PITLUK v GAVENDO AND OTHERS 1955 (2) SA 573 (T)

Citation	1955 (2) SA 573 (T)
Court	Transvaal Provincial Division
Judge	Price J
Heard	March 24, 1955
Judgment	April 14, 1955
Annotations	

Flynote : Sleutelwoorde

Will - Validity - Execution by testatrix domiciled in Transvaal. - Testatrix thereafter marrying citizen domiciled in Southern Rhodesia - Testatrix never permanently domiciled in Southern Rhodesia - Application to declare will null and void under sec. 7 of Act 14 of 1929 (S.R.) - Granting of.

Headnote : Kopnota

The deceased, who was domiciled in the Transvaal, had on 16th April, 1953, made a will followed by a codicil on 17th December, 1953. On 29th December, 1953, and at Johannesburg, she married the applicant who was domiciled in Southern Rhodesia. On 1st February, 1954, the deceased followed the applicant to Rhodesia where they set up a home. The deceased had obtained the necessary forms of application for permission to take up permanent residence in Southern Rhodesia, but did not use them. She died on 24th February, 1954, as the result of an accident. In an application for an order to declare the will and codicil of the deceased null and void under section 7 of Act 14 of 1929 (S.R.),

Held, as the deceased had on the marriage acquired the domicile of her husband, that her property rights became regulated by the laws of Southern Rhodesia.

Held, accordingly, that the application should be granted as prayed.

Case Information

Application for a declaratory order as to whether a certain will was null and void. The facts appear from the reasons for judgment.

O. Galgut, Q.C. (with him *H. J. Preiss)*, for the applicant: (1) This Court has jurisdiction - the estate consists of movables in the Union, and the Master has registered the will, see The Administration of Estates Act 24 of 1913 secs. 6, 19; Pollak, *Jurisdiction*, pp. 116 - 7, 137 - 8. (2) The law to be followed is the law of the matrimonial domicile. The wife's domicile follows the husband's, 1934 S.A.L.J. pp. 27 - 30, and authorities there cited, especially *Ebrahim Mahomed's* case, 1928 T.P.D. 439; *Rooth v Rooth*, 1911 T.P.D. 41; *Voet*, 5.1.95; *Brown v Brown*, 1921 AD 482. See also *Frankel's Estate and Another v The Master*, 1950 (1) SA 221. In other words, the governing law is the law of the husband's domicile at the date of his marriage, *In re Martin*, 1900 P. 211. In that regard, our law is the same, *Brown v*

Brown, 1921 AD 482; *Frankel's Estate, supra.*

S. M. Kuper, Q.C. (with him *C. Rosenthal)*, for the respondents: On a proper construction of the section, the will therein referred to is a will made by a Southern Rhodesian, probably, although not necessarily, in Southern Rhodesia. It is clear in regard to sec. 18 of the English Wills Act that where a will is made by a woman in England and domiciled there and she afterwards marries in England a domiciled Scotsman, the will is not revoked, *Westerman's Executor v Schwab and Others* (1905) 13 S.L.T. 594, explaining *Martin's* case, *supra*. The case of a party to a joint will who has adiated has no reference to other than Roman-Dutch Law. It is not the law of England, *Hailsham*, vol. 34, para. 14. The endorsement can only be made before marriage and the section would not be intended to legislate for aliens. It is submitted, therefore, that the will liable for revocation on marriage must be a will made by

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a Southern Rhodesian. A statute cannot as a general rule impose laws on foreigners, *Maxwell*, 9th ed., p. 148; *Hailsham*, vol. 31, p. 518; *Craies*, 5th ed., p. 430; *McLeod v Attorney-General of N.S.W.*, 1891 A.C. 455. The words in sec. 7 of Act 14 of 1929, 'executed by any person' coming after the exceptions which are designed to describe wills of a Southern Rhodesian nature only must mean executed according to the laws of Southern Rhodesia by any person being a Southern Rhodesian. The endorsement being a purely Southern Rhodesian formality confirms that it is intended for Southern Rhodesian wills. This is fortified by the formal requirement for the endorsement 'in the manner required in the case of a will'. A competent witness in one country may not be competent in Southern Rhodesia and it can hardly be expected of a foreigner that an endorsement be made to her will in a foreign country according to the laws of Southern Rhodesia.

Galgut, Q.C., in reply: *McLeod's* case, *supra*, relates to statutory crimes where the presumption is in favour of territoriality. Sec. 7 of Act 14 of 1929 legislates for Rhodesians wherever the will may be executed, *Maxwell*, 9th ed., p. 158. *Westerman's* case, *supra*, is in applicant's favour. The only reference to Roman-Dutch Law wills is in respect of an exception to the revocation rule. This does not assist respondents.

Cur. adv. vult.

Postea (April 14th).

Judgment

PRICE, J.: A certain woman, Mrs. Haskell (hereinafter called the deceased) who at the time was living and was domiciled in Johannesburg on the 16th April, 1953, made a will followed by a codicil which she made on the 17th December, 1953. She made bequests in these testamentary dispositions to the first ten respondents and to another respondent who was joined in the proceedings as respondent No. 13, being the Jewish Helping Hand and Burial Society of Johannesburg. On the 29th December, 1953, she married the petitioner in Johannesburg where he was on a temporary visit. He was then, and is now and at all relevant times has been, domiciled in Southern Rhodesia and, on 1st February, 1954, the deceased followed the petitioner to Southern Rhodesia where the married couple set up a home. She obtained the forms of application for permission to take up permanent residence

in Southern Rhodesia but did not make use of them. She died as a result of an accident on the 24th February, 1954.

There is provision in the Rhodesian Statute Law for the annulment of a will made by a person on the subsequent marriage of such person, and the question in this case is whether the marriage between the petitioner and the deceased has had the effect of annulling the will and codicil referred to in the first paragraph above, which were made by the deceased while she was domiciled and resident in the Union.

Sec. 7 of Act 14 of 1929 (Chap. 51) reads as follows:

> '7. Except in the case of a party to a joint will who has adiated, a will, other than a joint will of an intended husband and wife who have thereafter married each other, executed by any person prior to marriage shall become null and void on marriage, unless such person endorses on such will that it is

> desired that the same shall remain of full force and effect. Such endorsement shall be duly signed and witnessed in the manner required in the case of a will.'

