

**N & B VENTURES (PVT) LTD
T/a NESBITT CATLE HOTEL**

Versus

**THE MINISTER OF HOME AFFAIRS &
ANOTHER**

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 20 JANUARY 2005

J Tshuma for applicant
Nzarayapenga for respondent

Urgent Application

CHEDA J: Applicant filed an urgent application wherein it seeks the return of various goods seized by 2nd respondent.

Applicant is a duly registered company in terms of the laws of Zimbabwe and trading as Nesbitt Castle Hotel. In addition to providing accommodation it also sells liquor. 1st respondent is the Minister of Home Affairs, Harare. He is sued in his official capacity as the Minister responsible for the 2nd respondent.

The 2nd respondent is the Officer-In-Charge, Zimbabwe Republic Police, Drill Hall, Bulawayo and is cited as the most senior person in charge of the station where the seized goods are kept.

The facts of this case which are largely common cause are that on 17 September 2004 police officers from 2nd respondent station arrived at applicant's premises wherein they demanded to see a valid liquor licence authorising them to sell liquor. Applicant did not have one in their possession but proffered an explanation as to why they did not possess it. They explained to the police officers that they were waiting for its issuance by the Liquor Licensing Board in Harare. Police Officers

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were shown copies of letters sent to the Liquor Licensing Board, Harare to which they had not received a response.

On 13 March 2003 applicant through its legal practitioners of record wrote a letter to the Liquor Licensing Board in which they attached application for renewal for the year 2003 and 2004 together with the expired licence for 2002. It appears no response was received from the Liquor Licensing Board until applicant again wrote another letter on 3 September 2004 enquiring about the same licence.

It is also common cause that the Liquor Licensing Board was experiencing problems in issuing liquor licences as evidenced by a letter by applicant's erstwhile legal practitioners, Messrs Winterton, Holmes & Hill who had expressed concern in the delay in issuing the said licences way back in June 2002.

Applicant having experienced the delay in receiving the liquor licence continued to sell liquor without a licence and was therefore on two occasions issued with tickets for contravening the Liquor Licensing Act [Chapter 14:12] and it paid admission of guilt fines. Subsequent to the seizure of the liquor in question applicant has since been issued with a licence which it produced to respondent on 24 September 2004 after the Magistrates' Court had authorised forfeiture of the said liquor.

Mr *Nzarayapenga* for respondents argued that the said goods should not be returned to applicant as applicant was engaged in an illegal sale of liquor i.e. without a valid liquor licence, moreso, that it did so on two occasions.

Mr *Tshuma* for applicant argued on the other hand that the offence of trading without a licence in the circumstances was technical, in that, it is the Liquor Licensing Board which is at fault by not issuing licences timeously. He further argued that

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forfeiture of the goods should not have been ordered after the admission of guilt fine was paid on 17 September 2004.

It is pertinent to note that the application for forfeiture was made to the Provincial Magistrate on 17 September 2004 and was issued on 20 September 2004.

There are basically two issues which arise as I see them in this matter. Firstly, it is that of trading without a liquor licence. The Liquor Licensing Board is the authority for issuing licences. In the event that an offence is committed, it is 2nd respondent who should arrest the offender. At that juncture, 2nd respondent indeed was the proper authority to issue tickets. However, the most important aspect is the manner the Liquor Licensing Board (issuing authority) has been conducting itself. Applicant way back in March 2003 sent renewal applications for the years 2003 and 2004 but no response was received until 24 September 2004 when the licence was issued.

The fact that applicant committed an offence by selling liquor without a licence is not in dispute. It is however, not enough to look at this offence and end there. It is necessary to look at the circumstances surrounding the commission of this offence in order to arrive at a just and equitable decision. The Liquor Licensing Board is the issuing authority and is a creature of a statute which empowers it to establish administrative machinery in handling matters relating to liquor licences.

