



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE
Case No. 1951/13

In the matter between

PERCY MAGWAZA

Applicant

and

THE CHAIRMAN LIQUOR LICENSING BOARD Respondent

Neutral citation: *Percy Magwaza v The Chairman, Liquor Licensing Board* (1951/2013) [2014] SZSC 09 (14th February 2014)

Coram: **MAMBA J**

Heard: **23 December, 2013**

Delivered: **14 February, 2014**

- [1] Civil Law - Review of a decision of the Liquor Licensing Board made in terms of the Liquor Licensing Act 30 of 1964 as amended – in what instances.
- [2] Civil Law - Review – application for Liquor Licence governed or regulated by liquor Licensing Act 30 of 1964 (as amended). Trading Licenses Order 20 of 1975 not applicable thereto as stated in section 19 of that order.
- [3] Civil Law - Liquor Licensing Board importing provisions of Trading Licences Order 20 of 1975 into Liquor Licensing Act – this is improper and is an irrelevant consideration. Decision thus set aside.

- [1] The applicant, Mr Percy Magwaza, is an adult Swazi businessman of Manzini and operates a bottle store liquor license at KaKhoza just outside the City of Manzini. His business is situate on Swazi nation land.
- [2] The said business was originally owned and operated by a certain Mr Cardoso who later sold it to the applicant in 2007. It is common cause that after the said sale of the business, the licence concerned was then transferred into the name of the applicant. Both the grant and transfer of the licence were made by the Liquor Licensing Board of which the first respondent is the chairman. The Board is constituted and established in terms of section 6 of the Liquor Licences Act 30 of 1964 as (amended). The said transfer took place on 12 November 2007.
- [3] It would appear that sometime in 2009 the first respondent and one Magenius Hlophe, an officer from the Ministry of Commerce and trade, received word from one Sihle Dlamini at Lozithehlezi Palace that the rightful authority had expressed concern that liquor outlets were mushrooming on Swazi Nation land and that those outlets which did not have the consent of the Ngwenyama to so operate had to be closed down or

in other words, the licences had to be revoked. The message by Sihle was verbal.

- [4] When the applicant's licence came for renewal at the end of 2009, Mr Magenius Hlophe appeared before the Board and opposed the application for renewal of the licence based on the information related to him by Sihle Dlamini. The applicant was unable to produce the original consent but produced what appeared to be a Photostat copy thereof. The Board had some misgivings about this and insisted on having the original consent.
- [5] The papers before court appear rather sketchy and disjointed on the history of the dispute herein. It would seem, however, that the licence was conditionally renewed and the issue shelved for sometime until in December 2012 when the license came up for renewal once more.
- [6] On 5 December 2012 the first respondent reminded all present during the hearing of the renewal application that '... trading in liquor is not permitted under Swazi Nation Land without the necessary consent.' It further became

common ground that the applicant's business was situated on Swazi Nation Land; outside the Manzini City Municipal area. This was confirmed by Mr Mlungisi Dube, an official from the Manzini City Planning Department. Faced with this dilemma the applicant's attorney applied that: 'In the circumstances, let section 19 of [the Liquor Licenses) Act be applicable whilst we start the applications anew and consider other available option.' The Board immediately acceded to this request or application and ordered that: 'Application under section 19 approved. Applicant to wind up business in terms of the said section (ie, in 3 months).'

[7] Section 19 of the Act provides that:

"19 If a board refuses the renewal of a licence prescribed to be grantable by it and held by any person, and the person has not, during the preceding 12 months, been convicted of an offence against this or any other law relating to the sale of liquor, he shall, on payment of the proportionate part of the cost of the licence such as has been held by him, be entitled to obtain a licence for a period of three months after the expiry of the licence the renewal of which has been refused.'

What is plain from the above, is that the board refused the applicant's application for a renewal of the licence but granted him three months-reckoned obviously after the expiry of the existing licence – to wind up his business. He was thus given until 31 March 2013 to wind up his business.

[8] Again, it would appear that the Board then wrote a letter to the Manzini Police Station Commander advising him not to cause the applicant to close his business after March 2013. This was to allow the applicant to prosecute his appeal before the Minister for Home Affairs. Again the information is sketchy on this issue and there is no indication as to what the outcome of that appeal was, if it was heard at all. What is certain though is that there was a lull again and the matter went to sleep.

[9] On 4 December, 2013 the matter appeared before the board once more, as an application for a renewal. Again, Mr Hlophe objected to the application. He pointed out that there was no licence to renew as the application for such renewal had been refused in 2012. He further submitted to the Board that the said consent was not necessary or required under the Liquor Licences Act 30 of 1964 (as amended) and that the consent that had been granted in

this case related to the other businesses situated or operating on the premises where the bottle store was. He pointed out further that the Trading Licences Order 20 of 1975 did not apply or regulate the issue of liquor licenses. He concluded by saying: ‘We have sought for an explanation why was this application included under a wrong Act to no avail. We have not up to now been given any response except to leave it to speculation.’ This is a bit confusing. The court observes or notes that it would appear from the submissions made by Mr Hlophe that the necessary consent had been granted to the original owner of the liquor business. I say so because Mr Hlophe complained that this caused confusion in the matter as there was no requirement for such consent under the Liquor Licences Act 30 of 1964. He may have been referring of course to the Photostat copy that had been exhibited to and rejected by the board earlier.