Mr. *Galgut*, who appears for the petitioner, contends that when the deceased married the petitioner her property became regulated by the law of Southern Rhodesia.

According to Private International Law, upon marriage a woman acquires her husband's domicile and her property rights become regulated by the law of such domicile. This rule of International Law applies whether she is living with her husband or not and even if she has been judicially separated from him. So long as the marriage subsists her property rights are regulated by the law of her husband's domicile. (See Mr. *Pollak's* articles 27 - 30 in the 1934 volume of the *South African Law Journal: see also Frankel's Estate and Another v The Master and Another*, 1950 (1) SA 220 (AD) at p. 221 *et seq.*, and also at p. 251.) There is no doubt that this is a rule of International Law and Mr. *Kuper*, who appeared for most of the respondents, does not dispute it.

Mr. *Galgut* referred the Court to the case of *In re Martin*, 1900 P. 221. The facts in this case were as follows: A French woman, who was domiciled in France, made a will while so domiciled but when she was actually living in England. Thereafter she became domiciled in England. At a later date she married a Frenchman in England who was a fugitive from justice. He remained in England until the crime in respect of which sentence had been passed against him had become prescribed whereupon he returned to France. This was some years after his marriage. His wife remained in England and in due course died. The English Wills Act (sec. 18. 1 Vict. Chap. 26) provided:

> 'That every will made by a man or woman (prior to marriage) should be revoked on his or her marriage.'

The answer to the question raised in the case depended upon whether the husband was domiciled in France or in England and whether the property rights of the wife were subject to the law of France or of England. LINDLEY, M.R., held that on the facts the husband was domiciled in France and the will was therefore valid and was not invalidated by the provisions of the Wills Act set out above. VAUGHAN WILLIAMS and RIGBY, L.JJ., held that the French husband of the woman was domiciled in England and that the wife's will was

annulled by the Wills Act on her marriage. At p. 240, VAUGHAN WILLIAMS, L.J., said:

> 'In my opinion the effect of the husband's domicil on the matrimonial property is based on the presumption that you must read the law of the husband's domicil into the marriage contract as a term of it, unless there is an express agreement to the contrary.'

RIGBY, L.J., at p. 225, after holding that the husband was domiciled in England, continued as follows:

> 'It is *his* intention that governs, not that of the wife, in the absence of any marriage settlement; and I conclude that he intended English law to apply, and that law gave him, immediately on the marriage, the exclusive right to all the wife's movables - that is to say, everything that could pass by the holograph will of 1870.'

The holograph will of 1870 was the will made by the wife living in England but still domiciled in France. LINDLEY, M.R., at p. 233, after finding that the husband was domiciled not in England but in France, said:

> 'The husband being domiciled in France when she married him, it became necessary to ascertain the effect of such marriage by French law on her will.'

1955 (2) SA p576

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It is perfectly clear that everything depended upon the domicile of the husband at the time of his marriage to his wife and, to my mind, the law as set out in that case, if correct, is decisive of the issue in the present case. It is not suggested for a moment that the law laid down in the case quoted is incorrect in any respect.

Mr. *Kuper*, however, contends that in the present case it is a question of interpreting sec. 7 of Act 14 of 1929 (S.R.) and that the Rhodesian Law is different from the English Wills Act in certain respects, more particularly in respect that there is provision under the Rhodesian Act for maintaining the validity of the prior will whereas there is no provision under the English Act. I cannot see how that makes the slightest difference to the principles to be applied to the case.

Mr. *Kuper* referred to the case of *McLeod v Attorney-General of N.S.W.*, 1891 A.C. 455, but that case merely follows the principle expressed in *Bishop and Others v Conrath and Another*, 1947 (2) SA 800 (T) , namely that a penal statute only applies to acts committed within the territory of the country where the statute was passed. The purchasing of a lottery ticket in South Africa is an offence, but a South African purchasing such a ticket in Rhodesia does not commit an offence. As far as I can see nothing turns on the decision in *McLeod's* case.

Mr. *Kuper* also referred to *Westerman (Westerman's Executor) v Schwab and Others*, 1943 Sc.L.R. 161. In that case a will disposing of movables was executed by a woman domiciled in England and it was held not to be revoked by her subsequent marriage in England to her husband who was at the time domiciled in Scotland. I agree with Mr. *Galgut* that this case supports his argument. It is an authority to the effect that the Wills Act of England does not affect the property rights of a woman who marries a person domiciled abroad. The contention advanced by Mr. *Galgut* is that the property rights of the deceased are to be regulated by the laws of Southern Rhodesia from the moment of her marriage because she thereby acquired the domicile of her husband, which was Southern Rhodesia, and her

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property rights became regulated from that moment by the laws of Southern Rhodesia. This is the principle that was decided in the case of *Westerman v Schwab, supra*. Mr. *Kuper* also argued that because according to sec. 7 of the Rhodesian statute the endorsement required to validate the will must be executed according to the law of Southern Rhodesia, it follows that the will was not invalidated by the said section. I do not follow the logic of this argument. It seems to me that the provision as regards the endorsement strengthens Mr. *Galgut's* case, because it is quite clear that the endorsement must be made according to the law of Southern Rhodesia and not according to the law of any other country. Mr. *Kuper* also argued that the use of Roman-Dutch Law expressions such as 'adiation' and 'joint will' indicates that the marriage between the deceased and petitioner did not invalidate her prior will, because the use of these expressions indicates that Southern Rhodesian law is to apply to the section. Again I have difficulty in understanding how that helps Mr. *Kuper*. In my opinion it supports Mr. *Galgut's* argument.

I find that the marriage between the deceased and the petitioner had the effect of rendering null and void the prior will and codicil which is

the subject of this litigation and which is referred to in the first paragraph of this judgment. The Court makes an order:

1. Declaring null and void the will and codicil of the late Miny Pitluk, dated 16th April, 1953, and 17th September, 1953; and

2. Ordering that none of the assets of the late Miny Pitluk be dealt with by any executor or other official appointed to deal with the assets in the Union of South Africa, unless and until the amounts bequeathed in the 7th, 8th, 9th and 13th respondents, viz.

