G.P.-S.12136—1952-3—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Transvaal Provincial Division).
(Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

WILCOCKS J. SMITH Appellant,

versus

VENTERSBURG LIC. MIG. BK. Respondent.

✓ *Appellant's Attorney* Kisch N.O. *Respondent's Attorney* Hoffe
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate Smellan Q.C. *Respondent's Advocate* 1st Respondent Plewman Q.C.
Advokaat vir Appellant J. Smuts *Advokaat vir Respondent* 2nd Resp. J. van Rhyn

Set down for hearing on Tuesday 8th Nov, 1955
Op die rol geplaas vir verhoor op

(C.P.D. 21)

II-12, 7, 11)

Coram: Steyn C.J. van den Heever, de Beer, Reynolds et Hall JJ.A.

Mr. Sellan Q.C. } for appellant 9.30 am — 11.0
11.15 am — 12.25 pm
Mr. Crosman Q.C. } for resp 1 12.25 pm — 1.0 pm
2.45 pm — 3.15 pm
Mr. van Rhyn } for resp 2 3.15 pm — 3.45 pm
Mr. Sellan 3.45 pm — 4.15 pm

C.A.V.

Judgment
9/12

a/R

(Record)

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between:

A. J. BOTHA Appellant

and

THE LIQUOR LICENSING BOARD FOR THE DISTRICT OF VENTERSBURG. and 1st.Respondent

W. A. VENTER. 2nd.Respondent

Coram: Schreiner, v.d. Heever, de Beer, Reynolds et Hall, JJ.A.

Heard: 8th. November, 1955. Delivered: 2-12-1955

J U D G M E N T

SCHREINER J.A. :- I agree with the conclusion reached by my brother de BEER and in general with his reasons ; I wish, however, to mention one or two other factors which have weighed with me.

The Provincial Division considered itself bound to treat as peremptory the part of section 31 (2)(d) that requires a description of the premises, because of what was said in Feinberg v. Pietermaritzburg Liquor Licensing Board (1953(4)S.A. 415). But, although at page 420 CENTLIVRES C.J. said that the provisions of section 31

(2)/.....

(2) (d) seemed to be peremptory, it is clear from what follows that it was only the requirement of a plan that was actually held to be peremptory.

A difficulty in making the requirement of a description peremptory is that the word "description" is seriously lacking in precision. To call a building a single-storeyed building or a brick building is to give it a description, though a bald and unhelpful one. Counsel for the appellant contended that a description was required not only for the Board but also to meet the needs of members of the public, who are potential objectors but might not be able to read a plan. But the legislature could not have intended that the description should cover substantially the same ground as the plan; the result would be altogether too cumbersome. It was the plan that was to provide the details. The provision is certainly not ideally clear, since under section 31(2)(c) there is a separate obligation to state approximately all that was considered in Swart v. van der Merwe (1943 A.D. 629) to be a sufficient compliance with the description requirement. It would indeed be difficult to hold, in the face of that decision, that where you have a clear linking of an adequate plan with a proper statement of the situation of the premises you have not already a

sufficient/.....

sufficient description of the premises. That being the position there seems to be little room for a relevant enquiry into whether the requirement of a description is peremptory or not. For present purposes it is sufficient to say that the description in this case is covered by Swart v. van der Merwe (supra) and is therefore unassailable.

Another matter to which I wish to refer is the relationship of section 68 to section 69(2) and (3) in a case like the present. Section 68 requires the Board to be satisfied inter alia that the premises afford suitable and satisfactory accommodation for all purposes to which they may lawfully in terms of the licence be put, and that they are sufficiently complete to enable them to be occupied for the purposes of the licence and to enable the business to be carried on lawfully. Unless it is satisfied on these points the Board may not grant the licence (see Swart v. van der Merwe - supra - at page 643, and Johannesburg Liquor Licensing Board v. Short, 1946 A.D. 713 at page 721). It cannot grant the licence subject to alterations being made that will render the premises suitable, satisfactory and complete.

