

IN THE WESTERN CAPE LIQUOR LICENSING APPEAL TRIBUNAL
(HELD IN THE WESTERN CAPE AT BELLVILLE)

CASE NO: 2019/566

In the matter between:

CAROLYN NEVILLE

FIRST APPELLANT

SHEILA BARSEL

SECOND APPELLANT

LESLIE LONDON obo OBSERVATORY CIVIC

ASSOCIATION

THIRD APPELLANT

and

WESTERN CAPE LIQUOR LICENSING TRIBUNAL

FIRST RESPONDENT

DAVID HARRIS T/A SPRINBOK PUB OBSERVATORY

SECOND RESPONDENT

JUDGMENT: 16 NOVEMBER 2020

[1] This matter came before me as a virtual hearing on 5 November 2020. It was an appeal directed against the decision of the first respondent (hereinafter referred to as the LLT) to conditionally grant a liquor licence to the second respondent, trading as “Springbok Pub Observatory” (hereinafter referred to as “Springbok Pub”), on 20 November 2019 and thereafter, on 12 February 2020, granting it a full liquor licence in terms of section 36 of the **WESTERN CAPE LIQUOR ACT 4 OF 2008** (the Act) after the applicant had complied with the conditional approval conditions. It appears that the conditional licence was granted in respect of the service of liquor inside the premises of the Springbok Pub whereas the full licence, issued on 3 March 2020, included service of liquor outside the premises according to an approved plan.

[2] At the outset three separate appeal/review applications were launched by the appellants, all of which essentially deal with the same issues. The main argument before me was presented in person by the first appellant, Mrs Carolyn Neville, who also represented all the neighbours residing in the immediate vicinity of the

Springbok Pub. The second appellant, Mrs Sheila Barsel, the deputy chairperson of the Observatory Civic Association (OCA), attended the hearing but was in substantial agreement with the submissions made by Mrs Neville and the third appellant, Dr Leslie London, the chairperson of the OCA and a professor of public health at the University of Cape Town (UCT), who submitted detailed reasons as to why the liquor licence, in its final form, should not have been extended to the outside of the Springbok Pub premises and should hence be revoked. At the hearing Mrs Barsel chose not to put forward any arguments additional to those appearing in her grounds of appeal appearing in annexure B of the papers.

[3] The LLT was represented before this appeal tribunal by Adv S D (Shawn) Willemse, a Deputy Presiding Officer (DPO) of the LLT, while the Springbok Pub was represented by Mr E W (Ed) Booth, a practising attorney from Bellville. They furnished full argument on behalf of their respective clients, as will appear from what follows. Adv Willemse, however, indicated that the LLT would abide by the decision of this tribunal should I decide to allow the appeal regarding the extension of the liquor licence to the outside of the premises of the Springbok Pub. For the rest he stood by his arguments as set forth in the appeal reply of the LLT.

[4] In a letter dated 4 February 2020 by Mrs Neville to the Western Cape Liquor Authority (WCLA) a number of submissions were made, including that the LLT had not conformed to relevant practice standards in considering the Springbok Pub's application by not informing community members or the Observatory Neighbourhood Watch (ONW) or the OCA of the application and likewise not informing objectors to the application of the LLT decision. In this regard it was submitted that the LLT had not applied its mind to the application and had in fact totally ignored a body of evidence which demonstrated that the granting of a liquor licence in its current form was not in the interest of the residents of Observatory and would indeed severely prejudice residents in the adjoining premises.

[5] Of particular importance was that the Designated Liquor Officer (DLO), one Warrant Officer Ms S S E Muller, had, in her report dated 12 June 2019, stated that the granting of the liquor licence applied for would not be in the public interest inasmuch as there were 43 liquor outlets in the vicinity and the premises in question was known to the DLO's office as "a crime generator" while its operating hours would

negatively influence the community of Observatory. The application could hence not be recommended. Mrs Neville submitted that the DLO report was totally ignored by the LLT in coming to its decision regarding the liquor licence application.

[6] An additional submission by Mrs Neville was that she and her family, who reside in a home immediately adjacent to the premises of the Springbok Pub, together with a number of neighbouring residents residing in the close vicinity, had no objection to the conditional liquor licence being awarded for the serving of liquor on the inside of the Springbok Pub premises. They did, however, have serious objections to the granting of a full licence which would have the effect of extending such service to the outside of the premises.

[7] Mrs Neville pointed out further that she was in the tourism and hospitality industry, which of necessity entails requiring patrons and visitors to keep down the noise level should they make use of outside amenities. In the present case, the owner of the Springbok Pub had made provision for several barbecue amenities and seating for some 36 persons in the outside area. This would necessarily create noise, nuisance and disturbance which could not be dealt with by the enforcement mechanisms of the WCLA, the SAPS or the municipality. The *onus* to police the activities of the Springbok Pub and to report any transgressions occurring there would in fact be delegated to residents affected thereby. It would be virtually impossible for such residents to adequately report all occasions of disturbance or nuisance suffered by them.

