IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case no: 3174/2021

In the matter between:

BOXER SUPER LIQUORS (PTY) LTD Applicant

and

EASTERN CAPE PROVINCIAL LIQUOR BOARD 1st Respondent

THE CHAIRPERSON OF THE EASTERN CAPE

PROVINCIAL LIQUOR BOARD 2nd Respondent

JUDGEMENT

MFENYANA AJ

[1] The contentious issue in this matter hinges on who should pay the costs of an urgent application instituted by the applicant on 8 October 2021. The application was set down by the applicant for hearing on 16 November 2021. In that application, the applicant sought an order directing the first respondent to consider and finalise two applications for liquor licences made by the applicant in March of the same year. In that application the applicant sought, as

an interim relief, an order that it be authorised to trade in liquor as if the licence had been granted, pending the determination of its application for liquor licence applications by the respondents. The essence of the interim relief sought is that should the applications be refused by the first respondent, the applicant should still be authorised to trade in liquor until such time that the applicant itself has made a decision whether or not to take the matter on review. The applicant self-imposed a timeframe of 30 days from the date the decision had been communicated to it by the respondents within which to make that decision.

[2] Having duly delivered its notice of intention to oppose the application on 15 October 2021, the respondent made a decision on 27 October 2021, refusing the two liquor licence applications. Axiomatically, this rendered this part of the relief sought moot.

[3] On 5 November 2021, a day out of the time stipulated in the notice of motion, the respondents delivered their answering affidavit. In it, the respondents dealt in part with the applicant's failure to comply with the provisions of the Act[1] in so far as they require proof of service to the ward committee which in turn must consult with the community and submit a report to the first respondent. This aspect is not relevant for the determination of the present application. Nothing further need be said about it.

[4] The respondents submitted that the order sought by the applicant, seeking to compel them to make a decision on the two liquor licence applications had become moot and would serve no practical effect. This is conceded by the applicant. It is well worth mentioning that the decision on the two liquor licence applications was taken only after the application papers had been issued and after the respondents filed the notice to oppose.

[5] The respondents in their answering affidavit place in issue the 'interim relief' sought by the applicant and seek to convince the court why it should not be granted. Principally, the respondents aver that the relief sought has the effect of undermining the spirit of the Act in so far as the intention and purpose of the registration and community involvement processes are concerned. They further place in issue as without merit, the intended review, on the basis of which the applicant sought to be authorised to trade without the required licence, stating that

[1] *Eastern Cape Liquor Board Act, 10 of 2003*

to the extent that the applicant had not provided any basis for such, the order sought is without merit and falls to be rejected.

[6] Emerging from the respondent's answering affidavit is a contention that a dispute existed between the parties in respect of the responsibility to ensure that the ward councillor consults with the community. This is evident from the parties' submissions. I do not intend to deal with the merits and demerits of these submissions.

[7] The respondents further contend that the applicant had an alternative remedy of an internal appeal which it failed to pursue before approaching the court. The respondents' further contention is that the delay in processing the liquor licence applications was as a result of the back and forth communication between the parties regarding the community involvement aspect of the application and also that the order sought shall interfere with the doctrine of separation of powers.

[8] The filing of an answering affidavit by the respondents prompted a letter from the applicant on 9 November 2021 suggesting that the application be removed from the roll as the relief sought had become moot due to the respondents having already taken the decision. The respondents replied to the letter on 10 November 2021 disputing that the matter had become moot. They also aver that they would 'oppose any 'withdrawal of the matter without the leave of court. It is also the respondents' case that the issue of costs be argued on the set down date.

[9] On 11 November 2021 the applicant addressed a further letter to the respondents the essence of which was *inter alia* that the applicant would go ahead with the urgent application on 16 November albeit on issues different from those raised in the notice of motion, the conduct of the respondents and the fact that the applicant had to lodge an appeal against the decision of the respondents or the court to exercise its discretion to dispense with the internal appeal. The applicant further stated that it would bring a second urgent application a day before the hearing of the matter, to seek a declaratory order and highlight the conduct of the respondents.

[10] On 15 November 2021 the applicant delivered an affidavit titled "Affidavit Re: Postponement" in which it set out what had transpired up to that point, and sought an order that the matter 'be removed from the urgent roll, postponed *sine die* and to be enrolled for hearing on the ordinary motion roll.' At the hearing of the matter on 16 November 2021, it was

'postponed to 20 January 2022 and the costs were reserved. The court further directed that the matter be referred to Case Flow Management no later than 30 November 2021.