When one turns to section 69(2) and (3), however, the position is different. For the purpos

of/.....

of those provisions regard is had to the time when the premises will be used for the sale of liquor, and, so long as the Board is satisfied that the licence will not issue until the premises may lawfully be used for the sale of liquor, the licence may be granted. It was so decided in Daitsh v. Osrin (1950 (2) S.A. 334). At page 341 ad fin. the words "standing alone" might be thought to countenance the view that sections 68 and 69(2) should be taken together; but that this was not the intention appears from what follows, where the striking difference in the language of the provisions was pointed out. Under section 68 the Board must look at the premises as such, irrespective of whether in fact a trade, business or occupation is being carried on in adjoining premises. It may be assumed that doors, windows and the like are to be treated as features to be taken into account by the Board when considering whether in view of section 68 it can lawfully grant a licence in respect of the premises. But even if it is satisfied that the premises are suitable, satisfactory and sufficiently complete, it must also consider the specific question of separation from other trades, businesses or occupations. When considering that question it is not obliged to limit its investigations to the existing

position/.....

position, for what, ultimately, it must concern itself with is what the position will be when the licence is issued and liquor is sold.

Where, as was the case here, you have a door leading into the adjacent premises where another business is being carried on, the position may seem confusing to the members of the Board. It may not be easy for them to separate the problem under section 68 from that under section 69(2) and (3). And indeed in these proceedings there are not wanting traces of the view that the provisions may properly be treated together. But it seems to be clear that the Board considered the premises to be suitable, satisfactory and complete, within the meaning of section 68. In regard to the requirements of section 69(2) and (3) the closing of the adjoining business before the grant of the licence was certainly sufficient, but even if this had not happened the subsequent bricking up of the door before the issue of the licence would, in the light of what I have said, also have met those requirements.

In regard to the question of the yard it seems to me that the appellant failed to establish in the review proceedings that there was a yard, within the meaning of section 69(3) (b), and consequently, that there was

any/.....

any failure on the part of the Board to carry out its functions. I do not find it necessary to deal with the case of Ramsay referred to by my brother de BEER.

van der Heever J.A. Concurs.

1. 2. 55

Original (Record)

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

In the matter between :

Alfonso Jacobus BOTHA ..... Appellant,

and

THE LIQUOR LICENSING BOARD FOR THE DISTRICT OF VENTERSBURG ..... First Respondent,

and

Willem Albertus VENTER ..... Second Respondent.

CORAM :	Schreiner, van den Heever, de Beer, Reynolds et Hall, JJ.A. .
HEARD ON :	8th November, 1955.
DELIVERED ON :	2. December, 1955.
JUDGMENT :	DE BEER, J.A. .

As a result of the registered number of parliamentary voters within the area of the Hennenman Municipality having increased beyond the quota specified in section 63(1) of the Liquor Act, (Act No. 30 of 1928), the Liquor Licensing Board for the District of Ventersburg was empowered at its sitting during December, 1954, to grant a new bottle licence for that area. When the Board met, the Appellant, second Respondent and a third party figured as competing

applicants...../.....2/.....

applicants for that licence. After hearing the different parties on the afternoon of the 1st December, the Board considered their respective claims on the 2nd December and granted the licence to the 2nd Respondent.

The two unsuccessful applicants thereupon impugned the propriety of the Board's decision by instituting review proceedings to have ~~this decision~~ it set aside in terms of section 29 of the Act. In the Petition, which was heard by the Orange Free State Provincial Division, an order of Court was sought setting aside the grant of the licence, ordering first Respondent to call a special meeting of the Board without the necessity of first publishing notice of such special meeting in the Government Gazette, at which to reconsider the applicants' applications and ordering first and second Respondents, jointly and severally, to pay the costs of such proceedings.