(a) Charlie Sabela;

(b) The Jewish Orphanage, Johannesburg;

(c) The Jewish Old Aged Home, Johannesburg;

(d) The Jewish Helping Hand and Burial Society, Johannesburg;

have been paid to the Master of the Supreme Court, in Pretoria, in order to enable the said persons or institutions to take such steps as they deem fit in regard to the recovery thereof.

3. Ordering that the costs of all the parties on an attorney and client basis be paid out of the estate of the late Miny Pitluk.

That part of the order set out in para. 2 above is by consent of the petitioner and is a concession to the respondents therein mentioned. The order set out in para. 3 is by agreement of all parties.

Applicant's Attorneys: *Schewitz & Schwartz*. Attorney for certain Respondents: *Harold Braude & Braude*. Attorney for other Respondents: *Marcus Lewis & Sons*, Durban.

BEHR v OBERHOLZER LIQUOR LICENSING BOARD AND ANOTHER 1955 (2) SA 577 (T)

Citation 1955 (2) SA 577 (T)
Court Transvaal Provincial Division
Judge Murray J
Heard February 3, 1955
Judgment April 18, 1955
Annotations ❑

Flynote : Sleutelwoorde

Intoxicating liquor - Licence - New licence - Grant of. - Unsuccessful applicants applying to review decision - Difficult for reviewing Court to hold decision arbitrary or grossly unreasonable - Affidavit required under sec. 31 (3) of Act 30 of 1928 not stamped - Effect on proceedings before Board - Semble: such affidavit exempted from stamp duty under Act 30 of 1911 or Act 24 of 1944. - Board limiting one applicant's right to cross-examine another - Representative of a competing applicant has no unfettered right - Proceedings before licensing board - Review of by an employee of a company who had unsuccessfully applied for a licence - *Locus standi* of such employee to review proceedings.

Headnote : Kopnota

There is more difficulty in the way of the reviewing Court characterising the decision of the Licensing Board as 'arbitrary' or 'grossly unreasonable' when that decision concerns the grant of a new licence than when it concerns the grant of a renewal or the imposition of conditions on a renewal. Where the Board has before it a number of applications each for the award to the applicant of a privilege which it may grant or refuse at its discretion, it is no easy task for the reviewing Court, in the ordinary course, to come to the conclusion that the Board's assessment of the competing claims, its weighing up of the pros and cons of each application, is to be set aside as arbitrary or grossly unreasonable.

The prior lodging of a formal objection is not a *sine qua non* before a competing applicant for the same type of liquor licence has *status* to address the Board not only in support of his own application but in order to point out defects and weaknesses in the application of another applicant.

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Applicant an employee of a company which held a wholesale liquor licence, had in that capacity applied for the retail bottle licence which the respondent Board had decided to grant. There were several other applicants for such licence and the Board decided to grant it

to the second respondent. It gave no reasons for its decision. Applicant in his personal capacity and as the representative of the company, applied to review the decision of the Board; he contended (1) that the decision was in the circumstances grossly unreasonable and arbitrary and was reviewable under section 29 of Act 30 of 1928; (2) that the proceedings before the Board had been grossly irregular and reviewable under common law on the ground of absence of jurisdiction in that in the application by the second respondent the affidavit required under section 31 (3) of Act 30 of 1928 had not been stamped as required by Act 30 of 1911; (3) that gross irregularities had occurred in that the Board had *(a)* refused to permit the applicant's representative to advance certain objections to the second respondent's application and *(b)* unfairly limited such representative in his cross-examination of the second respondent. At the hearing the second respondent had objected *in limine* to the applicant's *locus standi.*

Held, despite the applicant's allegations of the company's interest, as he was in truth the party bringing the review proceedings, that he had *locus standi.*

Held, as to (1), regard being had to the facts before the Board, that its decision could not fairly be characterised as arbitrary or grossly unreasonable.

Held, as to (2), as this affidavit could be produced at any time, that the failure to stamp it at time of execution could be subsequently remedied.

Held, further, that the whole proceedings were not vitiated by the non-stamping of the affidavit.

Held, further, that it had not been shown that substantial injustice had occurred or that the applicant had suffered any substantial prejudice.

Semble: That the affidavit in any event fell within the exemption provided either under Act 30 of 1911 or Act 24 of 1944.

Held, as to (3) *(a)*, even assuming the impropriety of declining to hear the representative, that no substantial prejudice had been suffered, nor had any substantial injustice been perpetrated.

Held, as to (3) *(b)*, that the applicant did not possess a right of unfettered cross-examination which had been denied him.

Held, further even if such representative had been allowed to cross-examine without limits, that he would have extracted no more than what had already been disclosed as to the second respondent's rights as to tenancy and alteration of the condition of the buildings and the absence of stamp duty.

Case Information

Application to review the decision of the respondent Board. The facts appear from the reasons for judgment.

G. Findlay, Q.C. (with him *H. H. Moll)*, for the applicant.

D. Melamet, for the first respondent.

J. F. Marais, for the second respondent.

Cur. adv. vult.

Postea (April 18th).

Judgment

MURRAY, J.: The applicant applied unsuccessfully at the December, 1954, sitting of the first respondent Board for the grant of a retail bottle liquor licence and now moves the Court to review and set aside the proceedings of that Board in so far as concerns its refusal to grant him that licence and its grant of a licence of that character to the second respondent.

In September, 1953, the magisterial district of Oberholzer was created for an area which includes the townships of Oberholzer and Carletonville, and a separate Liquor Licensing Board was constituted for such district. It sat for the first time in December, 1953. Previously thereto the township of Carletonville fell within an area over which the Liquor

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Licensing Board for the district of Potchefstroom exercised jurisdiction. In December, 1948, the Potchefstroom Liquor Licensing Board granted to the Carletonville Bottle Store, Pty. (Ltd.) (hereinafter referred to as the Company) a wholesale liquor licence for a business to be carried on in the township of Carletonville. As this township then possessed no local authority and was in consequence within a rural area the Company's simultaneous application for a retail bottle licence could not lawfully be granted and was refused.