[11] As aforesaid, the contentious issue in these proceedings is who is liable to pay the costs with one party contending that it was successful or substantially successful in its case so the other party must pay the costs and the other repelling such with contrary contentions Determining the issue of which the successful party is pivots on the mootness or otherwise of the application and the cause thereof.

[12] The applicant contends that the refusal of the liquor licence applications by the first respondent rendered the whole application moot as the *mandamus* portion of the application was the primary relief sought. The refusal thereof, so continues the applicant continues, disposed of the *lis* between the parties and in that way 'disentitled the applicant from pursuing the interim relief'. This is disputed by the respondents who contend that the interim relief remains a live issue between the parties.

[13] In its submissions the applicant states that after the respondents made a decision refusing the liquor licence applications, the applicant addressed a letter to the respondent suggesting that the matter be removed from the roll and that the issue of costs be enrolled for determination at a later stage. In response thereto, the respondent advised that they would oppose any withdrawal of the matter if it was not sanctioned by the court. It bears mention that the suggestion by the applicant to remove the matter from the roll came after the respondents had delivered their answering affidavit.

[14] Presumably, on account of the respondents' resistance, the applicant did not persist and follow through with the removal of the matter. Instead, the applicant delivered a further affidavit, the "*Re Postponement affidavit*". Although this affidavit is entitled Affidavit: Re: Postponement. Its title notwithstanding, Mr Brown, counsel on behalf of the applicant, submitted that the said affidavit is in fact the applicant's reply as the applicant essentially did not seek a postponement. However in paragraph 13 of the said affidavit, the applicant prays that the matter be removed from the urgent roll, postponed *sine die* and that it be enrolled on the normal 'motion' roll. The tenor of the above paragraph is an antithesis of Mr Brown's submission above, and flies in its face.

[15] In arguing that a costs order be granted in its favour, In support of its argument for the costs, the applicant relies on two propositions. Firstly, the applicant argued that the application was necessitated by the respondents' failure to comply with its statutory obligations and decide on the applications submitted by the applicant within the prescribed timeframes. Secondly, the applicant contends that the issuing of the application resulted in the respondents making a decision on the applications, albeit outside of the 118 days required in terms of the Liquor Act, which is what the applicant sought to achieve in issuing the urgent application.

[16] In the final analysis, the applicant contends that it was successful in the application and the costs should accordingly follow this result. Driving this point home, the applicant further submits that the application was not without merit or frivolous and that the respondent's ultimate decision in the face of the application was a calculated move to render the primary relief moot.

[17] I was referred to the decision in *Welgevonden*[2]. In that matter the Limpopo High Court, per Makgoba JP, granted an order authorising the applicant to trade in liquor pending a decision by the respondent and to continue so trading pending finalisation of a review application by the applicant. As already stated, the merits of the matter are not an issue before this court, having been disposed of at the hearing of the matter on 16 November 2021. For this purpose, nothing much turns on whether the interim relief was abandoned by the applicant 'from the bar' as the respondents contend, or whether it was disposed of at some other time. Where this alleged abandonment or withdrawal or removal becomes relevant is in respect of the awarding of costs, that being the core consideration in these proceedings.

[18] The parties appear to be on the same page in this regard. However, contrary to the applicant's submission, the respondents contend that once the decision to refuse the liquor licence applications was made, the *mandamus* part of the relief, and only that part became moot. The remainder of the relief sought, the respondents aver, remained live until it was abandoned at the hearing of the matter. On this basis, the respondents contend that they were successful in the application as the matter was only resolved once the applicant abandoned the remaining prayer on the day of the hearing. My difficulty with this line of argument is that it trivialises the primary relief sought by the applicant seeking to compel the respondents to make

[2]*Welgevonden Lodge No. 57 (Pty) Ltd v Limpopo Provincial Liquor Board Case No:7896/2020*

a decision which is the main reason for the applicant to launch this application. The issue, in my view, is whether the making of the decision by the respondents after the application was instituted indeed rendered the matter moot and whether the respondents could have in any event taken the decision had the application not been instituted. The applicant however denies, that it abandoned the interim relief and argues that it had become moot and was not dealt with. This elicited a response from the respondents that the applicant was disingenuous as it maintained this line of argument in a different matter under case number 3727/2021.