[8] In her notice of appeal Mrs Barsel was in substantial agreement with Mrs Neville, adding that the LLT had not assessed the application fully and reasonably when considering the balance of probabilities. Apart from ignoring the DLO report, it had not taken cognisance of the White Paper on *Western Cape Alcohol Harms Reduction Policy* nor of the fact that there was a Buddhist Meditation Centre some 70 metres away. It had indeed accepted the applicant's submission that the 2017 report on *Alcohol Outlet Density and Crime in Observatory, Cape Town* by Ms Anine Kriegler of the Centre of Criminology, UCT, was out of date but did not consider any alternative evidence in support of the application such as the recommendation by the municipal sub-council 16 to the effect that the approval of a licence for outdoor use was totally unacceptable, despite any number of suggestions made by the applicant

regarding the soundproofing of, and control of noise and disruption in, the outside area. The applicant's assurance that dedicated personnel would ensure that no disturbance or nuisance would be caused to neighbours was likewise unacceptable.

[9] In his notice of appeal Dr Leslie London, the chairperson of the OCA, indicated that the OCA was in full support of the above-cited submissions of Mrs Neville and Mrs Barsel. For present purposes it is not necessary to deal with Dr London's submissions in any detail, other than to point out that he relied strongly on the principle that the LLT was required to find, on a balance of probabilities, that the granting of the liquor licence to the applicant would be in the public interest and not have the effect of causing prejudice to the residents of the residential area in which the Springbok Pub was situated. In addition the applicant's submission that soundproofing would be effected by the introduction of double doors between the inside and outside areas and by introducing stretch tents in the outside area would be totally ineffectual. Neither of these items would have the effect of functioning as acoustic devices while the construction of a double wall on the outside would not help at all. The same applied to the reliance on human behaviour when alcohol was used or abused or when limitations or restrictions were placed on the hours of service in that area. In the event he submitted that the decision of the LLT to grant the liquor licence was wrong in law and should be overturned.

[10] In his response to the submissions on appeal by the three appellants, Adv S D Willemse stressed that the appeal related only to the decision of the LLT to include the outside open area situated at the back of the premises of the Springbok Pub. The limitation of trading hours would certainly play a role in this regard, as appears from the reasons for the decision with reference to the criteria for granting licences in terms of section 34(1) of the Act and the conditions it deemed appropriate in terms of section 20(3)(a) of the Act and the relevant provisions of the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)*.

[11] The reasoning of the LLT for its decision to include the outside open area as part of the licenced premises was that such decisions constitute administrative action which must comply with the relevant legislative provisions and be procedurally fair, rational, reasonable and proportional. The LLT was satisfied that the applicant would provide soundproofing in both the inside and outside area, double doors to the

outside area, no music or television screens in the outside area, the erection of canvas stretch tent in the outside area and dedicated personnel to ensure that the outside area would not cause disturbance to neighbours. In addition it had taken cognisance of the various representations objecting to the granting of the application, including the DLO report and municipal comments, and indeed gave consideration to what extent the concerns of objectors could be mitigated by imposing appropriate conditions and taking action in terms of section 20(3) of the Act. Such conditions included restricted trading hours, the appointment of security guards and the erection of a stretch tent to cover the outside area as soundproofing. The LLT confirmed, however, that, as far as its decision to licence the outside open area was concerned, it would abide the decision of this tribunal.

[12] In his responding statement on behalf of the second respondent (Mr David Harris trading as the Springbok Pub), Attorney Booth pointed out that the Springbok Pub had traded since August 2019, except during the Covid -19 lockdown period, after which it had recommenced trading as a restaurant and sports club as from August 2020. At the outset he submitted that the appellants should have furnished a transcription of the proceedings before the LLT. I was quite satisfied, however, that it was not necessary to do so inasmuch as the detailed submissions of the various parties before me, including the record of the decision which is the subject of the notice of appeal, were more than sufficient for purposes of dealing with the appeal. It was not required of the appellants, collectively referred to as *dominus litis* in the appeal proceedings, to have obtained a transcript of the oral evidence presented at the hearing and to have insisted that it be placed before me.

[13] Mr Booth gave the background to the conduct of the business of Mr Harris, who personally furnished this tribunal with certain further information which does not all appear from his responding statement. The basis thereof was that he could ensure that operating and conducting business by means of braai units in the outside open area would not cause prejudice or hindrance to any residents in the adjacent area. The planned double wall and stretch canopy would provide the necessary soundproofing and it would be properly monitored by security personnel.

[14] As for the report and evidence of the DLO, Mr Booth submitted that, in her evidence before the LLT, she had made certain concessions which would in fact

have the effect of substantially withdrawing her objection. Ms Kriegler likewise made certain concessions in her evidence, which would indeed indicate that certain of the information used by her in her research was in fact out-dated and would not support all the consequences appearing from such research. The same applied to a former chairperson of the Observatory Civic Association (OCA), one Mr Tauriq Jenkins, who conceded that only a limited number of the Observatory community members were in fact “paid up” members of the OCA. This would explain, Mr Booth suggested, why only three of the twenty original objectors were appellants in the current matter and indicated that the objectors who did not appeal were “satisfied” with the manner in which Mr Harris was conducting the Springbok Pub business.

