...

(3) Notice of the application shall include the full names of the applicant, intended trading name, identity number or registration number of the applicant, full address and location of the premises, the type of licence applied for, names and nature of educational institutions, names of and distances to similar licensed premises and places of worship within a radius of one (1) kilometre from the premises.

(4) The notice contemplated in subsection (1) shall invite interested persons to lodge any objections in terms of section 25.”

[43] Section 25 is headed objections and state:

Any person may lodge an objection to the granting of a licence in terms of this Act, in the prescribed manner, with the local committee and the applicant within twenty- one (21) days from date of lodgement of the application with the secretary of the local committee referred to in section 23.

[44] The respondents contend that the provisions of section 24 and 25 above were apparently tended to be applicable only to new and intended licences and not in respect of existing businesses only eligible for conversion, such as those operated by shebeen permit holders.

- [45] I cannot agree with the respondents. Shebeens are mostly located in residential areas and in some cases next to places of worship and schools. Residents and the general public were never allowed to be heard before the permits were granted. To avoid conflict with the stated purpose of the Act, there has to be a process of notification and participation of interested persons during the process of conversion so that appropriate conditions can be imposed where necessary.
- [46] The provisions of Sections 24 and 25 are peremptory for any types of licence. The Shebeen Regulations deprive members of the public of the protection afforded by section 24 and 25 of the Act. No reasonable decision-maker could have decided to promulgate rules that run counter to the very purpose of their promulgation.
- [47] By not providing for public notification and participation the MEC has created a new category of licence for shebeens. This licenses would not fall under the category “any other licence that the Board, in its discretion, will deem appropriate” as provided in section 28(1)(c) as such licences in my view also requires public notification and participation.
- [48] In my view, the MEC has acted outside the scope of the empowering statutory provision, namely section 141(m) of the Act and the promulgation of the Shebeen Regulations falls to be reviewed and set aside in terms of sections 6(2)(a)(i) of PAJA as been ultra vires the powers of the MEC.

#### The appropriate remedy

- [49] Having concluded that the Regulations are in direct conflict with the stated purpose of the Act and are accordingly invalid, it is necessary to consider the appropriate remedy.
- [50] all parties accept that the existence of shebeens are a reality in South Africa and the Act envisages that regulations will be promulgated according to which shebeens will be “phased-in”, similar regulations must be put in place provided there are public notification and participation.
- [51] It is so that the liquor trading by shebeen owners would be unlawful from the moment the order is granted and because of this illegality anyone running a shebeen will be prosecuted.
- [52] There will be no harm if the regime applicable under the Regulations is permitted to continue to exist for at least two years to enable the MEC and other relevant authorities to promulgate regulations which achieve the legitimate aims of “phasing-in” the licensing of shebeens under the Act.
- [53] In the interim any particular instance of social ills attaching to one specific shebeen could be reported to the police and the liquor board to be dealt with.

[54] Order

The following order is made:

- a. The decision of the MEC to promulgate the provisions of the Gauteng Liquor Regulations and Shebeen Licences published under Government Notice 586 in Provincial Gazette 56, dated 1 March 2013 (“the Regulations”) is reviewed and set aside.
- b. The provisions of the Regulations are declared ultra vires and therefore invalid.
- c. The declaration of invalidity shall not have retrospective effect.
- d. The declaration of invalidity is suspended for two years to allow for the defects to be remedied.
- e. The first and second respondents are liable for costs.

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K E MATOJANE J

Judge of the High Court,

Gauteng Local Division, Johannesburg

I agree.

COUNSEL FOR THE APPLICANT: JJ MEIRING

APPLICANT’S ATTORNEYS: WERKSMANS ATTORNEYS

COUNSEL FOR THE 1ST – 3RD RESPONDENTS: ADV KRUGER SC

1ST – 3RD RESPONDENT’S ATTORNEYS: STATE ATTORNEY

COUNSEL FOR THE 4TH

- 21ST RESPONDENTS: ADV S BUDLENDER

COUNSEL FOR THE 22ND RESPONDENT: D MPOFU

2ND RESPONDENT’S ATTORNEYS: STATE ATTORNEY

[1] Act No 2 of 2003

[2] Act No 2 of 2003

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