Since January, 1949, the Company has carried on a wholesale liquor business under the above licence and renewals thereof, the last renewal prior to December, 1954, being granted in December, 1953, by the present Board at its first sitting after it had come into existence. The present applicant is an employee of the Company and has at all times managed its wholesale liquor business in Carletonville. He is apparently not a shareholder in the Company. According to applicant the Company's business was conducted directly with members of the public who bought from it liquor in the minimum quantities permissible under a wholesale licence: it did not deal with any other retailers. In December, 1953, the Company as well as other persons applied to the respondent Board for the grant of bottle liquor licences, but owing to quota restrictions imposed by the Act, the Board was precluded from considering any of these applications, even though an area including Carletonville had been proclaimed as a local authority under the Peri-Urban Areas Health Board Ordinance of 1943. From 1949 onwards the Company has repeated its application each year for the grant to it of a retail bottle liquor licence in addition to its wholesale licence, but these applications could not, by reason of the quota restrictions, be considered by either the Potchefstroom Liquor Licensing Board on the first respondent Board. In 1954 however Act 38 of 1954 altered the legal position, and the Minister acting under powers granted by that Act authorised the first respondent Board despite the quota restrictions to consider retail bottle licence applications within its area and to grant one new retail bottle licence in each of three townships, viz. Oberholzer, Carletonville and Carletonville Extension.

Prior to the respondent Board's sitting in December, 1954, the Company duly lodged an

application for the renewal of its wholesale liquor licence, and the present applicant Behr applied, really in the interests of the Company, for a retail bottle licence. Certain other persons, including second respondent, lodged applications for wholesale and for retail bottle licences in respect of the township.

At its meeting on December 1st, 1954, all applications for the renewals of licences throughout the Board's area were considered and all granted - this of course included the Company's wholesale licence. The Board then dealt with the new applications in respect of Oberholzer: there being no applicants for wholesale licences only in that area, the Board heard all the applications together, whether for new retail bottle licences only, or for new wholesale licences coupled with retail bottle licences in Oberholzer Township. Having disposed of these, and announced its decisions, the Board proceeded to deal with the Carletonville applications. It had previously decided to grant one new retail bottle licence in Oberholzer and one in Carletonville. In

regard to Carletonville, after hearing the various applications it eventually decided (1) that no new wholesale licences should be granted and (2) that the one available new retail bottle licence for which applicant, second respondent and various others had applied, should be granted to second respondent. This decision is now attacked by applicant on certain grounds, summarised as follows by his counsel at the commencement of this address:

I. That such decision was in the circumstances of the case grossly unreasonable and arbitrary, and consequently reviewable under sec. 29 (1) of Act 30 of 1928.

II. That the proceedings of the respondent Board were grossly irregular and reviewable at Common Law on the ground of absence of jurisdiction in that the application by second respondent before it was invalid for lack of stamping under Act 30 of 1911.

III. That gross irregularity had occurred in the proceedings reviewable under sec. 29, in that the respondent Board had (1) refused to permit applicant's legal representative to advance certain objections to second respondent's application, and (2) unfairly limited such representative in his cross-examination of second respondent.

Before considering these grounds of attack it is, I think, necessary to deal with a preliminary objection to applicant's *locus standi*, which was taken by second respondent. In paragraph 1 of the petition applicant alleged that he was making the petition in his personal capacity and as the representative of Carletonville Bottle Stores (Pty.) Ltd., for the purposes of the application for the bottle liquor licence now in question. In answer to this allegation second respondent *(a)* denied that applicant in his personal capacity had any interest in the petition, and *(b)* alleged that applicant was only an employee of the Company, not a director or a shareholder and had no authority from the Company to bring the present application. In answer thereto applicant alleged he was interested both in his personal capacity and as trustee for the Company, of which he was an employee; he attached a resolution by the Company, given prior to launching this application, authorising him to act on its behalf. In my opinion this preliminary objection is not well founded. In argument second respondent's counsel stressed that fact that in terms of sec. 67 of the Act a licence of this type could not be issued to the Company. Obviously the Company is vitally interested in the licence and

has the right, if its employee is granted a licence, to take steps for the transfer of the licence to some other employee if the grantee of the licence leaves its service. To my mind the applicant's statement that he acts also on behalf of the Company is in fact superfluous, the object being to show the interest which the Company has in his receiving the licence, having regard to the fact that this licence will, it is contended, seriously affect the Company's position as holder of a wholesale liquor licence in the area. The present applicant was, despite these allegations of Company interest, the applicant before the Board and in truth the party bringing review proceedings (*Farquhar v Pretoria Liquor Licensing Board*, 1938 T.P.D. 295). There is no doubt but that the present applicant even if he lodged no specific objection

to the grant of the licence to second respondent, has a *locus standi* to bring review proceedings to set aside the grant to a competing applicant of the particular licence for which he himself applied. (*Kotze v Marks*, 1945 AD 838; *Johannesburg Liquor Licensing Board and Sidelsky v Short*, 1946 AD 713.).

I. In regard to the applicant's first ground of attack, the contention is that in all the circumstances of the case and in particular on a consideration of the merits of his claim in comparison with those of the second respondent, the Board's decision to grant the one available retail bottle liquor licence to the second respondent was grossly unreasonable and arbitrary. Particular stress was laid on the fact that the Board had deliberately refrained from giving reasons for its decision and thereby specifying the precise grounds upon which it had determined to prefer second respondent to applicant in the grant of the licence in question.

At the outset of his argument, Mr. *Findlay* for applicant contended that the decision of the Appellate Division in *Pretoria North Town Council v A1 Electric Ice-cream Factory (Pty.) Ltd.*, 1953 (3) SA 1 (AD), had introduced an entirely new approach for the investigation by the Court on review of the decisions of licensing boards and similar bodies. Where reasons for such decisions are deliberately withheld, it was argued, the Court is at large to draw its own conclusions as to the honesty and correctness of the Board's consideration of the matters before it. And in the present instance it was contended that the claims of the applicant to be granted the licence in issue outweighed those of the second respondent (and of all other applicants before the respondent Board) to such a degree that the only possible inference was that the selection of the second respondent as the grantee of the licence was arbitrary and grossly unreasonable. Reliance for the principle that a Liquor Licensing Board is equated in this regard to any body empowered to license trades was placed on the following passage from the judgment of SCHREINER, J.A., in the above case (*loc. cit.* at p. 12):

> 'Statutory provisions may provide special procedure for the relief of disappointed applicants for some kinds of licence, and the provisions may condition the right to relief. But apart from such special provisions, applicants for permission to trade stand, generally speaking, on the same footing. An applicant for a certificate for a licence to hawk ice-cream is entitled to have his application dealt with substantially on the same lines as one who seeks a liquor licence, and this is so whether he held a certificate in the previous year or not.'