The application was dismissed with costs, whereupon first applicant, the Appellant, brought the present appeal before this Court where it was contended, generally, that the Board had, within the meaning of the terms of section 29 of the Act, exceeded its powers, failed to exercise those powers which it was bound to exercise, and, that where it did ex-

ercise...../.....3/.....

ercise those powers, it did so in an arbitrary and grossly unreasonable manner. These irregularities, (it was contended,) caused or were calculated to cause substantial prejudice to the Appellant. The same four major grounds relied on by the Appellant in the Court below were again advanced here, and I propose dealing with them seriatim.

The first ground was that the Board exceeded its powers in considering second Respondent's application which did not comply with the requirements of section 31(2)(d) of the Act in that no proper description of the premises accompanied the application, and that the plan which was lodged with the application, though drawn to scale, falls short of the requirements of the section. This section has been the subject of numerous judicial decisions. It was held in FEINBERG v. PIETERMARITZBURG LIQUOR LICENSING BOARD, (1953(4) S.A., 415, (A.D.)), that the provisions of this section are peremptory in so far as it requires a plan to accompany the application : the question whether the provision requiring the plan to be drawn to scale is merely directory, as was held in MOLTENO v. CALEDON LIQUOR LICENSING BOARD AND ANOTHER, (1936 C.P.D., 189), was expressly left open : here, however, the plan was drawn to scale. It

was contended on the authority of GARB AND ANOTHER V. GOLDER AND ANOTHER, (1954(1) P.H., K. 45, (C.P.D.)), that a description of the premises is likewise peremptory.

I have not been able to ascertain, nor has Counsel been able to assist me in ascertaining what is meant by such "description", and the Act itself affords me no guidance. When confronted with certain anomalies which would flow from the interpretation that a description of the premises is peremptory, Counsel was inclined to concede that in a given case the plan may suffice to describe the premises but contended that here the plan did not portray an explicit and sufficient description.

This contention I cannot accept, for, to my mind, the Board was provided with a composite plan, drawn to scale, which showed the front elevation, the side elevation and the ground floor. It was possible to ascertain the dimensions of the premises, the floor space, the composition of the ceiling and the floor, the thickness of the brick walls, the situation and size of the supporting pillars, the number and dimensions of the doors and windows including the two display windows, the position of the wash-up basin, the fact that the entrance door and windows are burglar proof, the

slope of the corrugated iron roof, the height of the roof and parapet wall. To my mind the plan could only be considered incomplete because of failure to specify and describe the counters and shelves which are installed : these are movables and form no part of the premises. To insist on more details than are here provided would be sheer pedantry. Further, the decision in SWART v. VAN DER MERWE, (1943 A.D., 629, at pages 640 to 641), bears out first Respondent's contention that a plan, sufficient in detail, complies with the requirements of the section. In so far as the decision in GARB AND ANOTHER v. GOLDER AND ANOTHER, (supra), is inconsistent with this conclusion, it must be taken to be overruled.

The second and third grounds advanced centre around the interpretation and application of sub-sections (2) and (3)(a) and (b) of section 69 of the Act. Sub-section (2) provides that, with certain exceptions, no licence shall be granted in respect of any premises in which any other trade, business or occupation is carried on. Sub-section (3) reads as follows : -

" (3) For the purposes of this section premises shall

" not be deemed to be separate if -

" (a) ..../....6/..

" (a) being under the same roof as other premises, they are not completely separated therefrom by a wall or walls having no door, window, aperture or other means of communication with such premises; or

(b) having a yard, that yard is not completely separated from the yard of any other premises by a fence or wall having no door, gate, aperture or other means of communication with such other yard. "

The second contention was thus formulated : -

" It was not competent for the Board to grant the
" second Respondent's application inasmuch as there was
" direct communication between the proposed Bottle Store
" and the adjoining premises in which a General Dealer's
" business was being carried on, at least until 9 a.m.
" on 2nd December. "

It is common cause that when the applications were heard on the ~~XXXXXXX~~ 1st December as also when the Board announced its decision on the 2nd December there existed a sliding door which afforded communication between the bottle store and the adjoining premises. The record, however, reveals...../...../....