The law not only empowers administrative bodies to act but also places them under a strict duty to act properly. It is that duty to act which should complete their own smooth running of those individuals or institutions which are affected by their administrative actions. The Liquor Licensing Board is duty bound to issue liquor

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licences within a reasonable time. If it fails to do so, it, literally means that those in the business of trading in liquor will either cease operations or risk operating without licences without an intention of doing so. Applicant had been waiting for a licence for 2 years at no fault of its own. The Liquor Licensing Board had a duty to either decline the issuance of such a licence or issue one at a reasonable time. The response to an application must be done without a delay. A delay of 2 years without an explanation can certainly not be regarded as reasonable. Their failure to do so was a clear derelict of duty. The offence therefore, becomes purely a technical one.

Administrative powers are always conferred for certain purposes. In the present case it is clear that powers conferred on the issuing authority are for the purpose of advancing public interest. For that reason they should be exercised reasonably. It can certainly not be said that such powers are used reasonably when the issuing authority neglects its duty of issuing licences but at the same time turn a blind eye when 2nd respondent who are its agents enforce the law against applicant in total disregard of the reason for applicant's failure to possess a liquor licence.

It is a fact that applicant applied for the renewal of its licence timeously and has a right to expect the issuing authority to issue them with one timeously too. The consequences of the failure to do so has a devastating commercial effect on the applicant. It is therefore in the best interest of applicant that his business be allowed to run efficiently and effectively without being frustrated by the issuing authority's inaction. Administrative authorities are required to act reasonably and in my view, the failure to issue a liquor license under such unexplained circumstances is unreasonable. Where in the absence of an adverse reason the administrative authority fails to act, the courts have a duty to interfere

with its administrative powers in order to safeguard the financial and social interests of the applicant and the public respectively.

The Liquor Licensing Board should timeously process liquor licences so that it can justifiably deal with those who offend against the act. They can not be allowed to take a safe route purely on the basis of non-compliance by retailers while they have not performed their part in this exercise.

The principle of fair play is part of our legal system and it must be strictly adhered to. The Liquor Licensing Board cannot merely rely on the fact that applicant was selling liquor without a license when they know fully well that its failure to possess one was due to their own administrative inaction. Where an administrative authority is seized with a duty to perform a certain act which act is a condition for another party to act, it can not be allowed to penalise the other party on the basis of non-performance when it has not itself performed its own part. It must first perform its part before it penalises the other party for non-performance. It can not sit back and do nothing on its part but only to rush to penalise those who fall under its authority when it has not performed its part.

The second issue is the reason for the forfeiture. The forfeiture was authorised after an admission of guilty fine had been paid by applicant. It was ordered on the basis of the admission of guilt by applicant. The matter had been finalised and no other case was pending. Applicant was not informed of the intended forfeiture by 2nd respondent. Failure to inform applicant clearly offends against the principles of natural justice *audi alteram partem* (hear the other side). Baxter L, *Administrative Law Juta & Co* 1984 at 538 clearly states-

“The principles of natural justice serve three purposes; firstly, they facilitate accurate and informed decision making; secondly, they ensure that decisions are made in the public interest; and, thirdly, they cater for certain important process values”

There is, in any case a lot to be gained by hearing the other side while there is everything to lose by not hearing it. The learned magistrate should have afforded applicant an opportunity to explain its default before it took such a drastic step of forfeiting its goods.

The 1st and 2nd respondent are administrative agents of the liquor licensing authority and as such are required to act in the public interest and not according to their own whims. As they were acting for and on behalf of the administrative authority they are therefore subject to the full rigour of the requirements of public law. As they are a creature of a statute, they must therefore, act within the four corners of the said statute which in itself places a duty on the administrative authority to act in the public interest. This objective was clearly not carried out by both the Liquor Licensing Board and 1st and 2nd respondents. The notice of the forfeiture was in my view premature.

In conclusion this application succeeds with costs.

Webb, Low & Barry applicant’s legal practitioners
Civil Division of the Attorney-General’s Office, respondents’ legal practitioners