I see no necessity to consider respondent's contention that this passage is *obiter* and is open to criticism, on the ground that the position of a Liquor Licensing Board differs from

that of a local authority in its licensing capacity. It was urged that the latter body merely regulates the common law right of any citizen to carry on a lawful trade, while the former exercises the right to grant a privilege, conferring a limited monopoly to sell liquor, and the privilege is the more noticeable in the case of an original grant, seeing that the Act clearly discriminates in various sections (e.g. 24 and 39) between grants and renewals. Even if a liquor licensing board stands on no special footing, the decision in the *A1 Ice-cream Factory, supra*, does not hold that the Liquor Licensing Board's failure to give reasons vitiates its decision. Such failure

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(*loc. cit.* p. 16) is a special example of a failure of a party to testify on a matter within his own knowledge. In a proper case it may give rise to, or support, an inference of arbitrariness, and the weight to be given to such silence naturally depends on the circumstances.

Applicant's counsel refrained from supporting an allegation in para. 31 of the petition that the respondent Board's chairman had imported personal knowledge of second respondent's family and business affairs without open disclosure thereof. The basis of the application was the applicant's statements in para. 27 of his petition that at the sitting of the respondent Board his legal representative drew the Board's attention to the following matters in his favour:

(a) The Company was the first licensee to obtain a wholesale licence in the Oberholzer area and in particular in Carletonville;

(b) it had over a period of years built up its business which at the start was run at a loss but was now a financial success; it had served the public faithfully and to the satisfaction of the police authorities;

(c) since 1948 it had regularly applied each year for a bottle liquor licence, and but for legal obstacles such licence would have been granted to it previously;

(d) the Company had shewn its fitness to hold a licence: its financial standing was high: its servants were reliable and of undoubted integrity: its resident director had been in the liquor trade for 31 years without a blemish on his record;

(e) the applicant's premises satisfied the Police and his previous conduct of the wholesale business had been favourably commented on by them;

(f) 'that is was desirable that wholesale and retail licences should be conducted in one shop so as to prevent unhealthy competition between rival traders which might lead to malpractices occurring having regard to the limited requirements of the public.'

(g) That in accordance with Police policy it would be desirable to simplify control by having the minimum of separate liquor businesses, and a minimum area to control: the second respondent's proposed place of business was 300 yards away from the applicant's premises, which are in the centre of the business area of Carletonville.

On the other hand, so applicant urged, in para. 32 of the petition as against second

respondent that the latter

> 'has had no previous experience in the conduct of a liquor business and has had comparatively little experience in business affairs generally. His evidence discloses that he had followed a number of occupations from time to time and while he stated in his evidence that he was financially independent, there was nothing to show the extent of his means or that he was in a position properly to finance the conducting and management of a bottle store.'

In regard to these allegations it should be pointed out that in his evidence before the Board second respondent made the following statements.

> 'Ek is hier gebore en groot geword. Met uitsondering van enkele jare, wat ek vir 'n paar jaar weg was, woon ek my hele lewe hier. Transportryer sedert 1937 - daarna slaghuis gehou op Oberholzer. In 1944 het ek met 'n winkel begin. Gedurende die swaar jare, het ek hier gewerk. Toe ek met besigheid op Wonderfontein begin het, was hier nog geen huise op Oberholzer of Carletonville nie. Ek is finansieel onafhanklik en kan besigheid finansieër. Ek sal nie spekuleer met besigheid nie. Ek het vier seuns, en ek sou dit vir hulle wil nalaat.
>
> Op die oomblik is daar 'n algemene handelaarsbesigheid in perseel. Dit sal tot niet gemaak word sodra ek met die drankhandel begin. Ek sal die drankbesigheid bestuur solank ek kan. Die besigheid op Wonderfontein, sal ek aan my seun van 23 jaar laat oormaak. Die perseel is oorkant die hotel, langsaan Carletonville. Die perseel is geskik gemaak vir 'n dranklisensie.
>
> Voorsitter:
>
> My vrou help my in bestaande besigheid. My seun het ondervinding van die winkel en kan besigheid oorneem.
>
> Deur mnr. Fleischack:
>
> Uit my oogpunt is groot en kleinhandellisensies saam noodsaaklik, maar nie vir publiek nie. Ek het geen ondervinding in drankhandel nie.'

MURRAY J

Thereafter his legal representative made the following statement:

> 'Aansoeker is ou inwoner. Hy gaan nie spekuleer nie. Die perseel is geskik en is sentraal geleë. 'n Kleinhandellisensie moet nie noodsaaklik aan groothandelaars toegestaan word nie, aangesien monopolië teëgegaan moet word.'

As the Chairman of respondent Board points out in para. 24 of his answering affidavit, the second respondent's allegation of his financial soundness and willingness not to speculate with the business was not questioned and was accepted. Even with the limitations placed by the chairman on the scope of the cross-examination of the second respondent by the legal representative of the applicant, these allegations could have been tested in cross-examination, and they were not.

In regard to applicant's allegations that the retail bottle liquor licence would have been granted him in the past but for quota restriction, objection was taken by respondent's counsel to the consideration of this matter as alleged by applicant and by the deponents Fleischack and Luke and relating to events at sittings of the Potchefstroom Liquor Licensing Board in December, 1950, and June, 1951. These events were, it appears, not specifically brought out in evidence or statements before the respondent Board. Although I refrained from giving a decision at the time on respondent's motion to strike out these allegations, it

seems to me that they carry little, if any weight. The propriety of the Board's decision depends on a consideration of the matters actually before it, as this Court does not sit to rehear the whole case of the grant of the licence (*Loxton v Kenhardt Liquor Licensing Board,* 1942 AD 275 at pp. 293, 294). Even, however, if these matters now relied on by the applicant are now relevant, their cogency is, at best, limited. The views of the Potchefstroom Board three or four years ago can hardly be much of a standard by which to test the decision of the present Board. In regard to the present Board, all the information before the Court is that at its one and only sitting prior to that now in issue it had before it various applications (including those of the applicant and the second respondent) for retail bottle store licences, and refused them all on the ground that as the law then stood it was not competent to grant the same.