reveals that an ejectment order was issued out of the Magistrate's Court on the 30th November as a result of an automatic rent interdict summons served on that date on the occupant of the adjoining premises. Then follows a conflict of evidence as to whether or not the ejectment order was served on the XXXXXXX 1st December. Robertson, the tenant of the adjoining premises, in his first affidavit stated that his greengrocer's business was closed by the Messenger of the Court on the 1st December : in a later affidavit he resiled from this, stating that XX the premises were closed only on the morning of the 2nd December. Bezuidenhout, the Messenger of the Court, corroborates this latter statement adding that Robertson was ejected from the premises at 9 a.m. on the 2nd December when he locked up the building and removed the keys.

The contention that the Board was precluded by section 69(2) from granting a licence to second Respondent because another business not XXXXXXXXXXXXXXXXXXX excepted under section 69(1)(b) was at the time being carried on in the premises fails on various grounds.

Before dealing with those grounds I wish to add, in parenthesis, that the provisions of section 68 are not, as

contended, relevant to the interpretation of these sub-sections because it merely deals with the "general suitability of the premises".

Reverting then to the existence of the sliding door, on the assumption most favourable to the Appellant, namely that the crucial time was the very moment at which the licence was granted, even then the Appellant has failed to establish that the greengrocer's business was then still being carried on. On the contrary, the probabilities that the decision was announced only after the business had been closed at 9 a.m. are overwhelming, the more so as the Chairman, a Magistrate, testifies that all applications were considered on the 2nd December before the Board arrived at its decision. It follows that as the adjoining premises were vacant at that time the Board was empowered to grant the licence and, if so advised, to impose under section 79 any condition requiring structural alterations such as that the communicating door should be bricked up before the licence was issued. Although no such condition

was imposed...../.....9/..

was imposed it appears that the offending door was in fact bricked up before the 10th December, the date on which the Secretary of the Board signed the certificate authorising the issue of the licence.

Further, Captain van den Bergh states that he was deputed to act on behalf of the Police in the matter of these applications. Armed with a plan he inspected the premises and discussed the questions with second Respondent's Attorney, who assured him that, should his client's application be granted, the door would be closed as was in fact indicated on the plan. He consequently submitted a favourable report.

Finally, the assumption in favour of Appellant that the matter is governed by conditions as they prevailed at the time the licence was granted and not when the certificate was issued or when the grant becomes operative, does not appear to be justified. In DAITSH AND ANOTHER v. OSRIN AND ANOTHER (1), (1950(2) S.A., 334, (A.D.)), the present CHIEF JUSTICE in reading the statutory meanings of "grant" and "licence" into section 69(2) ~~evolved the following~~ *summarised the effect as follows)* (at pages 340 to 341) : -

" No certificate shall be granted authorising the issue,

" by the officer charged with the duty of issuing licen-
" ces, of a new licence for the sale of liquor in respect
" of any premises in which any other trade, business or
" occupation is carried on ..... . "

After pointing XXX out that the duration of the licence is from 1st January to 31st December and that what the Legislature intended to prohibit was the selling of liquor in premises in which some other business is carried on the judgment proceeds : -

" The prohibition is not against the granting of a cer-
" tificate while other business is carried on, but the
" sale of liquor at such a time.

" The construction which I have placed upon sec.
" 69(2) is in consonance with the ratio decidendi in
" SENEKAL LICENSING COURT v. STEIN, (1924 A.D., 506,
" at pp. 512, 513), where SOLOMON, J.A., pointed out
" that what a liquor licensing board is concerned with
" is the future, not the present. It is true that in
" that case the relevant statute was not Act 30 of 1928,
" but it seems to me that the principle there enunciated
" holds good in respect of the 1928 statute except in so
" far as that statute provides otherwise. There is

" nothing...../...11/...