[19] The parties are in agreement that the costs should follow the result and that this rule should not be lightly departed from. What they are miles apart on is what 'the result' is, with each claiming success. The applicant contends it was successful as what it sought to do in issuing the application, was to compel the respondents to make a decision, which is what happened shortly after the application was issued. Here, I must interpose to state that no *mandamus* compelling the respondents was issued by the court. On the other hand, the respondents contend that they were successful as they opposed the application until the applicant abandoned the remaining part of the relief from the bar.

[20] What the applicant does not say is that that part of the relief became the subject of the court hearing on 16 November 2021. This is hardly surprising as the applicant insists that the entire application became moot upon the first respondent making a decision to refuse the liquor licence applications. I do not agree. The application brought by the applicant was three-fold: *First*, it sought to compel the respondents to make a decision. Whatever the outcome. Linked to that was that before the decision is made, the applicant be authorised to trade until the decision had been made. *Second*, once the decision had been made and it was not in the applicant's favour, it sought authorisation, similarly, to trade until the applicant itself took a decision whether or not to take the refusal by the respondents on review. It is not in dispute that the first leg of the relief had been overtaken by events even prior to the hearing of the matter. The dispute with regard to the second leg persisted until, it seems, 16 November 2021 at which stage the parties were before court. On that day, by agreement between the parties, the matter was postponed to 20 January 2022 with costs reserved.

[21] In the way the relief sought by the applicant is crafted, it makes provision for the eventuality that the main relief is not granted in which event it would be authorised to trade as if the licences had been granted pending its decision to take the matter on review. It would

seem to me that what remained of the application at that stage was for the applicant to make that decision. It did not. Believing as it did, that that part of the relief was of no consequence, the applicant approached the respondents in an attempt to agree to put the entire matter to bed, and suggested to remove the matter from the roll. I am of the view that this suggestion was well made. However it was not proceeded with on the basis that the respondents did not agree to it and stated that they would oppose any attempt to withdraw the application.

[22] There is no doubt that the respondents were quite skilful in the manner they handled the liquor licence applications as well as the urgent application. That notwithstanding, nothing prevented the applicant from withdrawing the application, with a tender for costs. As the applicant harboured the view that the matter had become moot correctly or incorrectly, and that it was entitled to costs up until that stage, the issue of costs could have stood over for later determination. In that event the matter would not have endured for as long as it did.

[23] By the applicant's own admission, a refusal by the respondents would trigger the interim relief. It may be that for some reason or another, the applicant no longer wished to press ahead with a review application. That also, was well within the applicant's rights as at its own instance it sought to first make a decision whether to take the matter on review or not within the time it had prescribed. The only way that the respondent would be apprised of the applicant's election is if the applicant itself communicated its decision. It has not. That eventuality has indeed come to pass. To act otherwise would be tantamount to leave the issue hanging in the air.

[24] I could find no authority for the applicant's contention that the interim relief in its entirety had become moot on occasion of the first respondent's refusal of the liquor licence applications. The authorities provided by the applicant all point towards fortifying the applicant's contention that the interim relief as sought has been granted by our courts on previous occasions. They do not assist the applicant in making the point that the entire application became academic upon compliance by the first respondent. The applicant's own notice of motion belies this contention.

[25] The general rule is that the successful party is entitled to his/ her costs. To the extent that the respondents complied with the relief sought, the applicant was substantially successful

in its case. To the extent that the applicant, proceeded with the matter even after the decision was taken, the respondents were substantially successful.

Order

[26] In the result the following order is made:

1. The respondents shall pay the costs of this application from the date of its inception up to 27 October 2021 when the respondents complied with the main relief sought by the applicant.

2. The applicants shall pay the costs of this application from 28 October 2021 to 16 November 2021 when the matter was heard in court, including the costs reserved on that date.

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S. M. MFENYANA
ACTING JUDGE OF THE HIGH COURT
EASTERN CAPE, MAKHANDA

Counsel for the Applicant:	Adv. G Brown
Instructed by:	McCallum Attorneys
Counsel for the Respondent	Adv. S Mpakane
Instructed by:	State Attorney, East London C/O Mabece Tilana Inc.
Date heard:	20 January 2022
Date handed down:	26 April 2022