It is probably unnecessary to emphasize that the issue before me is not whether, had the proceedings now reviewed been taken before a Court of law, the presiding judicial officer on the evidence before him should have awarded the new licence to the second respondent. The problem is whether the applicant in the proceedings in this Court has shown the Board's decision, in favour of second respondent, to be either *arbitrary* or *grossly unreasonable*. Malice is not charged. Although (*vide per* FEETHAM, J.A., in *Loxton v Kenhardt Liquor Licensing Board, supra* at p. 314), it is difficult to draw a clear distinction between the two terms, it is, I think, clear from the decisions that even though a Board's decision may not be reviewable merely on grounds of it being unreasonable, yet there are degrees of unreasonableness (*Vanderbijl Park Health Committee and Others v Wilson and Others,* 1950 (1) SA 447 (AD)): if the particualr degree of unreasonableness is so great as to induce the reviewing Court to form the opinion that it is gross, interference is called for. That position arises even when the grossness is not such as to raise an inference of malice,

ulterior motive or failure on the Board's part to consider the matter: it is enough if (in the case of restrictions imposed on a renewal)

> 'they are so unreasonable that no reasonable man, applying his mind to the condition of affairs dealt with, could impose such restrictions.'.

(*per* TINDALL, J., in *Pietersburg Club Ltd v Pietersburg Licensing Board*, 1931 T.P.D. 217, and in *Beckingham v Boksburg Licensing Board*, 1931 T.P.D. 280 at p. 284). In *Loxton v Kenhardt Liquor Licensing Board, supra*, at p. 314, FEETHAM, J.A., was inclined to regard 'arbitrariness' as not quite such a strong expression as 'grossly unreasonable,' but refrained from saying it was stronger than 'unreasonable' without the epithet of 'grossness'.

To my mind there is more difficulty in the way of the reviewing Court characterising the decision of the Licensing Board as 'arbitrary' or 'grossly unreasonable' when that decision concerns the grant of a new licence, than when it concerns the grant of a renewal or the imposition of conditions on a renewal. Where the Board has before it a number of applications each for the award to the applicant of a privilege which it may grant or refuse at its discretion, it is no easy task for the reviewing Court, in the ordinary course, to come to the conclusion that the Board's assessment of the competing claims, its weighing up of the pros and cons of each application, is to be set aside as arbitrary or grossly unreasonable. After all the applicant for a new licence has no claim to it - he is merely asking for a privilege

(*Brink v Lichtenburg Liquor Licensing Board*, 1944 T.P.D. 161 at p. 167) and entitled to a fair hearing of his application. In the present dispute there are no doubt certain points in favour of the applicant. He has had previous experience in the management of a liquor business, which second respondent lacks, and has conducted the Company's wholesale business to the satisfaction of the Police authorities. He has behind him the substantial financial backing of the Company, which is presumably greater than second respondent's personal means even granting the latter to be sufficient for the new business. If the applicant is entitled in regard to this new venture to rely on considerations really germane to the Company and not to him as the person who in the eye of the law is granted the licence which the Company cannot be given (and I shall assume he is) there is no doubt that whereas the second respondent will exchange his existing general dealer's business for a presumably more profitable liquor trade, the Company will thereby suffer an inroad into its existing lucrative business. The applicant may possibly be exaggerating the extent of that inroad when (to use his counsel's words) saying it sounded the death knell of the Company's wholesale business: the Company still retains the right to sell to private consumers in the relatively small wholesale quantities prescribed and in addition, though there is no direct evidence on the extent of its possible supplies to the club and hotel mentioned as existing in Carletonville, such supplies may be of some value.

There appears to be nothing to choose between the respective applications in regard to the nature of the premises: As regards situation, I cannot see that the Police policy of centralisation for control purposes is materially affected, if at all, by having two businesses separated from

one another by a distance of 300 yards in the centre of the township.

As to the second respondent he has had a certain amount of business experience as a butcher and as a general dealer. But in any event there are two considerations which if present to the mind of the members of the Board may legitimately in my view have induced them to consider that public interest in that area might better be served by conferring the privilege on him. The first is the question of the inadvisability of granting monopolies and thereby preventing healthy competition - the monopoly question was specifically relied on by his representative in addressing the Board. Such a consideration, it was held by INNES, C.J. in *Britten and Others v Pope*, 1916 AD 150 at pp. 158, 159, was not illegal or improper and the Board may therefore have legitimately considered it undesirable to give the retail licence to the applicant, he being the employee of the Company which held the only other off consumption licence, viz. a wholesale one. The second consideration, though somewhat different from the first, is allied to it: the Board may well have considered it preferable to give the financial advantage of the retail licence to an individual himself, living in that area, rather than to an employee of a Company, whose shareholders would enjoy the real benefit of the privilege. This consideration, if it was present to the Board, does not appear to me to be improper. It is not the function of this Court, generally speaking, to substitute its views as to the relative weight of each factor in favour of or adverse to each application for the valuation given thereto by the Board.

There may of course be other matters or considerations supporting the Board's view, but

unfortunately it has not deemed it fit to reveal these to the Court. Despite this failure, there were before the Board the facts I have detailed, from which it is just as likely as not that its decision cannot be inferred to rest on improper considerations, and cannot fairly be characterised as arbitrary or grossly unreasonable. The applicant's first contention therefore fails.

II. Nor do I consider that the second contention by applicant's counsel is well founded.

Sec. 29 (3) of the Act specifically limits the Court's power to review the proceedings of a licensing board to the instances mentioned in the two preceding sub-sections. Reference was made to a number of decisions as to whether this sub-section entirely excluded the ordinary common law right of review, *Loxton's* case, *supra* at p. 293; *Ramsay and Another* v. Zoutpansberg Liquor Licensing Board and Another, 1950 (3) SA 647 (T) at p. 655; *Brauer v Cape Liquor Licensing Board*, 1953 (3) SA 752 (C) at p. 765. Even however if the common law right remains it is restricted, so it would appear, to cases in which there is proof of either (2) fraud or (2) manifest absence of jurisdiction (*Union Government v Fakir*, 1923 AD 466 at p. 469). Fraud is not here alleged, but it was contended that the Board had no jurisdiction by reason of the fact that it had no proper application before it by the second respondent for the grant of a licence to him.