- [10] The foregoing excerpt from the submissions of Mr Hlophe is startling and confusing. He seems to concede that the required consent was obtained but under the wrong piece of legislation i.e. the Trading Licences Order 20 of 1975. Mr Hlophe was of course perfectly correct to suggest that no where in the Liquor Licensing Act is an applicant required to have the said consent as a prerequisite for a grant of a liquor licence.

[11] After the submissions before the Board by the applicant's attorney, the board ruled that 'We have difficulty here. The licence expired in 2012 and the Board had refused to renew it then for reasons stated and accepted by Counsel for the applicant in 2012. The whole year in 2013, the applicant traded without a licence.' And when the applicant's attorney applied for an extension of 6 or 12 months, the board stated that 'section 19 only permits 3 months and any further extension could be applied through the courts. There are twenty-five such licence holders who are trading unlawfully on Swazi Nation Land. The issues started in 2010 where original King's consents were demanded especially authorizing the sale of liquor on Swazi Nation Land and they have not complied with this call. Our orders from the King's Office was that unless a person together with his Lincusa come explains to the King how he got the authority or licence, the Board should not renew. None has done so. ...section 19 of the Act shall apply in that applicant has 3 months from 31 December 2014 to wind up his business, (not because he had a licence but as a facility to get rid of his stock otherwise he was given the 3 months for the 2012 refusal).' This is a rather strange ruling indeed. It was certainly not based on law.

[12] The applicant has approached this court for an order inter alia that the decision of the Board refusing to renew his bottle store liquor license should be reviewed, corrected and or set aside and that the respondent (Board) be ordered to renew his licence. He basically argues that the board took into consideration ‘improper grounds’ in refusing his application for a renewal. He argues that the board should not have taken into consideration the objection made by Mr Hlophe as stated above.

[13] As already stated, Mr Hlophe was correct that the applicant’s application is one regulated by the Liquor Licences Act 30 of 1964 (as amended) and not the Trading Licences Order 20 of 1975. He was further correct that nowhere in that Act is an applicant required to have the INgwenyama’s consent as a prerequisite for the grant of a liquor licence. The question that follows logically from this is why did the board require the applicant to produce or have this consent.’

[14] Section 8(1) of the Trading Licences Order provides:

‘8(1) A Licensing Officer may grant or refuse an application for the grant, amendment or transfer of a licence to conduct a business in a general business area:

Provided that no such application shall be granted, amended, or transferred if the business is to be carried in premises on Swazi Nation Land without the written consent thereto of the Ngwenyama or of any person authorized in writing by the Ngwenyama, either generally or specifically, to grant such consent.’

Again, this order is not applicable to a liquor licence. Section 19 of the order removes any doubts in this regard. It provides that

’19 Sections 5 and 12 shall not apply in respect of any licence which has been granted under the Act repealed by section 21, and this order shall not apply to any licence granted under any other law. (The underlining and emphasis have been added by me). The Liquor Licences Act 30 of 1964 is, in my judgment, such ‘any other law.’

[15] From the above analysis of the issues herein, the Board erred in importing or invoking the provisions of the Trading Licences Order into the Liquor Licences Act. It erroneously took into account irrelevant consideration and

thus arrived at a wrong or incorrect conclusion. The decision of the board in this regard cannot stand and is hereby set aside.

[16] I have referred above to the verbal communication by Sihle Dlamini to the board. The board was again in error in receiving it wholesale as it was clearly contrary to the provisions of section 8 bis (1) of the Trading Licences Order; which states:

‘8 bis (1) A Licensing officer may at anytime on good cause after due notice in writing to the licensee concerned revoke or suspend for such period as the Licensing officer may deem fit, any licence granted amended or transferred under section 7 or issued under the Act hereby repealed; Provided that a licence entitling the holder thereof to carry on any business on Swazi Nation Land, shall not be revoked or suspended unless the Ngwenyama or a person authorized by him in writing in that behalf has given his written consent to such revocation or suspension.’ (But as already stated, these provisions are inapplicable in the instant dispute, which is strictly regulated by the Liquor Licenses Act 30 of 1964).

[17] Both Counsel agreed that the reference to 31 December 2014 referred to in paragraph 10 herein is a typing error. The correct date is 31 December, 2013.

[18] Finally, I observe that if Parliament in its infinite wisdom should desire that all businesses, including those under the Liquor Licences Act 30 of 1964 should first have the consent of the INgwenyama before they could be granted the requisite licence to operate on Swazi Nation Land, then the said Act should be amended accordingly. Clarity in the law is one of the most crucial or central ingredients for business confidence and willingness to invest in a particular country.

[19] For the foregoing reasons, I make the following order.

(a) The decision of the Liquor Licensing Board refusing the renewal of the liquor licence by the applicant is hereby set aside (as irregular).

(b) The Board is hereby ordered to renew the applicant's bottle store liquor licence forthwith; and

(c) The respondent in his capacity as the Chairman of the Board is hereby ordered to pay the costs of this application.

MAMBA J

For the Applicant : S.C. Dlamini

For Respondent : Ms Ndlela