" nothing in sec. 69(2) which compels one to hold that a
" licensing board must have regard only to circumstances
" which exist at the time it considers an application
" and not also to circumstances which will exist at the
" time the licence asked for becomes operative. "

Thirdly, still dealing with sections 69(2) and 69(3)(b), the ~~proposition~~ contention was advanced that -

" the Board was precluded from granting the application,
" because the yard attaching to the proposed licensed
" premises was not completely separated from the yard
" of the adjoining premises. "

It appears from the plan and the affidavits filed that "Alberts Gebou" comprises three premises under the same roof, and that contiguous to the back of the three premises there is an undivided and unfenced area on which certain communal lavatories are situate. The question whether this area or portion thereof is a yard of the bottle store and, if so, whether it is completely separated from the yard of any other premises was ~~previously~~ apparently never raised before the Board. In the circumstances the bald statement by the Appellant supported by the assertions made by the deponents Robertson and du Plessis

that the...../....12/...

that the bottle store has a yard, takes the matter no further. If in fact the Board did consider the matter and concluded that there is no common yard or that the yard of the bottle store is sufficiently separated from that of the other premises, this would apparently be a finding of fact against which no appeal lies. No written objection was filed in respect of the question whether there was a yard attaching to the bottle store : the question was never touched upon at the sitting of the Board. It would nevertheless appear that the unsuccessful applicant, the present Appellant, is not disentitled to approach the Court under section 29(1) on the ground that the grant of the first Respondent's application and the refusal of the Appellant's were separate proceedings - see JOHANNESBURG LIQUOR LICENSING BOARD AND ANOTHER v. SHORT, (1946 A.D., 713, at page 721) - sed contra : RAMSAY AND ANOTHER v. ZOUTPANSBERG LIQUOR LICENSING BOARD AND ANOTHER, (1950(3) S.A., 647, (T.)). The matter, though [redacted] properly before this Court, does not avail the Appellant as his contention fails on the ground that he has not established that the area in question is a yard and that the leased premises include any portion of that area.

The lease confers on the second Respondent the use of : -

" Premises No. 18 (c) of Alberts Building of Erf 319,
" Hertzog Street."

Clause 4 of the lease provides that : -

" the premises shall be used solely as a bottle store
" and a store-room for empty cases and bottles. "

And clause 14 reads : -

" The Lessee shall have the use of one European and
" one Non-European Lavatory in the yard and shall at all
" times endeavour to keep these lavatories in a clean
" and sanitary condétion. "

These clauses bestow no legal right on the lessee to use the yard or any portion thereof for any purpose other than lavatory facilities, and, if actual use ~~XXX~~ is the determining factor, the use would have to be by the lessee : of this there is no evidence whatever.

The meaning of the word "yard" was fully discussed in ERASMUS v. HOJEN AND VEREENIGING LIQUOR LICENSING BOARD, (1948(3) S.A., 632, (T.)), where, after referring to several dictionary meanings, MURRAY, J., stated (at pages 636 to 637):-

" The Act itself contains no definition of a "yard"
" and the only guidance afforded by sec. 69 is that the
" opening words of sub-sec. (3)(b) show that it is in
" contemplation that the licensed premises need not
" necessarily have a yard."

(in the present case)
The area is unenclosed and undivided, the boundaries are not

defined or demarcated and, as pointed out in the ERASMUS case, (supra), the use of a yard is not so essential for the proper enjoyment of the premises as to justify invoking the principle of implied grant - see PRETORIUS v. ABRAHAMSON, (1904 T.S., 643).

Further, as the plan shows that there is no direct communication between the premises and the yard; the right to use the lavatories can only be exercised by emerging from the front entrance, going along Hertzog Street and round the building and then cutting across the unenclosed area : if the object of section 69 was to prevent illicit dealing in liquor, to facilitate the power of controlling and observing activities in bottle stores, it could hardly have been more effectively achieved than by confining access to the lavatories through the front door and along a public street. The lavatories might as well have been situate in some yard across the street in which case that yard could not be said to be a yard of the licensed premises.