This contention was based on the fact that the affidavit which in terms of sec. 31 (3) was required to and in fact did accompany the second respondent's application under sec. 31 (1) was not stamped as,

so it was argued, it should have been in compliance with the provisions of the Stamp Duties Act, 30 of 1911 sec. 5 and Item 1 of 2nd Schedule. It was not alleged that the application itself did not set out all the material required by sec. 31 (2) or that it did not comply with sec. 33 (1) which required it to be impressed with revenue stamps of the prescribed amount.

The only matters which by sec. 31 (3) must be put upon affidavit are particulars as to any tie or the existence of any financial interest by other parties in the business. All other matters may be set out without affidavit and documents (including true copies of the applicant's lease of the premises to be licensed) are attached not to the affidavit but to the application.

In the first place I have considerable doubt as to whether this affidavit does not fall within the exemption provided either by Act 30 of 1911 as originally enacted viz. affidavits required to be made in connection with any payment to the public revenue or by Act 24 of 1944 sec. 1 (1) - viz any affidavit required to be furnished to any officer in the employ of the Union Government. It is clear that the Government itself regards this type of affidavit as exempted from stamping and has never required stamping in practice.

It is also clear on the authorities that the affidavit can be produced at any time, even during the hearing of the application - *Farquhar v Pretoria Liquor Licensing Board*, 1938 T.P.D. 295. It is equally clear that even if not stamped at the time of execution the defect may be subsequently remedied (secs. 21 and 22 of Act 30 of 1911). In the present case no objection was taken to this affidavit by the applicant during the weeks it had been lying with

the Board's officers available for inspection prior to the sitting of the Board.

In these circumstances even if the affidavit did require the affixing of a shilling stamp (I am inclined to the view it did not) I am unable to agree with the submission of applicant's counsel that the whole application was vitiated by non-stamping of this affidavit, and that in consequence the Board had no jurisdiction to consider it. At most this was a technical defect, and there is nothing before this Court to show that any substantial injustice (*vide* sec. 29 (2)) has occurred, or that the applicant has suffered any substantial prejudice. There is, in fact, no allegation that in regard to the only matters required to be deposed to (viz. any tie or any third party interest) the second respondent's position was in truth such that the Board's decision would have been affected thereby.

III. The final question is whether substantial irregularities took place at the hearing of the various applications. Owing partially to the petition being framed on the rough notes taken by the secretary of the Board, and not on the true minutes of the proceedings certain confusion has been created as to what did occur and there is also a certain amount of dispute of fact. In the view I take of the case, however, I find it unnecessary to call for *viva voce* evidence - no application was made to me by either party that I should do so.

(a) The petition alleges a wrongful refusal by the chairman to permit the applicant's attorney Fleischack to address the Board and point out

certain defects in the second respondent's application.

There is at the outset a direct conflict as to when this occurred. According to applicant and his witnesses this happened when the Carletonville applications were being considered: according to the respondents the matter arose at an appreciably earlier stage, viz. during the consideration of the Oberholzer applications for new licences. According to the minutes, all applications for renewals - both in Oberholzer and Carletonville and elsewhere - had been disposed of during the first day of the Board's sitting, and on that day also it dealt with the applications for new grants in the Oberholzer area only. On the morning of the second day of the sitting the Oberholzer applications were disposed of and the Board's decision to grant a retail bottle licence to one Bolton in the Oberholzer area, but no other licences in that area, was announced. The Board then proceeded at 2.30 p.m. on this second day to consider the Carletonville applications.

According to the chairman of the respondent Board (para. 14 of his affidavit) it was during the hearing of an Oberholzer retail application that Fleischack rose to address the Board; the chairman refused to permit this as Fleischack's client (presumbaly the present applicant) had not submitted any written objection to the grant of the licence or of retail licences in general. This was the only occasion of the kind. The chairman is supported herein as to the time of Fleischack's attempt by the second respondent.

Now unless the grant of retail licences in Oberholzer was a matter which would affect the grant of similar licences in Carletonville (and this was not canvassed before this Court though in para. 4 of his reply applicant said it would) *prima facie* the probabilities support applicant and his deponents in their contention that Fleischack intervened only when the

new Carletonville applications arose for consideration. In addition the chairman to my mind laboured under an erroneous view of the legal position in ruling that the prior lodging of a formal objection was a *sine qua non* before a competing applicant for the same type of licence had *status* to address the Board not only in support of his own application but in order to point out defects and weaknesses in the application of another applicant. Secs. 36 and 38 deal with persons who are not competing applicants: they must lodge formal objections. But the mere fact of competition for the same type of licence appears to involve the right of each applicant to point out to the Board the defects in his competitor's case as an argument in favour of his own application.

Even so, and even assuming the time of Fleischack's attempt to be as applicant alleges, my difficulty still remains in regard to the consequences of the chairman's irregularity (assuming it to be such). What Fleischack desired to point out was - as set out in para. 22 of the petition - *(a)* that the affidavit in question had not been stamped, *(b)* that the premises were incomplete in having access to a common yard and in being occupied by a grocer's business, *(c)* that the second respondent's lease, *ex facie* his documents, would only commence after 14 days' notice of completion of the buildings and there was no evidence of such notice, and *(d)* that *ex facie* the lease the second respondent had

no right to make any alterations whatsoever to the premises. It conceded by applicant's counsel that in fact the second respondent's lease of the proposed premises was before the Board, as also that premises were in a state such that although not immediately in compliance with requisites for a retail bottle liquor licence they could have been made to comply therewith before December 31st - as in fact they were. In so far as it was desired to point out the technical objection that the affidavit was not stamped, the only result would have been to afford the second respondent an opportunity at the cost of one shilling to remedy this defect. In every respect therefore the matters which applicant's representative would, if permitted, have placed before the Board were such as could not have made any difference to the ultimate result. I am unable to see that, even assuming the impropriety of declining to hear Fleischack, any substantial prejudice has been suffered, or any substantial injustice perpetrated.