[15] Mr Harris (through Mr Booth) admitted in his submissions to this tribunal that braai facilities had been provided to persons making use of the outside area at the back of the premises, but argued that they would be soundproofed and subject to time constraints and security arrangements. This, he stated, would be in the public interest of the Observatory community and would not infringe upon the rights of persons residing in the adjacent or on neighbouring property. In any event, Mr Booth suggested, they could make use of the remedies furnished by the Act and lodge complaints with the DLO or WCLA should they wish to. In this regard he submitted further that the Covid-19 pandemic had caused Mr Harris severe financial loss and being able to trade in the outside area was a “life-saving factor” in respect of his business.

[16] In considering the arguments placed before me by the various parties, I have taken full cognisance of all the relevant facts and legal principles, including those set forth in the well-known judgment of Cleaver J in the case of *Bulk Deals Six CC and Another v Chairperson, Western Cape Liquor Board and Others* 2002 (2) SA 99 (C). The facts in that matter differed somewhat from those in the present case but the basic legal principles, such as those relating to public interest, are those likewise applicable to the facts in the present matter. More particularly, as stated by Cleaver J in par [9.4] of his judgment, the relevant factors relating to public interest should not be considered in isolation but holistically, with reference to the applicant, the premises in question and the potential prejudice which would be caused to residents of a particular residential area. Such prejudice may be assessed with reference to

the manner in which the proposed business was to be operated and not relate to speculative or irrelevant considerations (par [10] of the judgment).

[17] Once cognisance has been taken of the relevant considerations aforesaid, it is the duty of this tribunal, in terms of section 68(2) of the Act, “to confirm, amend or set aside” the decision or order against which the appellants have appealed and to “substitute such decision or order as the circumstances require”. In the present case, after hearing argument by all the parties, I adjourned the matter and reserved judgment. This enabled me to take full cognisance of all the documentation and the various arguments placed before me.

[18] I have indeed taken full cognisance of the various arguments and counter-arguments, including photographs and plans, placed before me by the respective parties against the background of the relevant legal principles and authorities. At the outset I am constrained to say that the submissions of the appellants are, to a great extent, by far the more persuasive of those I have been brought upon to consider. The reliance by Mr Booth on the arguments put forward by Mr Harris in favour of the retention of the liquor licence for the outside amenities of the Springbok Pub are, in my view, quite unpersuasive. The suggestion that the introduction of soundproofing in various untested ways, together with the existing time constraints and proposed security arrangements, would render the outside facilities to be in the public interest is disingenuous and singularly unimpressive. Even more so is the submission that the outside area is required because of financial loss suffered by the business during the Covid-19 lockdown and that to grant the liquor licence in respect of such area would be a “life-saving factor” in respect of the business. It can certainly not be required of the LLT or this tribunal to assist the business to recover damages by extending the liquor licence applied for to the outside area of the business premises.

[19] I have no hesitation in rejecting outright the suggestion by Mr Booth that Mrs Neville or other neighbours adjacent to the Springbok Pub may themselves police any transgressions by visitors to the business by making use of remedies provided by the Act to approach the WCLA, DLO and municipality. The mere fact that not all the original objectors have joined the appellants is certainly no indication that they are satisfied or content with the steps taken by the Springbok Pub to acquire an extension of the licence to the outside area.

[20] Despite Mr Booth's emphasis on the fact that the DLO and other persons relied on by the appellants might have made certain concessions during cross-examination at the hearing before the LLT does not justify any negative conclusion as to their truthfulness or reliability. This evidence was not before me and, even if it were, I would not feel constrained, on the basis thereof, to reject the evidence of Mrs Neville or the other appellants. In addition there is no indication that the LLT allowed itself to be swayed to reject any such evidence.

[21] In the event I am satisfied that the decision of the LLT, to include the outside area of the Springbok Pub in granting its final liquor licence application, was incorrect and should be reversed. To that extent the liquor licence must be amended to restrict it to the inside of the Springbok Pub premises. In this regard I am of the view that the concession by Adv Willemse on behalf of the LLT, that it would abide the amendment of the licence to exclude the outside area, was properly made and should be incorporated in the necessary amendment of the existing liquor licence.

[22] It follows that the appeal succeeds and that the liquor licence granted by the LLT to the Springbok Pub on 20 February 2020 and issued on 3 March 2020 be amended to restrict it to the inside of the Springbok Pub premises. The LLT is requested to give effect to such amendment and to issue an amended licence subject thereto.



D H VAN ZYL

APPEAL TRIBUNAL

WESTERN CAPE LIQUOR AUTHORITY

16 NOVEMBER 2020