The fourth and final ground is thus stated : -

" The Board, in granting second Respondent's application,

" did not apply its mind to the question before it

" and therefore failed to exercise the powers which it

" was obliged to exercise (namely, to satisfy itself as

" to the completeness and suitability of the premises),

" or acted arbitrarily or grossly unreasonably in grant-

" ing an application in respect of which it had not

" applied its mind to the real facts in issue. "

This is based on section 68 which requires the Board to "satisfy itself" that the premises are sufficiently complete and that the proposed licensed business may be carried on in accordance with law. It is urged that, as three members of the Board state under oath that they did not at any time see the plan of the premises or inspect the premises, ~~and~~ did ~~not~~ at any relevant time bear knowledge of the fact that there was a sliding door giving access to the adjoining premises, they failed to apply their minds to the problem.

The affidavits make strange reading. In reply to the petition the Chairman and three members of the Board testify that all applications were fully considered, that they individually decided that the premises in question complied with all the requirements of sections 68 and

69(3)(a) of the Act, that there was no evidence led that any business was being carried on in the adjoining premises, and that after hearing first Respondent's Attorney and the report of the Police the matter was carefully considered before granting the licence. When replying the Appellant produced fresh affidavits by two of these three members of the Board as also by a third, who now all state that during the sitting of the Board on the 1st and 2nd December no plan was "exhibited" to them, that they bear no knowledge that such a plan was ever available, that they did not inspect the premises in question and that they were unaware of the existence of the sliding door.

I shall, in considering this question, bear in mind Mr. Miller's contention that the test to be applied is not whether ~~first~~ second Respondent did all that was required of him but whether the Board applied its mind to the problem ~~in issue~~. What, however, must also be borne in mind is that even if the Court should find that any allegation ~~amounting to a contravention of~~ falling within the provisions of section 29(1)(a) has been proved, the decision of the Board will not be set aside unless the reviewing Court -

" is satisfied..../...17/.....

" is satisfied that the matter proved, caused or was
" calculated to cause substantial prejudice to the
" petitioner or any other person. " - Section 29(2)(b).

I do not think this objection rests on sound grounds. The Chairman of the Board definitely asserts that the plan did accompany the application and was removed only after the proceedings terminated : it was, therefore, available to members of the Board. He adds : - ,,na aanhoor van die Prokureur vir Applikant, en verslag van die Polisie" he considered that the building in all respects complied with the requirements of the Act : three of the Board's members use these identical words. Now, the two who raise this new point plus the member who had not testified before nowhere suggest that had the presence of the sliding door been brought to their notice it would or even might have affected their decision. They heard the Police report that the premises were satisfactory, and section 136 of the Act makes that report information of which the ~~and the Act in section 136 makes such opinion evidence ad-~~ Board may take cognizance. ~~missible.~~ Consequently the Appellant's contention comes to this - these members of the Board applied their minds to part of the evidence but not to the whole. If they accepted the Police ~~evidence~~ report, as they must have done, and acted on it,

as they...../.....18/...

as they were entitled to do - see INSOLVENT ESTATE RETIEF v. RIVERSDALE LIQUOR LICENSING BOARD (2), (1934(1) P.H., K. 26, (C.P.D.)), - I fail to see how it can be said that they failed to exercise the powers which they were obliged to exercise. To direct their minds specifically to the plan or to go out and inspect the premises after accepting the Police ~~evidence~~ report would be an act of supererogation. The presence of the sliding door was no bar to the grant of the licence; and I cannot accept the contention that had all the competing premises been equally satisfactory the Board may have been persuaded to give its decision in favour of some other applicant because of the presence of this sliding door. These three members carefully refrain from suggesting this.

The Appellant has thus failed to prove any irregularity : he has failed to prove any actual or potential "substantial prejudice".

In my opinion the appeal should, therefore, be dismissed with costs.

E. M. de Beer

Ll Kuever, Reynolds, Hall, JJ.A. } concurred.