(b) The final question is the alleged refusal to permit Fleischack full cross-examination of the second respondent.

It is somewhat difficult to ascertain precisely what occurred. The first of the applications for new licences in Carletonville was that of present applicant, and the evidence of one Jones (director and public officer of the Company) was led. Jones was cross-examined by second respondent's attorney Thiel - apparently this cross-examination was permitted because Jones had objected to the second respondent's application for a wholesale liquor licence. The cross-examination is very brief - it apparently hardly touched on the merits of applicant's request to be granted a retail bottle licence. At the conclusion of this cross-examination and after hearing Fleischack the chairman stated this application would be considered with others.

After two other applicants (and all the applications, being for wholesale and for retail, were considered together) the second respondent gave evidence and was very shortly cross-examined by Fleischack. The applicant's complaint is not that Fleischack was

completely prohibited from cross-examining: the complaint is that Fleischack was told that as applicant or the Company had lodged a formal objection only to the second respondent's application for a wholesale licence, not the second respondent's additional application for a retail licence, the cross-examination was to be restricted to the second respondent's application for a wholesale licence.

Though the applicant (replying affidavit para. 8) says there was a marked difference between the treatment given to Thiel and to Fleischack, the minutes do not show this - the cross-examination of Jones was short, and has very little bearing on the merits of applicant's application for a retail licence. The second respondent says (para. 18) that the chairman *mew motu* stopped Thiel from cross-examining Jones regarding applicant's retail application (also on the ground of absence of formal written objection). This is not denied by applicant nor by Fleischack.

According to Fleischack it was only when he had commenced to cross-examine second respondent and wished to put questions to him in relation to his application form and accompanying documents, that

he was then told that his cross-examination was to be confined to the wholesale licence application, inasmuch as his client had not objected to the second respondent's retail licence. He mentioned that he wished by cross-examination and address to raise legal issues arising from the documents: the chairman then said these issues could be left to the Board.

I have no reason to reject Fleischack's version - which unfortunately was not put in the petition and so could not be answered by respondents. But even on the basis of Fleischack's version, and even conceding that the chairman erred in considering a formal objection necessary to give Fleischack a right of full cross-examination, I am unable to hold that the applicant is entitled to relief.

An applicant has of course the right under sec. 38 (1) to appear either personally or represented by counsel or by attorney at the public sittings of the Board. The Act does not specifically give him the right to give evidence under oath, or to call witnesses - if the Board deems it necessary to take evidence then such evidence will be taken on oath (sec. 24) C and the Board by its majority decides *inter alia* whether evidence is to be taken, or witness called (sec. 27 (1)), *(vide Levisohn* v. *Dundee Liquor Licensing Board,* 1929 N.P.D. 14). Apparently the only section in the Act specifically referring to cross-examination is sec. 38 (4) where the applicant is entitled to have the police officer who signed the customary police report 'called as a witness for the purpose of cross-examination as to such report". This Court was not referred to any authority requiring a licensing board to act with the formalities of a Court of Law as to hearing and limitation of evidence given on oath before it, and the question must be as to whether the requisites of natural justice have been observed by a body which can regulate] its own procedure. It does not follow, because an applicant must be entitled to fair hearing, the opportunity to state his case and to be informed of, so as to answer, any statements made to his prejudice, that he should be as of right entitled by cross-examination to test all the evidence given by a competitor in support of his own application *(vide Fernandez* v. *South African Railways,* 1926 A.D. 60 at p. 70, and *Johnson* v. *Jockey Club of South Africa,* 1910 W.L.D. 136). It is by no means impossible that a

liquor licensing board may be faced with 20 or more new applications for available licences: it would protract the discharge of the Board's duties intolerably if by permitting each applicant to give evidence on oath it was obliged to permit cross-examination by each competitor or his representative. If it does permit cross-examination, it must do so fairly as between the parties. If, also, it does permit cross-examination it has the power to limit the scope of such cross-examination, also if acting fairly. Even therefore if the chairman erred (as I think he did) it does not appear to me that the applicant possessed a right of unfettered cross-examination which has been denied him.

There is again the question of substantial injustice or substantial prejudice which, in terms of sec. 29 (2) must exist before the Board's proceedings can be set aside. I am unable to see what matter could have been extracted under cross-examination from second respondent

which would have assisted applicant's case. Within the limited scope of cross-examination permitted him, Fleischack could have tested the second respondent's case in all its material aspects - suitability of buildings, possession of a right under his lease to occupy, character, experience, financial status. These were all relevant to the question of whether the second respondent should be given either a wholesale or a retail licence or both. The applicant (para. 7 of his reply) contends that Fleischack's four main attacks related to the retail licence; it was felt that the wholesale licence would never be granted to second respondent. This may have been Fleischack's view of the purpose of his attack, but the actual grounds of attack - the four matters which as set out in para. 22 of the petition he wished to point out to the Board - were (as I have stated) applicable to either licence.

I am unable to see that by restricting Fleischack to cross-examination on the wholesale licence the chairman prohibited him from asking questions on these matters. As the second respondent had not been in the liquor trade before, it is difficult to see how he could contribute anything of value as to his prospects of success in so far as they detrimentally affected the continued profitable nature of applicant's business.

In the result I do not consider that even if the applicant's representative had been allowed to cross-examine without limit, he would have tried to elicit, or succeeded in eliciting, anything more than the facts as are now known, in regard to second respondent's rights as to tenancy and alteration of the condition of the buildings and the absence of stamp duty. I have already expressed the view that the last point is only a technicality - as I understood counsel it was conceded that in respect of the other matters the second respondent had in fact shown that the grant of the licence was in order.

The application to review fails and is dismissed with costs, which costs (unless the applicant notifies in seven days time his desire to have special argument on the point) will include the costs of the interim interdict and its discharge.

Applicant's Attorneys: *MacRobert, de Villiers & Hitge.* First Respondent's Attorney: *State Attorney.* Second Respondent's Attorneys : *Vorster & Prinsloo.*